AMBER BERNARD,

Grievant,

v. DOCKET NO. 02-HHR-294

W. VA. DEPARTMENT OF HEALTH AND
HUMAN RESOURCES/BUREAU FOR
CHILDREN AND FAMILIES & W.VA.
DIVISION OF PERSONNEL,

Respondents.

DECISION

In a grievance filed July 5, 2002, Grievant claimed she was working out of her classification as a Social Service Worker II (SSW II), and instead should be classified as a Social Service Worker III (SSW III). She requested "Reclassification of the SSWII to a classification of SSWIII and pay equity."

Her grievance was granted in part and denied in part at Level III (See footnote 1), by a decision dated August 20, 2002. It was ordered therein that she "be temporarily upgraded to SSW III. . . and that [she] receive the upgraded salary from the time [she] began performing these duties until [she is] relieved of these duties, including any back pay due." On September 9, 2002, the Level III Grievance Evaluator issued an errata notice, restating part of the relief awarded to limit the back pay to "from ten days prior to the filing of thisgrievance on July 5, 2002. . . ." Grievant filed her appeal upon receipt of the errata notice, seeking reinstatement of the original relief granted.

A Level IV hearing was held in the Grievance Board's Charleston Office on November 22, 2002 on the issue of back pay only. Grievant appeared *pro se*, Respondent Department of Health and Human Resources/Bureau for Children and Families (DHHR) was represented by Darlene Ratliff-Thomas, Esq., Assistant Attorney General and Respondent Division of Personnel (DOP) appeared by Lowell D. Basford, Assistant Director, Classification and Compensation Section. The parties elected not to file written proposals, so the matter became mature for decision at the close of the hearing.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is a Social Service Worker II employed by DHHR in Kanawha County.

2. In a Level III decision entered in this matter on or about August 20, 2002, Grievant was found to be working in a temporary assignment outside her classification. DHHR was ordered to temporarily upgrade Grievant to Social Service Worker III and to pay her at the upgraded salary from the time she began performing the duties at a higher level.

3. On or about September 9, 2002, the Level III Grievance Evaluator, David M. Adkins, issued an errata notice revising the back pay award to cover the period from ten days prior to the filing of the grievance on July 5, 2002.

4. As a result of a Kanawha County Circuit Court Decision (See footnote 2) (the "Hartley Decision") entered in December, 2001, Respondent DHHR was ordered to designate anumber of employees as Home Finders (so-called Hartley Home Finders) to place clients in adult family care settings. These employees were to be designated by January 1, 2002, and were to have no other duties than as Home Finders.

5. Respondent DOP determined that the best fit for the proposed duties of the Hartley Home Finder positions would be in the Social Service Worker III classification. Respondent determined that existing staff would assume some of the home finding duties until the new Home Finder positions could be created and filled and the employees trained. Grievant was one of the existing staff who assumed some of the Hartley Home Finder duties, and who was still performing those duties as of the July, 2002 date of her grievance filing.

6. The level three decision did not include a factual finding of the specific date on which Grievant began performing home finder duties, but determined that the SSW II classification, not the SSW III classification, was the 'best fit" for the duties Grievant performed at the time the grievance was filed.

7. At no point in the Level I or Level II proceedings did Respondent raise the issue of timeliness with respect to the filing of this grievance. The Level II decision makes a specific finding that Grievant "filed within the required time frames[.]"

8. Grievant was subsequently granted a temporary upgrade to SSW III and has been paid at the higher pay rate effective on or about October 16, 2002.

DISCUSSION

In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). Grievant contends the original Level III decision correctly awarded her back pay for the period she had been working out of classification, andappeals only the later finding that her back pay award should be limited to the ten-day period prior to the filing of her grievance. Respondent asserts that the limitation is proper.

In general, when a grievant prevails in a misclassification grievance, she is entitled to back pay for the period she worked out of her classification, limited to the ten-day period prior to the filing of the grievance, *if the respondent has raised a timeliness defense.* See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). However, the Martin limitation "does not apply in cases where the employer has not raised a timeliness defense. . . ." Hedges v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 00-HHR-203 (Sep. 25, 2000). In Hedges, *supra,* the grievant was awarded full back pay from the date she assumed the additional duties of a higher classification, and there has been no showing that the same principle should not apply here.

However, the Level III decision made a specific finding that "the SSWII classification is undoubtedly the 'best fit' for the grievants." In other words, Grievant is not working out of her classification. Instead, the Grievance Evaluator found,

> [D]ue to the unique nature of this case, it appears that the Agency clearly foresaw that until the Hartley Home Finder positions are filled, that some employees would have to perform these duties. Not only did the Agency foresee this happening, they also were fully aware that dissension would arise since SSWIIs would temporarily be performing the duties of people who would receive more pay and a higher classification for performing many of the exact same duties. Until the Hartley Home Finder positions are filled and properly trained, the Agency has a duty, pursuant to DOP Administrative Rule 4.8, to temporarily upgrade the grievants for performing the duties of a position in a higher pay grade.

Level III Decision, p. 7. The Grievance Evaluator's ruling, which is contrary to his finding that Grievant's SSWII classification is the best fit for her duties despite the fact she has assumed some of the duties that will be assigned to the Hartley Home Finders, issomewhat inexplicable. Given that Grievant was temporarily given a higher classification despite the fact that she should not have been,

I find that in this particular case and based on these specific facts, it would be inappropriate to order Respondent to pay her at a higher pay grade for any time prior to the effective date of her temporary upgrade.

The following conclusions of law support this decision.

CONCLUSIONS OF LAW

1. In non-disciplinary matters Grievant must prove all the allegations constituting her grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. When a grievant prevails in a misclassification grievance, she is entitled to back pay for the period she worked out of her classification, limited to the ten-day period prior to the filing of the grievance, *if the respondent has raised a timeliness defense.* See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

3. The general rule that back pay is limited to ten days prior to the filing of the grievance "does not apply in cases where the employer has not raised a timeliness defense. . . ." Hedges v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 00-HHR-203 (Sep. 25, 2000).

4. Grievant did not prevail in her claim that she was misclassified, and is not entitled to back pay for the period prior to the effective date of her temporary upgrade.

For the foregoing reasons this grievance is **GRANTED** in part and **DENIED** in part. The relief requested by grievant, that she receive back pay from the date she began performing home finder duties is hereby **DENIED.** The relief granted by the level threegrievance evaluator in the September 9, 2002 Errata Notice is hereby affirmed, and grievant is **GRANTED** back pay at the SSW III rate plus interest at the legal rate from ten days prior to the filing of her grievance on July 5, 2002 to the effective date of her temporary upgrade.

Any party may appeal this Decision to the Circuit Court of Kanawha County. 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 Grievance Board with the civil action number so

that the record can be prepared and transmitted to the circuit court.

Date: December 9, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

At the lower levels, Grievant was joined by Becky A. Smith. Ms. Smith did not join the appeal of the Level III ruling.

Footnote: 2

E.H., et al. v. Matin, et al., Civil Action No. 81-MISC-585 (Dec., 2001).