

ERNIE CHAFIN

v.

DOCKET NO. 95-BCHD-362

**BOONE COUNTY HEALTH DEPARTMENT and
DIVISION OF PERSONNEL**

DECISION

This case is before the Grievance Board following a successful appeal by Grievant, of a dismissal of her grievance by the Grievance Board on jurisdictional grounds, to the Supreme Court of Appeals of West Virginia. A brief procedural history of this case is necessary to a determination of the issues in this grievance.

Grievant Ernie Chafin filed a grievance on March 30, 1992, alleging misclassification, and seeking classification as a Nurse II, effective October 1990. The West Virginia Division of Personnel ("Personnel") had determined that Nurse II was her proper classification, and by letter dated March 23, 1992, had informed the Boone County Health Department ("BCHD") of this determination. Grievant was unsuccessful in her grievance at Levels I and II of the grievance procedure, and the grievance was advanced to Level IV by Grievant when the statutory time frame for hearing at Level III was not met. The grievance was remanded to Level III for hearing. Thereafter, a Level III hearing was scheduled, but later Grievant was notified the hearing was canceled because Grievant was not covered by the grievance procedure. The grievance then returned to Level IV where a decision was issued finding the Grievance Board had no jurisdiction to hear the grievance because Grievant was not a state employee. On appeal, the Circuit Court of Boone County upheld this ruling. The Supreme Court of Appeals of West Virginia overturned this ruling in W. Va. Dept. of Admin. v. W. Va. Dept. of Health and Human Resources, 192 W. Va. 202, 451 S.E.2d 768 (1994), and this case returned to Level III of the grievance procedure for consideration of the merits. A Level III hearing was held on July 27, 1995, and a decision was issued on August 8, 1995. The record was supplemented at a Level IV hearing on November 3, 1995, and this matter became mature for decision with the receipt of the last of the parties' post-hearing written argument on December 21, 1995.

In the meantime, Personnel reclassified Grievant from a Nurse I to a Nurse II effective November

1, 1992, in the statewide reclassification project. BCHD refused, and continues to refuse, to accept Personnel's decision, but has taken no action to contest Personnel's decision. BCHD has simply refused to call Grievant a Nurse II. BCHD has, however, paid Grievant as a Nurse II effective November 1, 1992. Grievant seeks to have her classification to Nurse II made effective October 1990, and backpay from that date through October 31, 1992. She also seeks attorney fees and costs against BCHD for bad faith in this proceeding.

BCHD argued at Level III that one of the issues in this proceeding was whether it was bound by Personnel's decision to reclassify Grievant as a Nurse II. The Level III decision found that the Supreme Court of Appeals' decision in this case was controlling on the issue raised by BCHD, stating:

West Virginia Code 29-6-17 (a) requires county health departments which have not adopted their own merit system to comply with all rules and regulations as promulgated by the Division of Personnel. As the Division of Personnel reclassified the grievant as a Nurse II, effective 1 November, 1992, it is the opinion of the undersigned that the grievant is entitled to be classified as a Nurse II from said date.

The decision did not address whether Grievant was properly classified prior to November 1, 1992, but denied backpay from October 1990 to that date. The decision found BCHD's action to pay Grievant as a Nurse II, but withhold classification as a Nurse II, "bizarre," but that this did "not rise to the level needed to make a finding of bad faith" on the part of BCHD.

BCHD argued at the Level IV hearing that it could pursue as an issue whether Grievant was properly classified by Personnel as a Nurse II, even though BCHD filed no appeal of the Level III decision. BCHD argued a hearing at Level IV is de novo. The undersigned will address whether BCHD can pursue this issue, before addressing Grievant's complaint.

"The West Virginia Division of Personnel is the State Agency charged with establishing and maintaining a position classification plan pursuant to W.Va. Code §§29-6-1 et seq." Bennett/Wickline v. W. Va. Dept. of Health and Human Res./Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995), Finding of Fact Number 2. The Level III decision correctly states that any issue about whether Personnel's classification of employees of BCHD is binding on BCHD has already been decided by the Supreme Court of Appeals' decision in this case when the Court applied Personnel's regulations to find Grievant was a state employee with grievance rights. That decision is the law of the case, and is controlling. [\(See footnote 1\)](#) This issue cannot be revisited either at Level III or IV. See Tressler Coal Mining Co. v. Klefeld, 108 W. Va. 301 (1943); Bass v. Kanawha County Bd. of Educ., Docket No. 92-20-214 (Nov. 4, 1994).

Unfortunately, however, it is apparent that BCHD needs to be told yet again that, when a county health department is subject to the state merit system, which is the situation here, W. Va. Code § 29-6-10 provides that **the West Virginia Division of Personnel classifies state employees, not the Boone County Health Department**. BCHD is bound by Personnel's classification decision.

Grievant's classification is Nurse II.

Further, the grievance procedure is for employees, not employers. An employee can use the grievance procedure to challenge her classification, but when a grievant is not challenging the classification assigned to her by Personnel, BCHD cannot use the grievance procedure to challenge Personnel's classification of the grievant.

Before addressing the remaining issues, it is appropriate that the following Findings of Fact be properly made from the record developed at Levels III and IV.

Findings of Fact

1. Grievant had 31 months' experience as a nurse prior to beginning her employment with BCHD in June of 1990, as a Nurse I.
2. Grievant first asked BCHD to classify her as a Nurse II in October 1990, when she had acquired the requisite experience for the position of 36 months.
3. Grievant completed a Position Description which was received by Personnel on January 30, 1992. It was returned to Grievant for her supervisor's review and signature. The Position Description was signed by Grievant's supervisor, and returned to Personnel, which received it March 18, 1992.
4. Grievant was performing the duties listed on her Position Description on January 30, 1992.
5. By letter dated March 23, 1992, Lowell D. Basford, Assistant Director, Classification and Compensation, Personnel, informed BCHD that, after reviewing the Position Description for Grievant, he had determined "that the Nurse II classification is the appropriate class to be assigned" Grievant.
6. Ona Jane Howell, Chairman of the Board of BCHD, spoke to Mr. Basford about the March 23, 1992 letter, and informed him that Grievant did not do home visits. Mr. Basford asked her to send him a letter stating this, and that he would look at Grievant's classification again. BCHD sent a letter to Mr. Basford stating Grievant did not do home visits, and sometime thereafter, Mr. Basford sent BCHD a letter stating that this fact did not alter his determination on Grievant's classification.
7. Personnel took no further action to assure Grievant's reallocation to Nurse II was implemented by BCHD.

8. Effective November 1, 1992, Grievant's position was reclassified by Personnel to Nurse II in the statewide reclassification project. BCHD increased Grievant's salary to the minimum for a Nurse II effective November 1, 1992, but continued to classify her as a Nurse I.

Discussion

BCHD raised timeliness of the filing, stating in its post-hearing submission that Grievant had ten days from October 1990 to initiate a grievance, and "[w]hen she failed to do so she lost any claim pre-filing back pay." BCHD cited Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990), in support of this proposition.

Misclassification is a continuing practice. As such, a grievance may be initiated at any time during the time the misclassification continues. See Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399, 413 (W. Va. 1995); W. Va. Code § 29-6A-2.

As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance.

Martin, supra.

Grievant has proven she was misclassified at the time she filed her grievance, and fifteen working days preceding that date. Accordingly, she is entitled to classification as a Nurse II and backpay in the amount of the difference between the salary she would have received as a Nurse II and her actual salary from March 9, 1992, through October 31, 1992.

Grievant also seeks reimbursement for costs and attorney fees incurred since this grievance was initiated in 1992, less \$2,557.73 paid by BCHD pursuant to an Order of the Circuit Court.

W. Va. Code § 29-6A-7 provides:

Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs.

The undersigned has no authority to award attorney fees. See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Grievant seemed to argue that the undersigned could award attorney fees in a mandamus action. The Grievance Board hears grievances, and has no authority to hear an action in mandamus.

The undersigned finds BCHD's continuing refusal to implement Personnel's classification of

Grievant after the Supreme Court of Appeals' ruling in this case, and its insistence on continuing to raise this as an issue after failing to challenge Personnel's decision through the appropriate legal avenues, constitutes bad faith. However, Grievant has not presented any evidence to the undersigned that she has incurred any costs since this matter was remanded by the Circuit Court, and none will be awarded.

Conclusions of Law

1. In order to prevail, a grievant must prove the allegations in her complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR- 441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. "The West Virginia Division of Personnel (Personnel) is authorized by W. Va. Code §29-6-10 to establish and maintain a position classification plan for all positions in the classified service." Toney v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994), at 12.

3. Misclassification is a continuing practice. As such, a grievance may be initiated at any time during the time the misclassification continues. The proper relief in this case, however, is "limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance." Martin v. Randolph County Bd. of Educ., 465 S.E.2d 399, 413 (W. Va. 1995); W. Va. Code § 29-6A-2.

4. Grievant was working as a Nurse II at the time this grievance was filed on March 30, 1992, and during the fifteen days preceding the filing of the grievance.

5. BCHD's action in raising as an issue in this grievance whether it is bound by Personnel's classification of Grievant constitutes bad faith.

6. The undersigned has no authority to award attorney fees. Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986). 7. The undersigned may allocate the cost of the hearing to a party acting in bad faith. W. Va. Code § 29-6A-7. Grievant did establish she incurred any costs after this matter was remanded by the Circuit Court.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. BCHD and Personnel are **ORDERED** to reclassify Grievant as a Nurse II effective March 9, 1992. BCHD is **ORDERED** to pay Grievant backpay from that date through October 31, 1992, in the amount of the difference

between her salary as a Nurse II and the salary she received, plus simple interest. No attorney fees or costs are awarded.

Any party may appeal this decision 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. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 21, 1996

[Footnote: 1](#)

BCHD did not opt out of Personnel's classification plan.