LINDA THOMAS,

Grievant,

v v.

DOCKET NO. 01-HHR-385

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/WELCH HOSPITAL

and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Linda Thomas, filed this grievance against her employer, the West Virginia Department of Health and Human Resources/Welch Hospital ("DHHR"), and the West Virginia Division of Personnel ("DOP"), on April 24, 2001:

> I was reclassified from Supv. 1 to Supv. 2 after three attempts; the first was Aug. 15, 1996 and the last one was on January 5, 2001.
>
> As relief, Grievant seeks: Backpay plus interest back to the first reclassification attempt.

The grievance was denied at level two due to lack of authority and on the merits. Grievant appealed to level three, and a level three hearing was held on May 25, 2001. The grievance was granted in part by Desmond Byrne, Acting Commissioner, on June 4, 2001, holding that Grievant receive "[b]ack pay for the difference in wages between a Supervisor I and a Supervisor II . . . from December 15, 2000, the date the Grievant submitted her Position Description form, and the effective date of her reclassification, May 16, 2001." Grievant appealed to level four on June 12, 2001, and a

level four hearing was held in the Grievance Board's Beckley, West Virginia, office on September 13, 2001. This matter became mature for decision on October 17, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Kathryn Reed Bayless, Esq., Bayless & McFadden; DHHR was represented by B. Allen Campbell, Esq., Assistant Attorney General, and DOP was represented by Lowell D. Basford.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

None.

LIII DHHR Exhibits

Ex. 1 -

West Virginia Civil Service Position Description form completed on behalf of Linda Thomas and signed by her on June 26, 1996.

Ex. 2 -

August 20, 1996 memorandum from Cathy Addair to Linda Thomas.

Ex. 3 -

September 10, 1996 memorandum from Robert L. Stephens to Linda Thomas.

Ex. 4 -

September 17, 1996 Grievance Form filed by Linda Thomas.

Ex. 5 -

LIII Grievance Decision issued by John Bianconi on or about January 6, 1997.

Ex. 6 -

February 4, 1997 letter from Linda Thomas to the Grievance Board withdrawing her pending grievance.

Ex. 7 -

West Virginia Civil Service Position Description form completed on behalf of Linda Thomas, and initialed by DOP analyst on January 31, 2001.

Ex. 8 -

April 12, 2001 letter from Joe E. Smith to Linda Thomas.

Ex. 9 -

April 18, 2001 memorandum from Lowell D. Basford to Cathy Addair.

Ex. 10 -

WV-11 completed on behalf of Linda Thomas and signed by Jeanne Roberts on April 30, 2001.

LIII DOP Exhibits

None.

Testimony

Grievant testified in her own behalf, and presented the testimony of Cathy Addair and Ruth Mullens. Respondents presented the testimony of Lowell D. Basford.

FINDINGS OF FACT

After a careful review of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

1. At all times relevant, Grievant has been employed as Housekeeping Manager at DHHR's Welch Community Hospital.

2. Grievant filed a Position Description form on June 26, 1996, and it was forwarded to DOP for a review of her classification of Supervisor I. DOP concluded Grievant was properly classified as a Supervisor I. LIII DHHR Exs. 1, 2.

3. Grievant appealed that decision to then-Director of Personnel, Robert L. Stephens, who confirmed the classification of Supervisor I. LIII DHHR Ex. 3.

4. Grievant then filed a grievance on September 17, 1996, requesting to be reclassified from Supervisor I to Supervisor II. LIII DHHR Ex. 4. The grievance was denied at level three, and Grievant

appealed to the Grievance Board, but later withdrew her grievance by letter dated February 4, 1997. LIII DHHR Exs, 5, 6.

5. In 1998, Grievant believed employees at other hospitals had been reclassified from Supervisor Is to Supervisor IIs. Grievant again requested a review of her position, and DOP concluded once again that Grievant was properly classified as a Supervisor I. 6. In or about December 2000, DOP reclassified employees at the West Virginia Division of Corrections ("Corrections") from Supervisor I to Supervisor II. Grievant became aware of this reclassification, and she filed another Position Description form on December 15, 2000. DOP confirmed her classification as Supervisor I on January 31, 2001. Grievant appealed, and by letter dated April 12, 2001, Joe E. Smith, Senior Assistant Director of DOP, concluded she was properly classified as a Supervisor I. LIII DHHR Exs. 7, 8.

7. On April 18, 2001, however, Lowell D. Basford, Assistant Director of Classification and Compensation, DOP, notified Grievant's supervisor, Cathy Addair, that DOP, in consultation with Mike McCabe, Director of Personnel for DHHR, had decided Grievant's classification should be reallocated to Supervisor II. LIII DHHR Ex. 9.

8. Thereafter, Grievant was reallocated from a Supervisor I position to a Supervisor II position, effective May 16, 2001. LIII DHHR Ex. 10.

9. Grievant filed this grievance on April 24, 2001, seeking back pay to June 26, 1996, the date she first attempted to be reclassified as a Supervisor II.

10. Desmond Byrne, Acting Commissioner of the Bureau for Behavioral Health and Health Facilities, and level three grievance evaluator, concluded Grievant should receive back pay from December 15, 2000, the date she filed her Position Description form, to the effective date of reallocation, May 16, 2001.

DISCUSSION

In a non-disciplinary grievance, the burden lies with the grievant to prove her case by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95- DOH-287 (Jan. 22, 1996). Grievant claims she is entitled to back pay from June 26, 1996,the date she first filed a Position Description form seeking reclassification from a Supervisor I to Supervisor II. DHHR and DOP argue that Grievant is estopped from receiving relief back to June 26, 1996, based on a claim of

untimeliness.

A claim of untimeliness is an affirmative defense, and the burden of proof is on the party asserting that a grievance was not timely filed to prove the defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). W. Va. Code § 29-6A-4(a) provides, in pertinent part:

> within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or designated representative, or both may file a written grievance with the immediate supervisor of the grievant . . .

"Days" is defined as "working days exclusive of Saturday, Sunday or official holidays." W. Va. Code § 29-6A-2(c).

A misclassification, however, is a continuing practice, and thus, a grievance may be initiated at any time during which the misclassification continues. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). A grievant must file her grievance no later than ten days after her misclassification ends. Gaskins v. W. Va. Dep't of Health/Div. of Personnel, Docket No. 90-H-032 (Apr. 12, 1990). A grievant cannot wait until she discovers a legal theory to support her grievance, long after the misclassification began. Pryor, supra; Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052 (Sept. 27, 1991). Back pay is limited to the ten day period preceding the filing of the grievance, if an employer properly asserts a timeliness defense. Martin, supra. In support of her claim for back pay, Grievant argues that state agencies have a duty to properly classify and pay their employees; that DHHR and DOP assured her she was properly classified after several inquiries by her; that the purpose of statutes of limitations is to encourage the presentation of claims in a timely manner; that DHHR cannot claim that it was caught unawares by Grievant's claim; that DHHR received a windfall by not having to fully pay for the services of an employee it misclassified; and that Grievant did not know that she was misclassified until Personnel informed her of that fact. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997).

These arguments have been raised before this Grievance Board before, and the Board has declined to accept them. In Dudding v. W. Va. Dep't of Health and Human Resources/Welch Emergence Hospital, Docket No. 91-HHR-440 (Sept. 30, 1992), the misclassified grievant argued

that "it should not be necessary for an employee to file a grievance in order to obtain back pay[,]" but the administrative law judge, although recognizing the questionable personnel policy underlying his denial of relief, ruled that no statute, regulation, or rule required the employer to adopt a policy addressing back wage claims other than through the grievance process. See also, Akers v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-302 (Dec. 30, 1999).

The undersigned is constrained to follow this precedent. This Grievance Board has recognized the principle that "finality is desirable in the law," and applied it to grievance procedures. Oxley v. Summers County Bd. of Educ., Docket No. 98-45-104 (Nov. 19, 1998); Spurlock v. Lincoln County Bd. of Educ., Docket No. 97-22-019 (May 29, 1997); Oxley v. Summers County Bd. of Educ., Docket No. 95-45-123 (Feb. 13, 1997). The Supreme Court of Appeals of West Virginia has explained the doctrine of stare decisis as follows: "[a] simple statement of this rule will be found in Black's Law Dictionary, 3d Ed., wherein it is stated that it means: 'To stand by decided cases; to uphold precedents; to maintain former adjudications. . . [t]he doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.'" In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113 (1947).

It appears that the effect of the above-cited precedent is that a state employee who suspects she is misclassified has two choices: she may apply to DOP for reclassification, and thereby waive any back pay claim; or she may grieve and possibly recover back pay limited to the ten day period preceding the filing of the grievance, should her employer raise a timeliness defense. See Mullens v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 96-HHR-226 (July 31, 1997). In other words, an employee harboring any doubts regarding her classification should file a grievance at once, and certainly no later than her request for reclassification, or risk waiving any claim for back pay. Akers, supra.

With regard to recovering back pay to 1998, the date she alleges other hospital workers were reclassified to Supervisor IIs, Grievant claims DHHR should be estopped from raising timeliness as a defense, first, because Grievant's supervisor, Cathy Addair,encouraged her to withdraw her first grievance, and second, because DOP had a duty to inform Grievant that other similarly-situated employees were being reclassified.

With regard to the initial misclassification grievance filed in June 1996, Grievant testified that after she appealed the level three decision denying her grievance to level four, she spoke to her attorney and to her supervisor, Cathy Addair, about her chances for success. Grievant testified that Ms. Addair told her it was “futile” to challenge her misclassification because she did not supervise technical employees, one of the criteria for a Supervisor II classification. Grievant then withdrew her grievance at level four. Ms. Addair has no recollection of that conversation, however, she assisted Grievant by typing her letter of withdrawal for her. See LIII DHHR Ex. 6. Ruth Mullens, a co-worker of Grievant's, testified that in 1996 Grievant talked to her about her grievance, and told her Ms. Addair had recommended she drop the grievance.

Based upon this evidence, Grievant asserts that DHHR should be barred from asserting a timeliness defense on the theory that she relied upon Ms. Addair's representations about her chances of success in deciding to withdraw her grievance. The West Virginia Supreme Court of Appeals, in Naylor v. W. Va. Human Rights Comm'n, 180
W. Va. 634, 378 S.E.2d 843 (1989), defined the type of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge." This standard was adopted in and incorporated in this Grievance Board's decision in Steele v. Wayne CountyBd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987). See also Khoury v. Kanawha County Bd. of Educ., Docket No. 99-20-031 (Mar. 31, 1999); Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Altizer v. Greenbrier County Bd. of Educ., Docket No. 89-13-679 (Jan. 31, 1991).

Clearly, Ms. Addair did not act with deliberate design in expressing her opinion that Grievant had little chance of success in her grievance; she was doing just that - expressing an opinion. Grievant's own testimony indicates that Ms. Addair merely expressed her opinion that Grievant would not be successful in her grievance attempt, but she did not tell her or coerce her to drop her grievance. It was ultimately Grievant's decision whether to proceed with her claim and she chose to abandon it. Grievant cannot come forward now and try to revive her claim, nor can she recover back pay from that period forward.

Grievant also argues that this Grievance Board has applied the holdings in Martin, supra, far too

broadly, and that Martin should be revisited with regard to equitable tolling and/or estoppel to the ten day time period set forth in the statute. Specifically in this instance, Grievant maintains that DHHR reclassified other Supervisor Is in other health facilities except for her, even with full knowledge that she had requested reclassification, and that DHHR and DOP had an obligation to review her classification and inform her of its actions. Because the agencies did not perform this review, Grievant claims they are estopped through their own wrong-doing from asserting a timeliness defense to bar her claim for relief. Grievant argues that if the Grievance Board is going to apply the back pay limitation holding of Martin to misclassification cases, then it must also apply concepts ofequity to ensure fair treatment of state employees in cases where the employer has engaged in improper conduct.

While Grievant makes a good argument, the undersigned declines her invitation to revisit the Grievance Board's application of Martin to misclassification cases. However, the undersigned would point out that she is unaware that the Grievance Board has determined there is no exception to the ten-day filing rule of Martin in cases where it was found that an employer had engaged in misconduct or bad faith in dealing with a grievant. Unfortunately for Grievant, the undersigned does not find she has proven in this case that DHHR or DOP acted in bad faith or are guilty of some wrongdoing which would toll the statute with regard to Grievant's back pay claim.

Grievant claims DHHR and DOP should have notified her and reclassified her when it reclassified workers at other state hospitals to the Supervisor II position in 1998. Grievant identified several workers at level four who allegedly were reclassified to Supervisor II, but gave no other evidence of this claim. Lowell Basford, Assistant Director of Compensation and Classification, for DOP, testified that he was unaware of the individuals named by Grievant, but said DOP does not do global reviews of all members of a classification.

Mr. Basford testified the decision to reclassify Grievant came not in 1998, with the alleged reclassification of other state hospital employees, but in 2001, when the Division of Corrections requested that some of its positions be reclassified to Supervisor II because of problems with recruitment and retention. The reason Grievant had not been awarded a Supervisor II classification in the past was because she did not supervise technicalemployees, which marks the distinction between a Supervisor I and a Supervisor II position.

Upon review of the Corrections' positions, it was decided that positions that supervised large

numbers of employees on multiple shifts could be placed in the Supervisor II classification. After making that determination with regard to Corrections, Mr. Basford contacted Mike McCabe at DHHR to discuss Grievant's situation. Mr. Basford knew Grievant had requested reclassification in the past, and knew that she supervised large numbers of employees on multiple shifts, and thus, he believed she could be given the Supervisor II classification based upon this new interpretation. DHHR concurred with DOP's decision, and they reclassified Grievant effective May 16, 2001. The obligation which Grievant asserts DHHR and DOP had to review her classification when it reclassified other Supervisor Is happened when the Corrections' employees were reclassified. While Grievant would obviously prefer a finding that the “obligation” arose when other hospital workers were reclassified in 1998, she unfortunately has failed to produce enough evidence to demonstrate she should have been included in that review. Furthermore, there is nothing arbitrary or unfair in making this interpretation prospective. See generally, Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979).

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the burden lies with the grievant to prove her case by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). 2. A claim of untimeliness is a affirmative defense, and the burden of proof is on the party asserting the defense to prove it by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A grievance must be filed within 10 days following the occurrence of the event upon which the grievance is based. W. Va. Code § 29-6A-4(a) provides, in pertinent part:

> within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or designated representative, or both may file a written grievance with the immediate supervisor of the grievant . . .

4. The general rule in a case of misclassification is that misclassification is a continuing practice, and as such a grievance may be filed at any time during the time the misclassification continues. However, “as with a salary dispute, any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance.” Syl. Pt. 5, Martin v. Randolph

County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). W. Va. Code § 29-6A-2.

5. The West Virginia Supreme Court of Appeals, in Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989), defined the type of representations made by employers which would bar a subsequent claim of untimely filing. The Court held that estoppel was available to the employee only when the untimely filing "was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing hischarge." This standard was adopted in and incorporated in this Grievance Board's decision in Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987). See also Khoury v. Kanawha County Bd. of Educ., Docket No. 99-20-031 (Mar. 31, 1999); Watkins v. Logan County Bd. of Educ., Docket No. 93-23-052 (Sept. 20, 1993); Altizer v. Greenbrier County Bd. of Educ., Docket No. 89-13-679 (Jan. 31, 1991).

6. Grievant has failed to prove by a preponderance of the evidence that she was forced or coerced into withdrawing her 1996 grievance by her supervisor, Cathy Addair.

7. This Grievance Board adheres to the doctrine of stare decisis in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). See also Belcher v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.

8. Grievant has failed to show that the Grievance Board's reliance on and application of the principles set forth in Martin, supra to misclassification cases is clearly in error. 9. Grievant has failed to prove by a preponderance of the evidence that DHHR and DOP wrongfully failed to consider her for reclassification in 1998, when other hospital workers were allegedly reclassified from Supervisor Is to Supervisor IIs.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 20, 2001