**CHARLES CURKENDALL, II,**

**Grievant,**

**v.** **Docket No. 03-HHR-078**

**DEPARTMENT OF HEALTH AND**
**HUMAN RESOURCES/SHARPE**
**HOSPITAL and DIVISION OF PERSONNEL,**

**Respondents.**

## DECISION

Charles Curkendall, II, ("Grievant") initiated this proceeding on September 25, 2002, seeking back pay during his misclassification period from June 3, 1997, to October 1, 2002. On September 27, 2002, Grievant's immediate supervisor advised that he was without authority to grant relief at level one. A level two conference was held on October 3, 2002. In a decision dated October 9, 2002, the level two evaluator opined that Grievant was entitled to back wages, but she did not have the authority to grant them. A level three hearing was held on February 11, 2003, at which time the Division of Personnel was joined as a party to the grievance. In a decision dated March 11, 2003, it was determined that Grievant was entitled to back pay to ten working days prior to the filing of his grievance. Grievant appealed to level four on March 17, 2003. A hearing was held in Elkins, West Virginia, on July 23, 2003. Grievant was represented by Jack Atchison, a coworker; Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General; and the Division of Personnel ("DOP") was represented by Assistant Director Lowell Basford. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 15, 2003. The following findings of fact are made based upon a preponderance of the evidence of record.

## Findings of Fact

1. Grievant was hired by the Department of Health and Human Resources ("DHHR") as an

Information Systems Coordinator II, effective June 3, 1997.

2. Based upon the belief that he was improperly classified, Grievant completed a Position Description Form ("PDF") on March 1, 2001. After review by DOP, Grievant's request for reclassification was denied. Grievant did not grieve DOP's denial of his request.

3. On April 20, 2002, Grievant again submitted a PDF for review of his classification. DOP once again determined that Grievant was properly classified. Grievant appealed this decision to Nichelle Perkins, Director of DOP.

4. On August 29, 2002, Mr. Basford conducted a desk audit of Grievant's duties and responsibilities by observing his work firsthand. Subsequently, Mr. Basford determined that Grievant was misclassified and that his proper classification was Information Systems Specialist I. This recommendation was based upon Mr. Basford's conclusion that, due to changes and advances in technology, Grievant's responsibilities had broadened since his initial hiring.

5. Effective October 1, 2002, Grievant was reallocated to Information Systems Specialist I.

6. Grievant seeks back pay to the date of his initial hiring on June 3, 1997.

**Discussion**

The only issue to be decided in this grievance is whether or not Grievant is entitled to additional back pay beyond the ten days prior to filing the grievance. Respondent contends that, although misclassification may be grieved at any time, pursuant to the holding in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), that decision also states that back pay is limited to the ten-day period preceding the filing of the grievance, if the employer properly asserts a timeliness defense. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996).

Grievant counters that DHHR failed to raise the timeliness defense at levels one and two, and, in fact, the level two hearing evaluator recommended that Grievant be compensated for back pay to his initial date of hire. Pursuant to W. Va. Code § 29-6A- 3(a)(2), an employer is required to raise its timeliness defense at or before the "level two hearing." However, as determined in Greathouse v. West Virginia Department of Transportation, 99-DOH-413 (Aug. 21, 2000), since a conference is required at level twoinstead of a hearing (See W. Va. Code § 29-6A-4(b)), the timeliness issue may properly be asserted by the employer at level three.

In the instant case, DHHR deferred to DOP in the presentation of its case at the level three hearing. It has been held by this Grievance Board that DOP is permitted to raise the timeliness defense at the first level where it had the opportunity to do so, which is often not until level three. Delbart v. Dep't of Health and Human Resources, 99-HHR- 458 (Apr. 21, 2000). See Barnett v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-144 (July 20, 1999). Accordingly, the undersigned finds that the timeliness defense was properly raised at level three by DOP.

It has been repeatedly observed by this Grievance Board that:

> [A] state employee who suspects [he] is misclassified has two choices: [he] may apply to DOP for reclassification, and thereby waive any back pay claim; or [he] may grieve and possibly recover back pay limited to the ten day period preceding the filing of the grievance, should [his] 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 [his] classification should file a grievance at once, and certainly no later than [his] request for reclassification, or risk waiving any claim for back pay. [Akers v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-302 (Dec. 30, 1999).]

Thomas v. W. Va. Dep't of Health and Human Resources, Docket No. 01-HHR-385 (Nov. 20, 2001).

Grievant testified that his duties have not changed since his initial hiring, and he requested reclassification in 2001 based upon his belief that he may be misclassified. He chose not to grieve DOP's denial of reclassification at that time. Although the result may seem somewhat harsh, it is clear from the precedents set forth above that it was incumbent upon Grievant to promptly grieve his misclassification or forego any claim to back paybeyond the ten days prior to filing his grievance. Grievant failed to timely grieve his misclassification and has failed to demonstrate a proper excuse for his untimely filing. His deference to DOP, because "they are the experts," is not an appropriate excuse for failing to properly file a grievance. Accordingly, the undersigned finds that Grievant is entitled to no further relief in this grievance.

The following conclusions of law support the decision reached.

## Conclusions of Law

1. 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).

2. A grievance must be filed within 10 days following the occurrence of the event upon which the grievance is based, or within ten days of the most recent occurrence of a continuing practice. W. Va. Code § 29-6A-4(a).

3. Misclassification is a continuing practice, and as such a grievance may be filed at any time during the period that 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.

4. Grievant is entitled to back pay only to the ten days preceding the filing of this grievance.

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, and 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.

**Date: September 26, 2003** _____

**DENISE M. SPATAFORE**

**Administrative Law Judge**