



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

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

DONNIE L. HERRALD

v.

Docket No. DOH-88-062

**WEST VIRGINIA DEPARTMENT OF HIGHWAYS
and WEST VIRGINIA CIVIL SERVICE SYSTEM**

DECISION

Grievant filed a grievance on September 23, 1988,
alleging:

I am currently classified as a Storekeeper I. I feel I am working out of my classification. I feel I am performing the duties of a Storekeeper II. RELIEF: I request that I be reclassified to Storekeeper II. I request that I be compensated for the time period in which I worked out of my classification, and to be made whole in every way.

The grievance was denied at Level I on September 23, 1988, and at Level II on October 3, 1988. After a hearing at Level III on October 28, 1988, the grievance was again denied. Grievant's Level IV appeal was received December 1, 1988. A hearing was held February 6, 1989.¹ Proposed

¹While Grievant initially had requested a hearing at Level IV and a hearing was scheduled, on January 10, 1989, the undersigned was notified that Grievant and Respondent West Virginia Department of Highways wished to have this matter decided on the record compiled at the lower levels. However, the West Virginia Civil Service System, joined as a
(Footnote Continued)

findings of fact and conclusions of law and briefs were received from the parties on and before May 8, 1989.

At the hearing, Mr. Lowell Basford, Acting Director of Personnel of the West Virginia Civil Service System ("CSS"), who represented CSS at the hearing, moved for dismissal of the grievance on the grounds that CSS has exclusive jurisdiction of misclassification cases. The motion was denied.² However, during the discussion of the motion, the undersigned queried whether the principles of res judicata would apply in this case since Grievant had already been denied reclassification by CSS in a case Grievant pursued under the CSS's Classification Review procedures. Briefing was requested on the issue.³ It is hereby determined that res judicata does not apply to this matter.

(Footnote Continued)

party-respondent upon motion of Grievant on January 19, 1989, requested a hearing and that request was granted. At the hearing the parties agreed to submit no further evidence. Accordingly, the evidence considered in this matter was that presented at Level III.

²In AFSCME v. CSC, Docket No. 17929 (W.Va. March 28, 1989), the West Virginia Supreme Court of Appeals held that the procedures of W.Va. Code §29-6A-1 et seq. exclusively apply to the grievances of West Virginia state employees regarding classification of their positions.

³In his brief Grievant initially objects to consideration of whether the doctrine of res judicata applies herein, contending that the undersigned improperly raised the issue sua sponte. Grievant argues that res judicata is a defense that is waived when Respondent does not raise it. There is support for Grievant's contention that res judicata is an affirmative defense in Rule 8(c) of the West Virginia Rules of Civil Procedure and the undersigned accepts that she erred in characterizing res

(Footnote Continued)

The West Virginia Supreme Court of Appeals has defined res judicata "very broadly" as a

doctrine which bars the subsequent litigation of any cause of action which has been previously tried on the merits by a court of competent jurisdiction, and includes within its bar issues which might have been tried.

Mellon-Stuart Co. v. Hall, 359 S.E.2d 124, 131 (W.Va. 1987).

The Court has further ruled that the doctrine of res judicata, along with the related doctrine of collateral estoppel,

can be applied to quasi-judicial determinations of administrative agencies. In order for preclusion to apply, the decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court of law. Finally, the issues involved must be similar to those sought to be adjudicated in the second forum...The underlying purpose of

(Footnote Continued)

judicata as a jurisdictional issue. Nevertheless, in that the Level III evaluator discussed the CSC case in detail in his decision, it is questionable whether, in an effort to conduct a full and fair hearing to all parties, the undersigned erred in addressing the issue and considering it herein. In any case, any such error would be harmless since it is hereby determined that res judicata does not apply to this matter.

Finally, during the discussion at hearing on whether the undersigned had jurisdiction of this matter, Grievant's representative argued there was jurisdiction because the alleged misclassification of Grievant's position was a continuing practice. See W.Va. Code §29-6A-4(a). Grievant correctly contends in his brief that the timeliness of filing is not at issue in this case. Nevertheless, it is noted that the West Virginia Supreme Court of Appeals did approve CSS's concession that "working out of classification" is a continuing violation, AFSCME v. CSC, 341 S.E.2d 693 (W.Va. 1985), and Grievant's argument that any requirement that there be affirmative action by the employer for there to be a "continuing practice" is fulfilled in misclassification cases has merit.

both doctrines is to prevent relitigation of matters about which the parties have had a full and fair opportunity to litigate and which were in fact litigated.

Liller v. West Virginia Human Rights Com'n., 376 S.E.2d 639, 646 (W.Va. 1988). Finally, it is well-settled that, "[F]or both collateral estoppel and res judicata there must have been a final judgment rendered disposing of a case." Rovello v. Lewis Co. Bd. of Educ., Docket No. 18242 (W.Va. May 16, 1989), slip op. 5; see also cases cited therein.

Grievant concedes that the issue in the CSS proceeding was identical to the issue in this case, i.e., whether his position was misclassified, and therefore that requirement for applying the doctrine of res judicata is fulfilled. Whether the remaining requirements for applying res judicata are fulfilled requires a close look at the procedures of the CSS followed in this case.

In October 1984 CSS issued its Classification Review Policy, which established a three-step procedure for classification review. At the first step the agency personnel officer made a determination based on a Position Description Questionnaire filled out by the employee along with a narrative statement from the employee. The second step of review was by the Civil Service Classification and Compensation Division. The policy provided,

The determination of the personnel officer shall be reviewed to ascertain that the position is properly classified. If the employee so requests, the review will be conducted in his or her presence as well as the employee's representative, if any. Additionally, the employee and/or his representative may, on request,

present informally a statement of position, argument, and documentary or testimonial evidence.

The final step of review provided for was as follows:

If either the employee or the appointing authority is not satisfied with the decision, and if in the initial request for review alleged that the employee's duties had been changed in such a way as to constitute an abuse of the employee's classification, either party may, within 15 days, submit a written request for the Director of Personnel of the Civil Service System to review the classification decision. The Director shall review the determinations made by the personnel officer and the Civil Service System staff and issue a written decision within 30 days of the date of the request for review.

About October 1987 Grievant requested review at Step I pursuant to those procedures and was denied November 23, 1987. At Step II, on January 6, 1988, a Personnel Analyst for the CSS reversed the first-step determination, requiring Grievant's position be reclassified to Storekeeper II. On February 8, 1989, after more than the 15 days allowed for appeal by the procedure, the Department of Highways appealed the decision to Step III.⁴ On March 10, 1988, Mr. Basford reversed the Step II decision. No further action was taken and no further procedures were provided for by the policy.

The policy itself was inconsistent with a "Memorandum of Understanding" entered between AFSCME and the West Virginia Civil Service Commission September 28, 1984, and

⁴On February 18, 1988, Grievant's representative inquired of Mr. Basford why no action had been taken consistent with the Step II decision. In response to the representative's inquiry Mr. Basford, on February 19, 1988, informed her that the Department of Highways had appealed February 8, 1988.

approved by the West Virginia Supreme Court of Appeals, which provided in pertinent part,

The Commission will propose by November 2, 1984, a change in its regulations to add in substance following the rule pertaining to review of the determination of the Director of Personnel:

"Immediately upon issuance of the Director's determination, the Director shall send a copy of that determination to the Commission for its review. The Commission, at its discretion, may order a hearing on the determination. Whether or not the hearing is held, the Commission has the power to affirm, reverse or modify the determination of the Director. If the Commission declines to hold a hearing of the determination, the Commission's decision about the determination must be issued within forty-five calendar days of the Commission's receipt of the determination of the Director. If the Commission orders a hearing of the determination, the Commission's decision about the determination must issue as does any other appeal."

In fact, such provision was not enacted until July 20, 1988, after the Supreme Court, in AFSCME v. CSC, Docket No. 17929 (May 20, 1988), ordered CSC to implement Step IV within thirty days. The provision for Step IV was enacted as subsection (e) of §5.04 "Classification Appeals" of the CSS regulations and it is a proper verbatim duplication of what was agreed to in the Memorandum of Understanding of 1984.

Grievant's case was put in limbo by these procedures. At the time the Step III decision was issued the procedures did not provide any means for Grievant to appeal to Step IV, although the Memorandum of Understanding had required Step IV procedures since 1984. Furthermore, when the Step IV procedures were enacted July 1988, they still did not provide Grievant any means to appeal. Instead, the

procedures provided at Step IV for automatic review by the Commission of the Director's decision, with or without a hearing ordered at the discretion of the Commission, and mandated a decision by the Commission. The Commission did nothing at Step IV. Accordingly, at the time Grievant filed a grievance under the grievance procedures of W.Va. Code §§29-6A-1 et seq., his classification case was in essence still waiting for a decision by the CSC. Clearly, the requirement that there be a final judgment rendered is not fulfilled and the doctrine of res judicata should not be applied in this matter.⁵

The job description for Storekeeper I, at which Grievant is classified,⁶ is as follows:

STOREKEEPER I

Nature of Work: An employee in this class performs routine standardized work in receiving, handling, recording, storing and shipping of items, in

⁵There are other aspects of the CSS procedure that would militate against application of res judicata. At Steps I through III there are no provisions for formal hearings or action of a quasi-judicial nature. The only reference to a hearing in Grievant's case is the statement of the Step II evaluator that a hearing was held. It is clear that the evaluator was not an attorney and there is no indication that the hearing was conducted in any quasi-judicial manner. Compare Mellon-Stuart Co. v. Hall, 359 S.E.2d 124 (W.Va. 1987).

⁶The evidence did not establish how long Grievant has been a Storekeeper I. However, Respondent concedes, "He [Grievant] has been classified as a Storekeeper I since his reinstatement by the Department [of Highways] in July, 1984. (Department of Highways determination dated November 23, 1987.)" Respondent's proposed finding of fact 2.

either a small county or departmental storeroom or in a larger district or the state. The incumbent works under the direct supervision of a higher level Storekeeper or another supervisor. Responsibilities may include the supervision of clerks or other storeroom personnel. The employee must be able to lift heavy supply items.

Examples of Work Performed:

Maintains records of items received and/or dispersed. Orders supplies and equipment requested by agency or departmental personnel.
Unloads shipments and stocks shelves with items in an organized manner.
Maintains files of invoices, receipts, transfers and other information.
Takes inventory of supplies or equipment in stock or in use.
Solicits bids from local vendors for supplies or equipment.
Fills requisitions and delivers or ships items as necessary.
Performs related work as required.

Required Knowledge, Skills and Abilities:

Knowledge of storeroom methods and procedures.
Knowledge of transportation agencies and shipping methods.
Ability to understand and follow simple oral or written instructions.
Ability to perform moderately heavy manual labor in lifting and storing supplies.
Ability to keep simple store records.

Minimum Training and Experience Requirements:

TRAINING: Education equivalent to graduation from a standard four-year high school.

EXPERIENCE: Three years of experience as a stock clerk or in a clerical capacity in connection with large scale warehouse operations or in handling materials.

Grievant contends that he is entitled to the classification of Storekeeper II, for which the job description is as follows:

STOREKEEPER II

Nature of Work: An employee in this class performs responsible work, at a full-performance level, in receiving, storing, and shipping store items in a district or division office. The incumbent works under the general supervision of a higher-level storekeeper

or another superior. Responsibilities may include the supervision of subordinate clerical or storekeeping personnel. The employee must be able to lift heavy supply items.

Examples of Work Performed:

Locates and orders equipment, parts, or supplies not available from a district or state warehouse.
Solicits bids from vendors, maintains records of receipts and invoices obtained from vendors.
Supervises the maintenance and inventory control of the supplied storeroom.
Assigns inventory numbers to equipment or supplies.
Issues items and supplies as requisitioned; delivers or ships them if necessary.
Writes contracts with vendors who continually supply an item or items.
Maintains records of items received and or dispersed.
Prepares an estimate of cost for needed supplies or equipment.
Performs related work as required.

Required Knowledge, Skills and Abilities:

Knowledge of storeroom methods and procedures.
Knowledge of various types and grades of supplies and equipment used by the division or department.
Ability to accurately compare materials and supplies with prescribed specifications.
Ability to perform clerical work of average difficulty in keeping accurate inventory and store records.

Minimum Training and Experience Requirements:

TRAINING: Education equivalent to graduation from a standard four-year high school.

EXPERIENCE: Four years of experience as a stock clerk or in a clerical capacity in connection with large-scale warehouse or in handling materials.

It is undisputed, and indisputable, that Grievant's duties do not fit neatly into either description, notably because he works in an office at District I of DOH, not in a storeroom (Tr. 22). Grievant stated that, while there is a storeroom in the area, it is run by Mr. Phillip Morris.⁷

⁷ Phillip Morris is classified as a Storekeeper II.

Unfortunately, Grievant did not explain in general terms what his job entails other than stating,

I'm in the office there with Mr. Don Mallory [his supervisor] where we just purchase parts, we don't keep the storeroom in itself, we don't keep parts in that storeroom, we keep parts manuals and what you call more so the purchasing department or function there. We have no supplies or parts as such in our office there.

Tr. 23. From this testimony and his very detailed testimony on how he carried out his parts-ordering duties, it is clear that his primary duty is ordering parts for Respondent, which requires his using a large stock of parts manuals. Grievant's proposed findings of fact fairly represent what is involved in ordering parts:

5. Donnie Herrald references an equipment record book to access information such as make, model, serial number, engine specification number, tire size and axle code to determine which one of the 200-some parts manuals in the office contains the information on the parts in question.

6. Donnie Herrald locates the parts numbers in the parts manuals and fills out an SE-82 (mechanics work order) which includes information about the quantity needed, the part number, and a description; computes the cost of the items and any discounts offered to the agency.

7. Donnie Herrald determines whether the parts in question are available in any of the Department of Highways garages.

8. Donnie Herrald determines whether the part is under contract if the part is not available in the state system.

9. Donnie Herrald orders the part by contract if it is an item under \$500.00⁸ on the contract system.

10. Donnie Herrald solicits bids from vendors if the item is not covered by contract.

11. Donnie Herrald completes a DOH205 (authori-

⁸Grievant's testimony was that it now is necessary to order a part by contract if the item is under \$400, although previously \$500 was the cut-off amount.

zation to purchase and receive items) after receiving an invoice for the parts from the lowest bidder; submits this to the accounting department for payment.

12. Donnie Herrald submits a purchase request to Buckhannon for authorization to purchase contract or non-contract items over \$500.00; submits a bid quotation form which consists of the names and addresses at least of three vendors and the bids for the items; list items, the quantity needed, part number, a general description of the part and pertinent information about the vehicle.

Grievant testified that the first "example of work performed" of the Storekeeper II description accurately summed up what he had described as his duty of ordering parts (Tr. 17).

Grievant was also asked about the other "examples of work performed" on the Storekeeper II job description. Grievant stated that he solicits bids from vendors and maintains records of receipts and invoices obtained from vendors (Tr. 18). However, upon further questioning he admitted he was not responsible for maintaining files of receipts and invoices, but rather referred to those files (Tr. 22). When asked if he assigns inventory numbers to equipment or supplies, or issues items and supplies as requisitioned, or writes contracts with vendors, he replied that he had no such responsibilities (Tr. 22-24). He stated that "on occasion" he did prepare an estimate of costs for needed supplies or equipment (Tr. 24).

Grievant was further questioned as follows:

Level III Evaluator:

In going to the job description on the Storekeeper II with you basically, what you've indicated to me that you do under that classification is locate and order equipment

and parts and supplies not available and soliciting bids. Are these two job tasks not part of a Storekeeper I description also.

to which Grievant answered:

The point is, is that I do a Storekeeper I job and more. It don't list down here specifically, it says order supplies and equipment. That's very vague but you'll see on Storekeeper II locates and orders equipment parts and that's a little bit more specific than what is down here the most of the majority of the Storekeepers in the District in the Department of Highways orders supplies and equipment. But what I do being more specific, I have to locate, order and purchase those parts and that is very vague in the Storekeeper I it just say orders supplies and equipment and it's being more specific and a II locates and orders equipment and parts. I feel that I do all in a Storekeeper I plus a lot of those things in a II classification. Especially being more specific, locating and ordering equipment parts. We don't have a storeroom as such we're a purchasing department but we're all under the same Equipment Division and I'm classified as a Storekeeper I.

Tr. 25. Further questioning of Grievant on the "examples of work performed" on the Storekeeper I position description revealed that he, like others in the office in which he works, maintains invoices and receipts and "on occasion" takes inventory of supplies (Tr. 24-26). Grievant had to admit that he actually did not do all the duties listed on the Storekeeper I description because he does not have any storeroom responsibilities, but contended that "we're more specialized in the District than we are general Storekeeper duties [sic] because in our counties they take care of our storeroom on a smaller level and order parts. My specialty in the District is just purchasing" (Tr. 26). Further questioning revealed that Mr. Morris, not Grievant,

determines what needs to be ordered or Grievant is otherwise told to order an item (Tr. 27-28).

Grievant also testified that as many as 20 times a day, but on average 3 to 5 times a day, other DOH employees who order parts call him to find out parts numbers or from what vendors the parts can be purchased.⁹ This testimony was corroborated by a mechanic, who testified he calls Grievant when he needs the number of a part so that he can order it, and by a Storekeeper I who works in a garage with a store-room in Boone County, who also testified that he calls Grievant for numbers of parts when he does not know them.

Finally, Mr. Harold Hazlewood, a Storekeeper II in DOH's Nitro equipment repair shop, testified that Grievant replaces him when he is off, stating,

He's the only one we have at the District that can do my job because he is experienced a[t] operating a storeroom, he orders parts at the District and he does my job if I'm on vacation. The only thing that he doesn't do down there is enter stuff into the computer and they send it to Charleston and down there I have a computer.

Tr. 42-43. He stated his job entailed ordering and issuing parts, receiving and shipping, processing the paper work and entering it into the computer (Tr. 43). Knowing what

⁹Grievant's proposed findings of fact 13, "Donald Herrald assists county and sub-station storekeepers by procuring parts, looking up parts numbers in parts manuals not available to them, and informing them of any changes in purchasing procedures - fifty to one hundred calls a day[,]" grossly overstates the number of calls Grievant receives daily.

Grievant's job entailed because he had worked at the District office, he stated that the only difference between his job and Grievant's is that he maintains an inventory and a storeroom. Mr. Mallory, who also testified, agreed that the major difference between Mr. Hazlewood's and Grievant's job was that Mr. Hazlewood ran a storeroom. He thought that when Grievant replaced Mr. Hazlewood Grievant would not do ordering for the storeroom stock but would leave that for Mr. Hazlewood's return (Tr. 47).

Ms. Pamela Heinig, the Personnel Analyst who had ruled favorably for Grievant in the CSS proceeding, testified on why she thought Grievant should be classified as a Storekeeper II.

[L]et me first explain the way that we do position classification. We have specs., classifications written up. Now, what we do, we compare the position with job duties that we have with the class specification that we have. Now, the position may perform some of the duties or they may perform none of the duties as listed but the duties that they perform are very similar enough to be put in that same classification. Well, when looking at Mr. Herrald's work, one of the first things I was looking at was the fact that first specification, Storekeeper I, says the the employee performs routine standardized work in receiving, handling, recording, storing and shipping of items. Now, as the levels go on up, the job becomes more complex and at third level there are additional supervisory duties. In looking at District One, District One is a little bit different from other Districts and that is larger, has more roads to maintain and the position here is split up between the storeroom and the parts expeditor. Now, in looking at the fact that Mr. Herrald has access to a majority of the parts books, then he has access to parts books which other people do not have.

The fact that his position does not have storeroom which I consider to be one of the more basic types of storekeeping as if you have a whole rack of stuff, pencils, pens, shovels whatever, you know when you

start getting low that you order that some equipment. Because Mr. Herrald's work involves parts, there is no way of anticipating what you are going to need. People come in, they'll give an order form for a part, they'll tell you what equipment it goes on and it's up to him to look for the information and order that part the best way, the most efficient, the quickest way possible. Being that the does not have that storeroom which I said I consider to be more basic type of storekeeping, I felt that his job was more than routine storekeeper work

(T.29-30).

In terms of the parts expeditor again and in some of the other Districts, the job of having a stockroom and parts job of parts expeditor is together it's combined because there is not the need to have a full time parts expeditor. The fact that Mr. Herrald does do this full time, I felt made this a bit different than have a more routine as well as the job parts expeditor¹⁰

(T.31).

Again, in looking at District One, I felt that the complexity of having to order parts strictly outweighed having a job that was part time ordering parts and then part time inventoring stockroom

(T.35).

Ms. Heinig's testimony supports that the crucial hallmark for the Storekeeper I position is that the employee perform "routine standardized work." However, neither her testimony nor Grievant's established that his work is not routine and standardized even though other employees do not generally do it. Just because Grievant has to use a large library of parts manuals does not indicate that the work is not routine. Further, Mr. Mallory uncontradictedly

¹⁰There was no evidence showing whether a "parts expeditor" is or should be classified as a Storekeeper I or II.

testified that he thought Grievant's work "routine in the [sense] it is the same thing over and over basically of ordering parts" (T. 51). Grievant's characterizing his job as essentially parts-ordering really corroborates that testimony.

Accordingly, the record did not establish that Grievant's duties were at the same or of a similar level of responsibility as the examples of work performed provided by the job description, nor did he otherwise show that his work fulfilled the description of "nature of work" provided by the job description.¹¹ Finally, that he was capable and did fill in for a Storekeeper II for short terms does not qualify his job overall for a Storekeeper II Classification.

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

Findings of Fact

1. The essential duty of Grievant, Storekeeper I in District One of the W.Va. Department of Highways (DOH), is to order parts.

¹¹It is noted that the phrase "at a full performance level" of the Storekeeper II description is meaningless to this Board, for both routine and complex jobs can be carried out at a "full-performance level." In short, the phrase says nothing about the complexity or difficulty of the duties, and no authority indicating anything of legal significance to the contrary has been submitted by the parties.

2. In order to order parts, Grievant has to refer to parts manuals kept in his office. He also provides parts numbers to other DOH employees who order parts.

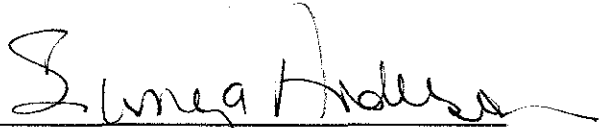
Conclusions of Law

1. The doctrine of res judicata does not apply to this matter in that the CSC decision denying Grievant reclassification was not final when he began grievance proceedings.

2. Grievant failed to establish by a preponderance of evidence that his duties were not routine and otherwise did not establish that his duties were of the level of responsibility that would qualify Grievant as a Storekeeper II.

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha 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.


SUNYA ANDERSON
HEARING EXAMINER

Dated: June 13, 1989