MARY ANN THOMAS, .

Grievant, .

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v. . Docket Number: 92-BOT-443

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WEST VIRGINIA BOARD OF TRUSTEES .

/ MARSHALL UNIVERSITY, .

Respondents. .

DECISION

This grievance filed by Mary Ann Thomas (hereinafter Grievant) at level one on April 24, 1992, pursuant to the provisions of West Virginia Code §§18-29-1, et seq., has a protracted procedural history. Grievant's original statement of grievance read as follows:

> With no warning, after fourteen (14) years of continuous employment at Marshall University during which I received excellent evaluations, I was notified by President Gilley that my position (associate Dean of Students and Director of Student Affairs Research) would be abolished on June 30, 1992. I was informed that I could either apply for other positions as vacancies for which I was qualified occurred and that the university would assist me in finding suitable future employment. This occurred in March 1992.
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> Other employees at my level or above have been reassigned positions. According to Operation Streamline, which was circulated in November 1992, I was initially reassigned to the VP for Multicultural Affairs. I have been given no reason for the cancellation of my reassignment.

> While it may be necessary to abolish my position for fiscal reasons, I do not understand why I was not reassigned. I have been and remain fully willing to adjust my position and responsibilities; however, I have not received any assistance in obtaining another full-time position at Marshall.
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> Relief Sought:
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> I seek to continue full-time employment and benefits at present level at Marshall University.
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> I am seeking continued full-time employment with Marshall University at a level comparable with my education and experience. After fourteen (14) years in Student Affairs where I have effectually served the university in a variety of positions and responsibilities, including Associate Dean of the Graduate School and Acting Director of the Honors Program, I find it difficult to understand why positions are created for others, yet there is no position available for a person with my depth of background and breadth of expertise.

Grievant was informed by Marshall University (hereinafter Marshall) that her grievance should be processed starting at level two. Thereafter, a hearing was held on August 4, 1992, and a decision denying the grievance was issued on August 17, 1992. Grievant appealed to level three and the Board of Trustees waived participation pursuant to W. Va. Code §18-29-4(c). An appeal was made to level four September 9, 1992.

The first evidentiary hearing at level four was scheduled for December 21, 1992. Thereafter, the parties entered into settlement negotiations. After numerous continuances which were granted forgood cause, change in Respondents' counsel, requests that the decision be made based upon the lower level record, and other unsuccessful scheduling attempts, the first hearing was held on October 18, 1993. Thereafter, the record was reopened to allow for the taking of a witness's testimony located in Clemson, South Carolina, by telephone, on September 21, 1994; the case became mature for decision on that date.

The record is extremely difficult to review as much of the testimony centered around actions and statements attributed to various individuals relating to a change in Grievant's position's status at Marshall in 1987. Grievant was hired in 1977 into the classified position of Associate Dean of Student

Affairs. In 1987, Grievant's position was removed from the classified service and placed within the nonclassified service. As a result, Grievant became an at-will employee of the University's President, and her position was ultimately eliminated due to a reorganization in 1992. At level four, the essence of Grievant's claim is that she relied upon assertions made to her that the move from classified to nonclassified status would be beneficial but, contrary to her belief, the opposite was true as her position was eventually eliminated; therefore, her position should not have been eliminated or she should have been reassigned to another full-time position. Much of the testimony presented was from witnesses who either have little actual knowledge of the facts relating to this change in Grievant's status or who could not effectively remember key facts related thereto. Further, Grievant often discussed facts not inevidence in attempting to ask questions of witnesses or to lay foundations for the admission into evidence of various exhibits.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant was hired by Marshall on October 1, 1977, as an Associate Dean of Student Affairs.

2. At the time of Grievant's hiring, her position was a classified position under the Board of Trustee's classification plan. Positions within the classified system enjoy certain statutory rights relating to tenure, seniority and salary. W. Va. Code §§18B-9-1, et seq.

3. Nonclassified positions within the Board of Trustees' system are limited to policy making positions. Only four percent of each institution's employees may be placed in the category of nonclassified. W. Va. Code §18B-9-2.

4. Nonclassified positions are at-will positions, i.e., the incumbents so classified serve at the will and pleasure of the institution's president. The salaries for nonclassified positions are not set by statute and these positions enjoy no seniority-related bumping rights during a reduction in force or reorganization.

5. For various reasons, the administration at Marshall, in 1987, believed that approximately 52 of its employees (the number representing four percent) should be removed from the classified system and placed within the nonclassified ranks. It was believed,among other things, that salaries

for these positions could be raised and that the job descriptions could more easily be modified.

6. The fifty-two classified employees were informed prior to any formal action of the proposed change in their status. Meetings were conducted within departments whereby the employees were allowed to ask questions of personnel officers concerning the differences between classified and nonclassified status.

7. On July 1, 1987, Grievant accepted an appointment to a nonclassified position. As a result, Grievant's salary was raised shortly thereafter.

8. In the fall of 1988, the President at Marshall offered the nonclassified staff the option of returning to classified status, few employees accepted this offer. Grievant did not elect to change her status.

9. In 1990, the nonclassified staff were again offered the ability to change status. It was required that all or none of the assistant and associate deans would be allowed to change to classified. Grievant did not change her position's status.

10. Pursuant to "operation streamline," a reorganization of Marshall's staff was implemented due to financial difficulty. Grievant was informed on March 9, 1992, that her position would be eliminated on June 2, 1992.

11. Pursuant to Grievant's request, she was allowed to serve in the position of ombudsman until December 31, 1992.

Discussion

Grievant never explained her legal argument. Grievant's contention that she should have had some form of "bumping" rights in 1992 as a nonclassified employee is clearly not supported by any statutory provision or policy; therefore, this argument is not persuasive. Her only viable argument is considered to be based upon her change in status in 1987, and this "but for" argument is considered to be an equitable one based upon the doctrine of estoppel. Grievant has not presented any evidence or authority to support a conclusion that Marshall was legally required to have sought her opinion prior to having reclassified her position. Marshall asserts that it neither misinterpreted nor misapplied any applicable law, policy or regulation in eliminating Grievant's position. It asserts that Grievant accepted the change in her position's classification in 1987, as evidenced by her repeated signing of various letters of appointment. It denies that Grievant was misled in any manner with regard to the

discussions had prior to the change in the classification of her position.

The equitable doctrine of estoppel is grounded in the theory that no man may take advantage of his own wrong. Beneficial Finance Co. of Virginia v. Lazrovich, 47 B.R. 358 (D.C. Va. 1983). An "estoppel" exists when a defendant has brought about or allowed such conditions as to make it inequitable for him to claim a right to which he would otherwise be entitled. Dye v. Pennsylvania Gas Co., 35 S.E.2d 865 (W. Va. 1945). "The doctrine of estoppel can be applied when a party is induced to act or to refrain from acting toher detriment because of her reasonable reliance on another party's misrepresentation or concealment of material fact." Ara v. Erie Ins. Co., 387 S.E.2d 320, 324 (W. Va. 1989).

More specifically, the essential elements of estoppel as are follow:

1) There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts;

2) Those facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;

3) The truth concerning those facts must be unknown to the other party claiming the benefit of the estoppel at the time when it was acted upon by him;

4) The conduct must be done with expectation that it will be acted upon by the other party, or under circumstances that it is both natural and probable that it will be so acted upon;

5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it;

6) He must in fact act upon it in such a manner as to change his position for the worst.

District 17, District 29, Local Union 7113, and local Union 6023, United Mine Workers of America v.

Allied Corp., 735 F.2d 121 (4th Cir. 1984), on rehearing 765 F.2d 412, certiorari denied 473 U.S. 905, certiorari denied 473 U.S. 905. Detrimental reliance is an essential element of estoppel. Mundy v. Arcuri, 267 S.E.2d 454 (W. Va. 1980).

With regard to proving estoppel, the party relying upon said theory has the burden to prove each element by clear, precise and unequivocal evidence. Prince Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust, 413 S.E.2d 599 (Va. 1992); Brown v. Crozer Coal & Land Co., 107 S.E.2d 777 (W. Va. 1959). Finally, "the doctrine of estoppel should be applied cautiously, only whenequity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine of estoppel against the state." McFillan v. Berkeley County Planning Com'n, 190 W. Va 458, 465 (1993) citing Samsell v. State Line Development Co., 174 S.E.2d 318 (W. Va. 1970).

Grievant has failed to establish sufficient evidence to support the application of the equitable doctrine of estoppel in this case. In fact, all inferences from the record indicate that Marshall attempted to be more than fair in attempting to explain the differences between positions in the classified verses nonclassified service. (See footnote 1) If Grievant had been unaware of any of the significant differences, she was given ample opportunity to ask questions and become informed of the differences. It is inferred that Grievant was, or should have been, well aware of the differences in the two types of positions. There is no evidence to support a finding that any of Marshall's agents misrepresented or concealed material facts to or from Grievant with the expectation that Grievant would make a certain decision. In fact, Grievant was given the opportunity in 1988 and 1990 to change back to classified status and she chose not to do so.

Grievant has not established that she relied upon the statements or actions of the administration at Marshall to her detriment. The elimination of her position in 1992 is too remote from the change in her employment status in 1987, and is notdirectly related to Grievant's decision to go along with the reclassification. Grievant's position was eliminated by a different President than the one who presided over Marshall in 1987. Further, the evidence indicates that Grievant benefited from becoming a nonclassified employee during the years she was so classified by receiving raises and by working in a more professional, administrative atmosphere, i.e., she did not rely upon Marshall's actions or assertions to her detriment. It is concluded that Grievant has not established sufficiently clear, precise and unequivocal evidence which could be used to substantiate the application of the doctrine of

estoppel against Marshall in this case.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. In general, Grievant bears the burden of proving the facts of her case by a preponderance of the evidence. W. Va. Code §§18-29-1, et seq. However, with regard to the doctrine of equitable estoppel, Grievant must prove the facts supporting said claim by clear, precise and unequivocal evidence. Prince Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust, 413 S.E.2d 599 (Va. 1992); Brown v. Crozer Coal & Land Co., 107 S.E.2d 777 (W. Va. 1959).

2. Grievant has failed to establish by a preponderance of the evidence any violation of W. Va. Code §§18B-7-1, et seq., or W. Va. Code §§18B-9-1, et seq.

3. Grievant has failed to establish sufficient facts to support her claim of equitable estoppel.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

February 14, 1995

Footnote: 1It was never established that Marshall was legally required to have received the employees' approval prior to changing the status of their positions.