



Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

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

DAVID R. MULLINS

v.

Docket No. 89-DHS-313

WEST VIRGINIA DIVISION OF HUMAN SERVICES ¹

DECISION

Grievant David R. Mullins is employed by Respondent West Virginia Division of Human Services (DHS) in its Charleston, West Virginia offices. On April 25, 1989, he, pro se, filed a document at Level I, reproduced in pertinent part below:

GRIEVANCE STATEMENT

Approval was given by [DHS] Commissioner Lipscomb on Jan. 3, 1989, for a promotion and transfer to Grafton, [West Virginia,] Area 9, as an Audit Clerk III (from Civil Service register). Approval by John A. Boles, Jr. was given to transfer on an indefinite basis. On April 12, 1989, we learned,

¹ The West Virginia Division of Human Services was known as the West Virginia Department of Human Services until July 1, 1989, and at all times relevant to this grievance prior thereto.

after the fact, the position was filled because the transfer was not made in a timely manner.

RELIEF SOUGHT

1. Promotion to Audit Clerk III, with a one-step increase.
2. That this pay raise be retroactive to Jan. 17, 1989.
3. Approval for transfer, in the future, to be given when approved.

After denials at Levels I, II, and III,² Grievant advanced his cause to Level IV on July 6, where it was heard August 11. The parties have chosen not to submit proposed findings of fact and conclusions of law, and the matter is therefore mature for disposition.

The facts underlying this dispute are basically uncontroverted. Grievant, on January 3, 1989,³ was approved for promotion to Audit Clerk III and transfer to Grafton. Shortly thereafter, and while this personnel action was being normally processed, a gubernatorial freeze on pay raises for state employees was imposed.⁴ Since

² Decisions from each of these planes, and the Level III hearing transcript, are part of the record herein. It is noted that witnesses were not sworn or affirmed to tell the truth at this meeting, but, in fairness to Grievant, all statements made thereat are presumed sincere.

³ Grievant's wife lives and works in the Grafton area, which is in the northern part of West Virginia and several hours away from Charleston.

⁴ This freeze was put in place by Governor Arch Moore on January 14, 1989, at the end of his term of office, and reaffirmed by newly-inaugurated Governor Gaston Caperton a few day later.

The authority of the Governor of West Virginia to impose such freezes has not been questioned herein.

Grievant's transfer involved a promotion and attendant salary increase, it was stymied by the freeze.

Around this same time, Governor Caperton also required the agencies of state government to effect cutbacks of operations and budgets. As a result, the Audit Clerk III post in Respondent's Area 9 was eliminated. The duties of the job were distributed among other staff, although most of them may have been assigned to one person.⁵

At Level IV, Grievant stated that the only remedy he asks herein is elevation of his Charleston-based position to Audit Clerk III and approval of any future intra-agency transfer he wants. He conceded that the issue of misclassification was not raised by him or considered by Respondent at any of the lower steps, although it was mentioned at both Levels II and III. See, e.g., Level III transcript, pp. 7-8.

There is no basis upon which the relief Grievant seeks may be granted in the context of this case. He has not established or even formally alleged that he is performing the duties of Audit Clerk III in his present job.⁶ Nor has

⁵ Two April 12, 1989, memoranda drafted by John A. Boles, Jr., Grievant's immediate supervisor, inaccurately stated that the Audit Clerk III position had been re-posted and filled by another individual after Grievant's transfer was obstructed. Level III, Gr. Ex. 2, 3.

⁶ His statement at Level III, "I feel that I am doing Audit Clerk III," p. 7, was withdrawn, p.8. Related comments were made at Level IV; however, Grievant admitted
(Footnote Continued)

he shown that he was inappropriately denied promotion to an Audit Clerk III vacancy in Charleston, or that any such post ever existed. Further, it would not be appropriate for this forum to require Respondent to take particular action on any future transfer Grievant may or may not desire; such order would be based on mere speculation and, therefore, advisory at best.

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

FINDINGS OF FACT

1. Grievant, an Audit Clerk II employed by Respondent West Virginia Division of Human Services, was approved for transfer from Charleston to Grafton, with attendant promotion to Audit Clerk III.

2. While the transfer/promotion was being processed, a gubernatorial freeze upon state agencies was imposed preventing the personnel action from continuing.

(Footnote Continued)

he had not made misclassification an issue in this grievance.

Also, at Level IV, Grievant inquired if misclassification could be joined as an issue. The undersigned considered this request and determined, per W.Va. Code §29-6A-3(j), that such amendment would be disallowed. Grievant was advised that he could pursue any misclassification complaint he might have by the filing of another grievance at Level I.

3. Grievant seeks only upgrade of his current, Charleston-based position to Audit Clerk III and guaranteed approval of any future intra-agency transfer requests he makes.

CONCLUSIONS OF LAW

1. A grievance may be denied if no claim is stated upon which relief can be granted. See WVESEGB Rule 4.9.

2. There is no sound basis in law or equity upon which to award Grievant an upgrade of his current job to Audit Clerk III.


3. "[A]bstract positions, the decision of which would avail nothing in the determination of controverted rights, are not properly cognizable in the grievance procedure. . .and this [Grievance] Board will. . .not issue advisory opinions." Wilburn v. Kanawha Co. Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988).

4. Any decision rendered upon Grievant's future employment transfers would be advisory.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Civil Service Commission 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.



M. DREW CRISLIP
HEARING EXAMINER

Dated: August 23, 1989