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

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**ELMER HAMLIN**

**v.**

**Docket No. H-88-036**

**W.VA. DEPARTMENT OF HEALTH**

**DECISION**

Grievant Elmer Hamlin was employed by Respondent West Virginia Department of Health at Huntington State Hospital (HSH) until his retirement July 31, 1987. On October 11, 1988, he initiated the following grievance at Level IV:

The Dept. of Health has agreed to stipulate that it owes back wages to the claimant for the period of 11-1-84 through 5-16-86. The claimant is aggrieved because he is owed back wages for the entire period of his misclassification from 6-1-82 to 1-1-87.<sup>1</sup> This case is presented in accordance with Civil Service policy issued pursuant to AFSCME v. Civil Service Commission.<sup>2</sup>

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<sup>1</sup> At the Level IV hearing, the parties agreed that the only periods in controversy are June 1, 1982 through November 1, 1984, and May 16, 1986, through January 1, 1987. Respondent conceded that Grievant is owed back pay as a Plumber from November 1, 1984 through May 16, 1986.

<sup>2</sup> The dispute between the American Federation of State, County and Municipal Employees (AFSCME) and others as petitioners and the Civil Service Commission of West  
(Footnote Continued)

The procedural history of this case may be described as convoluted, at best.<sup>3</sup> Grievant, an employee of HSH since 1977, was assigned to the Plumbers' Shop in Summer 1982. He was then categorized as "Maintenance Worker" and still was on November 2, 1984, when he formally sought reclassification and back pay by submission of the following complaint:

I have been working in the Plumbing Shop over two years and receive Maintenance Worker pay. I have a Civil Service grade of 85 as Plumber.

I want to be classified as Plumber and be paid Plumber's pay, with two years back pay.

Eventually, on February 28, 1985, Respondent found Grievant entitled to a promotion to Plumber "[a]s his current duties involve only plumbing and not the variety of manual labor associated with his current classification of Maintenance Worker." Respondent took no further action until August 5, 1985, when it claimed that "due to. . .[a] spending freeze," it was "unable to" afford Grievant Plumber status. Grievant's Ex. 4. Nevertheless, his job duties

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(Footnote Continued)

Virginia as respondents had resulted in three pronouncements from the Supreme Court of Appeals of West Virginia at the time this grievance was submitted. They are popularly known as AFSCME I and AFSCME II, which are located respectively at 324 S.E.2d 363 (1984) and 341 S.E.2d 693 (1985), and AFSCME III, which is a May 20, 1988, unpublished per curiam order. In addition, AFSCME IV, \_\_\_ S.E.2d \_\_\_, #17929, was handed down by the Court on March 28, 1989.

<sup>3</sup> In an effort at brevity, certain procedural details have been either summarized or excluded.

remained the same until, by memorandum of May 8, 1986,<sup>4</sup> he was relegated "[e]ffective immediately. . .to do only maintenance work" and to "[n]o longer. . .be assigned to the Plumbers' Shop." Gr. Ex. 2. This "functional demotion" was voided by the Civil Service Commission, Hamlin v. Dept. of Health, #1421 (Dec. 3, 1986); CSC ordered that he be advanced to the rank of Plumber within thirty days, and this was accomplished as of January 1, 1987.

In his continuing quest for backpay, Grievant at some point filed suit against Respondent and CSC in the West Virginia Court of Claims where a hearing was conducted March 25, 1987. At that hearing, Respondent agreed back pay was owed Grievant but that he had not exhausted administrative remedies, i.e., CSC's back pay procedure; CSC Acting Director of Personnel Lowell D. Basford represented to the Court "that the. . .[CSC] was preparing to issue guidelines on the process for resolving pending backpay claims." The parties agreed that Grievant would pursue his case via those guidelines once issued, but that a settlement conference would be convened in the meantime, and the case was dismissed. Counsel for Grievant and Respondent had scheduled a May 14

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<sup>4</sup> Apparently, this was precipitated by a May 7, 1986, letter from Mr. Hamlin to HSH, requesting action to reclassify him to Plumber in accordance with the February 1985 decision. Hamlin v. Dept. of Health, #1421 (W.Va.Civ.Svc.Comm'n. Dec. 3, 1986).

May 16, 1986 was the concluding date of the pay period containing May 8, 1986. See n. 1.

negotiation session, which was postponed because Grievant received "information. . .from. . .[CSC]. . .that. . .[it] would be issuing guidelines for back pay determinations on or about May 18, 1987." Grievant wrote a series of letters to CSC in an effort to expedite matters; finally, on July 16, 1987, CSC advised Grievant that the American Federation of State, County and Municipal Employees (AFSCME) and others, on April 20, had filed a petition with the Supreme Court of Appeals, asking that certain state employee backpay claim issues be resolved. CSC explained that "[b]ecause of this development. . .[it] had decided to await a ruling. . .before taking any further action on. . .claims [such as Mr. Hamlin's]." On May 20, 1988, the Supreme Court, in an unpublished per curiam order,<sup>5</sup> required CSC to forthwith establish a formal back wage computation policy, which it did effective July 20, 1988. Grievant immediately filed a claim under this Policy and, after lower level denial,<sup>6</sup> it

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<sup>5</sup> AFSCME III. See n. 2.

<sup>6</sup> Any lower level denial was based on the procedural ground that Grievant, due to this retirement, was no longer an "employee" per W.Va. Code §29-6A-2(e). For further discussion of this issue, see this Decision, infra.

Technically, this grievance should be remanded to the lower levels since it was not there substantively reviewed; indeed, it is not at all clear that the case was processed through each of Levels I, II and III. See n. 9. However, such action would only unnecessarily delay resolution of a matter which has already languished for an inordinate period. The undersigned will proceed to Decision, following the principle of State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 438 (W.Va. 1986).

arrived at Level IV as a grievance on October 11.<sup>7</sup> Respondent filed a Motion to Dismiss, which was the subject of a hearing on December 15, 1988, at which time the motion was taken under advisement pending the presentation of briefs by January 6. With the motion still in abeyance, the Level IV hearing was conducted January 30 and February 3, and, with the submission of proposed findings of fact and conclusions of law by March 8, this case is mature for disposition.

#### I. MOTION TO DISMISS

The crux of Respondent's motion is that this Grievance Board is without jurisdiction in this case for two reasons: one, Mr. Hamlin's retirement renders him unable to be an "employee" per Code §29-6A-2(e) or a §29-6A-2(k) "grievant"; and two, this grievance's origin prior to July 1, 1988, removes it from the purview of this Grievance Board under Code §29-6A-11.

Code §29-6A-2(e) defines "employee", in pertinent part, as:

[A]ny person hired for permanent employment, . . . by any department. . . of the state. . .

Code §29-6A-2(k) provides:

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<sup>7</sup> CSC's Back Wage Computation Policy, which was in effect at the time this grievance was initiated at Level IV, has since been declared null and void. AFSCME IV.

"Grievant" means any named employee or group of named employees filing a grievance. . . .

Code §29-6A-11 provides, in pertinent part:

This. . .[grievance procedure] applies to all grievances arising on or after. . .July 1, 1988. . .

§29-6A-2(e) simply says that an individual must have been "hired for permanent employment" to be classed an "employee" under the grievance procedure; it does not require a currently extant working relationship. Indeed, if it did, it would be in conflict with §29-6A-4(e), which grants terminated personnel standing to grieve. In the instant case, Mr. Hamlin unquestionably was hired by Respondent for permanent employment. He thus meets the criteria of an "employee" and accordingly, of a "grievant" per §29-6A-2(k). See Carney v. W.Va. Divn. of Voc. Rehab., Docket No. VR-88-055 (Mar. 28, 1989); Poole v. Nicholas Co. Bd. of Educ., Docket No. 34-88-162 (Dec. 6, 1988).<sup>8</sup>

Furthermore, even though Grievant's back wage dispute with Respondent is one of longstanding and undeniably has roots extending backward from July 1, 1988, the grievable act herein is Respondent's denial of his claim under CSC's Back Wage Computation Policy. This Policy was not even in effect until July 20, 1988; therefore, this grievance did

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<sup>8</sup> Respondent's contention that allowing former employees to meet the §29-6A-2(e) definition would create a potential "disastrous flood" of grievances is inappropos in light of the stringent timeliness requirements of the grievance procedure. See Code §29-6A-4.

not arise outside the jurisdictional purview of this Grievance Board. Code §29-6A-22.

The Motion to Dismiss is **DENIED.**<sup>9</sup>

## II. MERITS OF GRIEVANCE

### a) June 1, 1982-November 1, 1984

Respondent has conceded that Grievant should have been classified as Plumber as of November 1, 1984; Grievant alleges that he was performing the duties of Plumber from his entry into the Plumber's Shop on or around June 1, 1982. According to Respondent's Exhibit 8,<sup>10</sup>

[T]he Department of Health disputes the date of June 1, 1982 as being the time misclassification commenced [because],

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<sup>9</sup> Even if this grievance had arisen prior to July 1, 1988, it would have withstood Respondent's motion to dismiss. The AFSCME IV case opened a jurisdictional window on W.Va. Code §29-6A-11 by granting state employees with pre-July 1, 1988, backpay claims access to the state employees grievance procedure, beginning at Level I, for ninety days from March 28, 1989. It is well imagined that many of the employees so provided for are not currently working for the State of West Virginia.

In addition, it has been held that persons who had submitted backpay claims or other misclassification-related disputes to the grievance procedure prior to March 28, 1989, may but need not re-file their cases at Level I during the window period. Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989).

<sup>10</sup> This exhibit was a letter of August 16, 1988, from Mary S. Blizzard, Director of Respondent's Human Resources Division, to Marjorie Martorella, attorney for Grievant.

1. In a letter dated August 29, 1983, to Janeann King, Civil Service, Mr. Hamlin alleged he had been working out of class for the "last eighteen months." By our calculation, that would place the date on or about January, 1982.

2. In a March 6, 1986 letter from William W. Matthews, Attorney for Elmer Hamlin, to the Director of Health, Mr. Matthews indicated the period in question was September 16, 1982 until the promotion occurred.

3. In Mr. Hamlin's complaint filed with the NLRB, dated September 1, 1984, he stated, "...I have been working seven years at Huntington State Hospital, the last two years in the plumbing shop. ..." "I expect equal pay with the other plumbers." We interpret those statements to constitute a date of September, 1982.

4. In the grievance filed by Mr. Hamlin on December 20, 1982, he described the issues as, "I'm requesting a written statement of why R. H. made Maintenance Mechanic (emphasis added) and I didn't."

We find that Mr. Hamlin is unclear on the period of misclassification. In fact, in the December 1982 grievance Mr. Hamlin was concerned with a maintenance worker classification, and therefore has indicated he was not functioning as a plumber at that time. It was not until November 2, 1984 that Mr. Hamlin filed a formal complaint to be reclassified as a Plumber.

At the Level IV hearing, evidence was presented that Dorothy Wilson, a co-worker of Grievant's at HSH, was on medical leave from February 9, 1982, until June 1 of that year. Gr. Ex. 1. Ms. Wilson testified that when she returned to work in the hospital's Tool Room, Grievant was still there assigned, but that he was moved to the Plumbing Shop "within a week or so." She stated that thereafter, Grievant often checked out plumber's tools from her. She conceded that she never observed Grievant working as a Plumber and that "anyone could pick up tools" from her.



Eugene Rife, currently Acting Plumbing Supervisor at HSH, appeared at Level IV and earmarked Mr. Hamlin's transfer there as occurring "at least by Summer 1982." He opined that Grievant's "duties never changed from the date he got to the Plumbing Shop," that both he and Grievant were then "doing plumbing work" and that neither of them were "assigned to work under anyone" directly. Rife explained that Jim Zelman was Plumbing Supervisor in 1982, but then that the Shop was without a Supervisor for an extended period after Mr. Zelman's retirement; during this interim, Rife "worked mostly alone" and was self-supervised.<sup>11</sup> He implied that the same was true for Grievant, although he admitted that he did not work with Grievant every day and "wasn't always there to see what he did." Rife added that he had considered himself a Plumber for seven years before he officially achieved that title, and that Mr. Mechanic, Zelman's successor, was the individual who reviewed and rated his work performance. It is unclear from the record at what point in time Mechanic became Rife's superior.

Grievant offered testimony that he was moved to the Plumbing Shop "about two weeks after Dorothy came back to work." He averred that his job responsibilities were not altered in any way from his transfer day until May 8, 1986, "when they took me out of the Plumbing Shop to keep from

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<sup>11</sup> The date of Mr. Zelman's retirement is not in the record.

paying me Plumber's wages." He conceded he had never worked as an apprentice plumber in any setting, but argued that "being assigned to the Plumbing Shop made me a Plumber because I'd worked a lot as a plumber prior to that." He stated that Mr. Zelman had never evaluated his work to his knowledge; rather, Grievant testified that he completed his own evaluation forms and presented them to one Mr. Reed to sign.<sup>12</sup> There was no evidence that Mr. Mechanic ever evaluated Grievant's work, although he stated "I was doing the same work as Rife in the Plumbing Shop." Grievant declared that on many occasions, one or more of the individuals classified as Plumber sought his counsel on "how to do work."

On cross-examination, Grievant was asked about the grievance he filed in December 1982, contesting the selection of Roger Holley over him for a Maintenance Mechanic post. See Resp. Ex. 8, reproduced supra. He explained that that complaint was separate from his contentions about working as a Plumber. He added that he did not file a misclassification grievance at that time, even though he believed himself to be working as a Plumber, because "I

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<sup>12</sup> It is uncertain from the record just who "Mr. Reed" was. Apparently, he is the same individual who, according to Grievant, stated "in one of the hearings" that he, Grievant, "did the same work as the other Plumbers."

Grievant explained that Mr. Wilson and Mr. Nelson, supervisors over Maintenance Mechanics and Maintenance Workers, evaluated him as a Maintenance Worker.

filed one before that but Dr. Langan [HSH Administrator] said the State didn't pay back pay."<sup>13</sup>

Dr. Jack Sells, HSH Personnel Chief, offered that there is nothing in Grievant's employment records which shows when he was transferred to the Plumbing Shop. Respondent also presented CSC position classification descriptions including Plumber and Maintenance Worker, Resp. Ex. 4 and 5, respectively, and contended that they and the testimony reveal Grievant to have been correctly classified as Maintenance Worker prior to November 1, 1984. If Respondent's intended argument was that Grievant was not deserving of Plumber's wages because he did not meet the stated qualifications for the job, such is meritless. AFSCME II.

Grievant's burden in this matter is to prove his entitlement to back pay by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). While there is some uncertainty as to the exact date Grievant was assigned to HSH's Plumbing Shop, the overwhelming evidence points to somewhere around mid- to late June, 1982. Respondent's points, as documented in its Ex. 8, are not persuasive. Neither the fact that various approximate dates have been mentioned, nor even that Grievant may have been somewhat "unclear on the period of misclassification" is no reason, in and of itself, to deny

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<sup>13</sup> This may be a reference to the August 1983 letter mentioned in Resp. Ex. 8, supra.

him back pay altogether prior to the filing of his petition in November 1984. Additionally, his December 20, 1982, grievance appears without pertinence to the matter at hand.

As Grievant's proposed Finding of Fact 7 is "[t]he period of misclassification began July 1, 1982, when Mr. Hamlin was first transferred to the plumbing shop," July 1, 1982, will be adopted as the pertinent date.<sup>14</sup> The great weight of information also indicates that Grievant's job duties did not change from the time of his entree into the plumbing shop until May 1986, when he was removed from that work area.

b) May 16, 1986-January 1, 1987

As noted supra, on December 3, 1986, the West Virginia Civil Service Commission held Respondent guilty of "functionally demoting" Grievant for the period referenced immediately above.<sup>15</sup> Specifically, CSC found,

The evidence indicated that the only reason Mr. Hamlin was reassigned new duties was because the results of the classification review conducted by. . .[Respondent] revealed that because Mr. Hamlin's

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<sup>14</sup> Grievant identifies July 1, 1982, as the commencement of his misclassification throughout his proposals as to fact and law and not just in proposed finding 7.

<sup>15</sup> At the Level IV hearing, and upon request of the undersigned, CSC agreed to submit information on functional demotions and back pay, which it did on February 23. Puzzlingly, Grievant, apparently without knowledge of his attorney, wrote this Grievance Board on February 6 and objected to any CSC post-hearing presentment. Since he voiced no concern in this regard at the hearing, despite clear opportunity to do so, his belated objection will not be considered.

current duties involved only Plumbing and not the variety of manual labor associated with his current classification of Maintenance Worker, the appropriate classification for Mr. Hamlin should be a Plumber. In addition. . .it was determined, following a review of information submitted and after discussions with. . .[Grievant] and officials at. . .[HSH], that there was a significant downgrading in duties performed. . .with no corresponding change in class title. Therefore, this Commission finds that. . .[Grievant] was demoted without good cause, and directs that. . .[he] be returned to the Plumber's Shop. . .

Hamlin, p. 6.

Although CSC's order is silent on the issue of back wages for the period of the functional demotion, equitable principles auger in Grievant's favor. It follows from CSC's finding that Respondent's downgrading of Grievant's job duties was inappropriate and that failing to pay him at the classification level to which he deserved assignment was likewise inappropriate. In AFSCME v. CSC, 324 S.E.2d 363, 367 (W.Va. 1984) ("AFSCME I"), and AFSCME v. CSC, 341 S.E.2d 693 (1985) ("AFSCME II"), the Court determined that certain state employees actually performing at higher job classification levels than formally assigned and seeking attendant backpay were due such for the entire period of misclassification.<sup>16</sup> In the instant case, it is unrefuted that Grievant was not performing the duties of a Plumber, but

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<sup>16</sup> AFSCME IV recognized that laches may operate as a defense in such situations, however. Slip op. p. 7, n. 10.

instead those of a Maintenance Worker,<sup>17</sup> from May 16, 1986 until January 1, 1987; it also cannot be denied that this was due to Respondent's error. Hamlin. Grievant is certainly entitled to back wages as a Plumber for this period.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Grievant Elmer Hamlin was employed by Respondent West Virginia Department of Health at Huntington State Hospital (HSH) until his retirement July 31, 1987.

2. Grievant was assigned to the HSH Plumbing Shop continuously from July 1, 1982, until May 8, 1986.

3. On November 2, 1984, Grievant formally sought reclassification to Plumber and back pay for an alleged period of misclassification beginning in 1982.

4. By memorandum dated February 28, 1985, Respondent determined that Grievant should be reclassified, and thus promoted, from Maintenance Worker to Plumber. No other

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<sup>17</sup> See Resp. Ex. 5 and 6 (CSC position classification descriptions for Plumber and Maintenance Worker).

relief was granted. Due to a spending freeze, no timely action was taken to effect the classification change.

5. By memorandum dated May 8, 1986, in response to Grievant's demand for action on his reclassification, he was stripped of his Plumbing Shop assignment and returned to duties consistent with his official job title of Maintenance Worker.

6. By decision of December 3, 1986, the West Virginia Civil Service Commission (CSC) held that Respondent's May 8, 1986, action was a "functional demotion" and thus improper, and that Grievant was entitled to reclassification to Plumber within thirty days. Grievant officially attained the title of Plumber January 1, 1987.

7. After continuous and dogged attempts in various forums to obtain back wages from 1982, Grievant filed a claim under the CSC Back Wage Computation Policy. This policy became effective July 20, 1988. He was denied relief on procedural grounds and advanced his cause to Level IV of the state employees grievance procedure on October 11, 1988, for resolution.

8. Respondent has agreed that it owes Grievant back pay as a Plumber from November 1, 1984 until May 16, 1986. This represents the approximate time period from Grievant's filing of his successful reclassification petition (November 2, 1984) through his relief of plumbing shop duties (May 8, 1986, included in work pay period ending May 16).

9. Respondent contests its obligation to supply Grievant with Plumber's wages for June 1, 1982-November 1, 1984 and May 16, 1986-January 1, 1987.

#### CONCLUSIONS OF LAW

1. Grievant is an "employee" within the definition of W.Va. Code §29-6A-2(e) and a "grievant" under Code §29-6A-2(k), despite his retirement July 31, 1987. Carney v. W.Va. Divn. of Voc. Rehab., Docket No. VR-88-055 (Mar. 28, 1989); see Poole v. Nicholas Co. Bd. of Educ., Docket No. 34-88-162 (Dec. 6, 1988).

2. Although the back pay dispute between Grievant and Respondent has been in process for a number of years, the salient grievable act herein was Respondent's denial of Grievant's claim under CSC's July 20, 1988, Back Wage Computation Policy. Therefore, this grievance arose after July 1, 1988, and is not outside the jurisdictional period established by W.Va. Code §29-6A-11.

3. An employee found by appropriate authority to have worked out of classification, and who requests such relief, may be entitled to back pay for the entire period of his or her misclassification. AFSCME v. CSC, 324 S.E.2d 363, 367 (W.Va. 1984) ("AFSCME I"), 341 S.E.2d 693 (W.Va. 1985) ("AFSCME II"), #17929 (W.Va. Mar. 28, 1989) ("AFSCME IV").



4. It is incumbent upon a grievant to prove the allegations of his complaint by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

5. Grievant is entitled to Plumber's pay for the period July 1, 1982-November 1, 1984, based on his work as a Plumber while being classified as a Maintenance Worker during that time. See AFSCME I and AFSCME II.

6. Grievant is entitled to Plumber's pay for the period May 16, 1986-January 1, 1987, based on Respondent's "functional demotion" of Grievant, which unjustifiably relieved him of his Plumber's duties. See Hamlin v. Dept. of Health, #1421 (W.Va.Civ.Svc.Comm'n. Dec. 3, 1986); see also AFSCME I and AFSCME II.

Accordingly, this grievance is **GRANTED**; Respondent is **ORDERED** to, within sixty days of the date of this **DECISION**, pay Grievant back wages and -benefits covering the period July 1, 1982 through January 1, 1987, at the respective then-prevailing rates of compensation for the classification of Plumber, less any off-set for monies or benefits actually paid to or received by Grievant pursuant to work performed under other position titles.

Either party or the West Virginia Civil Service Commission may appeal this decision 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 §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 appropriate court.

A handwritten signature in cursive script, appearing to read "M. Drew Crislip", is written over a horizontal line.

M. DREW CRISLIP  
HEARING EXAMINER

Dated: May 15, 1989