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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
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GALE P. BENTZ

v.

Docket No. VR-88-057

**WEST VIRGINIA DIVISION OF REHABILITATION SERVICES
AND WEST VIRGINIA CIVIL SERVICE SYSTEM**

DECISION

Grievant Gale P. Bentz, a Rehabilitation Counselor for Respondent West Virginia Division of Vocational Rehabilitation Services, on August 30, 1988, filed a grievance alleging, "An unfair evaluation placing my rating in the West Virginia Civil Service Counselor classification system has been assigned to me." The grievance was denied at Levels I and II, and after hearing of October 31, 1988, at Level III.¹ Grievant appealed to Level IV on November 16, 1988. A hearing was held February 17, 1989.² At the hearing the parties³ waived their right to submit proposed findings of

¹The date of the Levels I and II decisions were September 6 and 21, 1988, respectively. The date of the Level III decision is not provided by the record.

²Hearings scheduled for December 8, 1988, and January 20, 1989, were continued at the requests of the parties.

³At the hearing, Respondent West Virginia Civil Service System was joined as an indispensable party-respondent. See WVESEGB Rule 4.11. Hayes v. DNR, Docket No. NR-88-038 (March 28, 1989).

fact and conclusions of law. The record of the Level III hearing, which the parties agreed would comprise the evidentiary record along with the record of the Level IV hearing, was received on and before March 9, 1989. The record is accordingly complete for consideration.

Grievant complains that when the Rehabilitation job class series was reorganized in July, 1988, he was improperly and unfairly classified as a Rehabilitation Counselor. He contends that, as a Rehabilitation Counselor III prior to the reorganization, he was entitled to be placed in the new classification of Senior Rehabilitation Counselor.

At the Level IV hearing Respondent moved for dismissal on the following grounds:

Mr. Bentz has resigned his position by letter dated February 14, effective February 28.⁴ Mr. Bentz's requested relief in his grievance was to be made a Senior Counselor in title. He did not request pay or other expenses in his relief. This issue is now moot due to his resignation.

Mr. Bentz, appearing pro se, responded,

It is true that I have resigned. However, this is not a moot point by any means. First of all, back pay has never been an issue. It has never been asked, requested or alluded to in any way whatsoever up to this point. Pay is not the issue here. I'm not asking for more money. I'm not asking for any such remuneration of any kind. It is important to me that I leave as a Senior Rehabilitation Counselor for a variety of reasons, one of which, not the least of which, is the fact that when I retire from the state, hopefully within 20 or so years, at that time who knows what Civil Service will have proposed in terms of benefits to the retirees as to their status that they were in at the time they left the agency. I intend to freeze my

⁴The letter was submitted into evidence, Res. Ex. 1.

retirement; I intend to leave this agency as a Senior Counselor. Hopefully at the time I retire there will be some benefits for Senior Counselors...so that at the time retirement comes I will be able to get any and all benefits coming to me at that time.

Upon questioning by the undersigned whether there are any known monetary benefits that would result from the change in title, Mr. Bentz only stated that there "may well be."

Respondent's representative responded as follows,

Mr. Bentz is correct that twenty years from now we can't know what the law will be but since 1961, when the retirement system was created for public employees, it's been solely based on wages,...regardless of title. It's all a monetary system, based on wages paid, not title. Of course, as Mr. Bentz stated, the law of twenty years from now is unknown.

While the motion was denied without prejudice at the hearing subject to further consideration, it must be granted upon further review of the record and the law. The grievance must therefore be denied.

Respondent is correct that there is no indication in the Public Employees Retirement Act, W.Va. Code §5-10-1 et seq., that a change in Grievant's title, without a change in salary, would have any effect on the value of his pension, for indeed the retirement annuity of a state retiree is based on his or her salary, with no consideration of title. See W.Va. Code §5-10-22. Furthermore, while Grievant correctly argues that it cannot be known whether the system might be changed before his retirement, that such a change will actually occur is very unlikely. Accordingly, that Grievant will someday be entitled to such a monetary remedy is speculative in the extreme.

Further, since Grievant specifies, and the record supports, that he would be entitled to no monetary relief such as backpay at this time, should the grievance be granted, it is clear that no practical remedy is requested or would result from granting the grievance. By asking for retroactive instatement to the classification, Grievant in essence is merely requesting a confirmation that his qualifications would entitle him to the position were he still employed by Respondent. While it is understandable that Grievant desires the status of the title and vindication of his position, such results are not legally cognizable remedies. This Board has held that "[s]uch relief, if granted, would be at best illusory and of little practical effect on the parties and such matters are not properly cognizable in the grievance procedure." Smith v. Marshall University, Docket No. BOR2-87-229-1 (June 29, 1988).⁵

In addition to the foregoing narrative, the following findings of fact and conclusions of law are appropriate:

⁵In Smith v. Marshall University, Docket No. BOR2-87-229-1 (June 29, 1988), the grievant requested exoneration from charges which, while the subject of a reprimand, were not retained in his personnel file. Although Smith arose pursuant to the grievance procedures of W.Va. Code §18-29-1 et seq., applicable to grievances brought by education employees, the law on remedies would be the same under that statute and W.Va. Code §29-6A-1 et seq., applicable to this matter.

Findings of Fact

1. Grievant, employed by Respondent as a Rehabilitation Counselor in Clarksburg, West Virginia, alleged in his grievance that he was entitled to be classified as a Senior Rehabilitation Counselor when the rehabilitation job class series was reorganized in July, 1988, rather than Rehabilitation Counselor.

2. Grievant resigned his employment with Respondent and the State of West Virginia, effective March 1, 1989, but retained his retirement benefits, payable in approximately twenty years.

3. Grievant requested no monetary relief but relied on a possibility that his retirement benefits, upon retirement, may be affected by his leaving the state government as a Senior Rehabilitation Counselor rather than a Rehabilitation Counselor.

Conclusions of Law

1. Grievant's reliance on a possible future change in the Public Employees Retirement Act, W. Va. Code §5-10-1 et seq., as supportive of a showing of monetary loss is too speculative to warrant addressing the merits of his grievance.

2. The requested relief of changing Grievant's title and status to Senior Rehabilitation Counselor, without any shown monetary loss, is relief that, "if provided, would have no practical effect on either party" and is therefore

"not cognizable in the grievance procedure[.]" Smith v. Marshall University, Docket No. BOR2-87-229-1 (June 29, 1988); Carney v. W.Va. Division of Rehabilitation Services, Docket No. VR-88-055 (March 28, 1989). See also Harrison v. Cabell County Board of Education, 351 S.E.2d 604 (W.Va. 1985)⁶; Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-87-102-1 (June 30, 1987); Ledbetter v. Braxton Co. Bd. of Educ., Docket No. 04-86-092 (April 15, 1986).⁷

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Harrison County and such appeal must be filed within

⁶In Harrison v. Cabell County Board of Education, 351 S.E.2d 604 (W.Va. 1985), the West Virginia Supreme Court of Appeals held that where a grievant contended he had been the most qualified candidate for a position but the position had been later abolished,

to determine the purely factual question of whether the [grievant] was more qualified for that position would be an exercise in futility. "Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or property are not properly cognizable by a court." [cites omitted]
351 S.E.2d at 605.

⁷In Ledbetter v. Braxton Co. Bd. of Educ., Docket No. 04-86-092 (April 15, 1986), it was held, "As this grievant is no longer employed in the position [in] question, is asking for no monetary relief and is asking this examiner to remedy a situation which no longer exists, this grievance will be denied without further discussion."

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 Hearing Examiners
is a party to such appeal, and should not be so named.
Please advise this office of any intent to appeal so that
the record can be prepared and transmitted to the appropri-
ate court.



SUNYA ANDERSON
HEARING EXAMINER

Dated: March 28, 1989