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TINA WALSH and  
JANE TAYLOR

v.

Docket No. WCF-88-002  
WCF-88-003

WEST VIRGINIA WORKERS' COMPENSATION FUND  
and  
WEST VIRGINIA CIVIL SERVICE COMMISSION

D E C I S I O N

Grievants, Tina Walsh and Jane Taylor, are employed by the West Virginia Workers' Compensation Fund (WCF) as Industrial Rehabilitation Counselors. They filed grievances at Level I on July 1, 1988 alleging:

"I was classified as Rehabilitation Counselor I from 4/16/86 to 5/1/88 and this classification has been utilized by this agency (WCF) for over 10 years. On 5/1/88, the Civil Service Commission reclassified my position as Industrial Rehabilitation Counselor, p.g.13. Effective on 7/1/88 the Civil Service Commission abolished the Rehabilitation Counselors 1 and 2 positions and established it as Rehabilitation Counselor, pay grade 17."

Grievants' supervisor, Stephen L. White, responded on July 1, 1988 that the matter was outside his jurisdiction to resolve

and, upon appeal to Level II, the grievance was denied by Sam Bays, Assistant Director. At Level III E. Thomas Wetzel, II, Administrative Assistant, found that the grievance procedure, contained in W.Va. Code §§29A-6-1, et seq., excluded consideration of classification matters and denied the grievance. An appeal to Level IV was filed July 19, 1988 whereupon it was determined no lower level hearings had been held and by order dated August 22, 1988 WCF was directed to hold a hearing on the merits of the grievance. A hearing was conducted August 30, 1988 (T2) by Mr. Wetzel and, after the testimony of several witnesses, he granted the motion of the West Virginia Civil Service Commission (CSC) to dismiss on jurisdictional grounds. The grievants filed again at Level IV September 15, 1988<sup>1</sup> and a hearing was held November 10, 1988 (T4). A motion to dismiss on jurisdictional grounds made by CSC was denied and a motion to join CSC as an indispensable party made by grievants was granted. See Hayes v. WV Department of Natural Resources and WV Civil Service System, Docket No. NR-88-038 (March 28, 1989). WCF elected not to appear at the Level IV proceedings.<sup>2</sup> At the conclusion of the hearing

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<sup>1</sup> A third grievant, Frederick Young, withdrew his grievance before the matter returned to Level IV.

<sup>2</sup> By letter dated August 12, 1988 to Mr. Lowell Basford, Director of Personnel for CSC, from Mr. Nelson Robinson, Jr., Commissioner of WCF, copied to the undersigned, Mr. Robinson informed CSC that WCF would not "contest or participate in the Level IV Grievance Hearings". Mr. Robinson also expressed his opinion that WCF "does not have the ability to address this grievance, as it was caused by your agency's (CSC) complete mishandling of this reclassification matter".

on November 10, 1988, a motion to continue by CSC was granted. By letter dated January 9, 1989 CSC indicated no further hearings were necessary. By letter dated January 10, 1989 all parties were notified that any proposed findings of fact and conclusions of law should be submitted by January 31, 1988. Grievants and CSC submitted proposals by that date but WCF declined to do so.

Prior to May 1, 1988 employees in the WCF Rehabilitation Counselor series were classified as either Rehab Counselor Trainee, Rehab Counselor I, II, or III. On or about March 1, 1988 WCF requested that CSC abolish that series and develop a new classification of Industrial Rehab Counselor in which all counselors would be placed at pay grade 14. The reason for the request was WCF's determination that the counselors were all performing the same duties but had different titles and salaries. CSC undertook a study of the employees' duties and responsibilities and granted WCF's request for the new classification but assigned it a pay grade 13. Grievants, who were previously Rehab Counselors I, were given the new title on July 1, 1988. They contend that their duties and responsibilities are identical to those of employees of the Division of Vocational Rehabilitation Services (DVR) in the new classification Rehab Counselor which is assigned a pay grade 17<sup>3</sup> and the disparity in salaries is in contravention

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<sup>3</sup>Effective July 1, 1988 employees of DRS who had previously been classified as Rehab Counselor I, II, III or Rehab Counselor Trainee were placed in newly created classifications of Rehab Counselor Trainee, Rehab Counselor and Senior Rehab Counselor.

of W.Va. Code §29-6-10, which in pertinent part provides:

The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.

Grievants request as relief the abolishment of the Industrial Counselor position and the implementation at WCF of a job series and corresponding pay grades identical to that of DVR.

CSC maintains certain material differences between the grievants' duties and those of the Rehab Counselors at DRS justify the difference in salary and that considerable weight was given to some rather severe recruitment problems which DVR had been experiencing in its Counselor job series.

The record as a whole supports the grievants' position.<sup>4</sup> The most significant and persuasive evidence in the fact that prior to May 1, 1988 the counselors at both agencies were placed somewhere within the Rehabilitation Counselor job series, i.e. Rehab Counselor Trainee, Rehab Counselor I, II or III. CSC's assertion that significant differences now exist between the duties of WCF counselors and DRS is therefore untenable. Additionally, the testimony of three persons who have served in both capacities reveal the duties to be nearly identical.

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<sup>4</sup>It should be noted that considerable testimony and documentation was offered and admitted without objection as WCF chose not to appear (see note 2) and the representative for CSC absented himself midway through the proceedings and chose not to request further hearings.

Mr. James Bragg is presently employed in the Summersville office of DVR as a Counselor<sup>5</sup> and previously worked for three years for WCF as either a Rehab Counselor I or II. According to Mr. Bragg the only differences in the functions of the respective positions are those imposed by the agencies, i.e. different methods for purchasing services, temporary emphasis on a particular disability and different paperwork (T.4, 18-20). Mr. Thomas Rapp has been employed as a Counselor for DVR for sixteen (16) years and was employed as a counselor by WCF for approximately eleven (11) years. He testified that he performs essentially the same duties for DVR as he did for WCF and he believed his job description was the same for both positions (T.4, 56). Ms. Rosemarie Hogan is presently employed as an Industrial Rehabilitation Counselor by WCF and was employed as a Rehab Counselor I by DVR for three and one-half (3½) years. She testified that if there was any difference between the two jobs it was that WCF counselors had more duties than those at DVR (T.4, 59).

The extensive testimony of grievant Jane Taylor revealed her function is basically to provide a broad range of services to persons injured in the workplace with the goal of returning the employee to his former employment or a modified employment with another employer. These services may involve referral to a variety of medical service providers, academic and vocational

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<sup>5</sup>The record is unclear as to what counselor position Mr. Bragg holds.

schools and social service agencies. Although the WCF counselor's caseload is restricted in the sense that all cases are in some way related to a job-related injury, clients have pre-existing disabilities, personal and socio-economic problems which require a counselor to apply a wide variety of skills and abilities.

There was no evidence presented which showed that counselors for DVR performed duties which were different from what Ms. Taylor described and it appears that the only significant difference in the two jobs is that a DVR Counselor may occasionally provide services to persons who, because of their age, might not have entered the workforce. This is not however such a substantial difference to justify a deviation from the provisions of W.Va. Code §29-6-10. The two jobs have the same basic goal, namely, to assist persons to overcome disabilities and achieve gainful employment. A comparison of the job descriptions for the Industrial Rehabilitation Counselor (Employee's Exhibit No.2) with that for Rehabilitation Counselor (Employee's Exhibit No.4) clearly reveals this similarity of purposes and while the "Examples of Work Performed" and "Required Knowledge, Skills and Abilities" listed therein are phrased differently, there are no substantive differences in those areas. The West Virginia Supreme Court of Appeals in AFSCME v. Civil Service Commission of West Virginia, 324 S.E.2d 363 (W.Va. 1984) (A.F.S.C.M.E. I), held that such circumstances amounted to a violation of the provisions of W.Va. Code §29-6-10,

which mandate equal pay for equal work.<sup>6</sup>

The actions which resulted in the improper disparity in pay do not, however, require as a remedy the abolishment of the new counselor classifications at WCF and/or the implementation in that agency of the Rehab Counselor job series used by DVR. Such relief would have the effect of granting substantial rights to employees who have not timely pursued those rights through the grievance procedure and the adjustment of grievants' salaries is therefore the only appropriate remedy.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

#### FINDINGS OF FACT

1. Prior to May 1, 1988 Rehabilitation Counselors employed by WCF and DVR were classified as Rehab Counselor Trainees, Rehab Counselor I, II or III.

Effective May 1, 1988 grievants, employees of WCF, were classified as Industrial Rehabilitation Counselors and assigned a pay grade of 13.

3. Effective July 1, 1988 Rehabilitation Counselors employed by DVR were given the classification of Rehab Counselor Trainee,

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<sup>6</sup>See also Henderson v. W.Va. Division of Vocational Services and W.Va. Civil Service Commission, Docket No. VR-88-023 (February 28, 1989).

Rehab Counselor or Senior Rehab Counselor and those awarded the Rehab Counselor designation were placed in pay grade 19.

#### CONCLUSIONS OF LAW

1. The grievants perform the same duties as employees of DVR in the Rehab Counselor position.

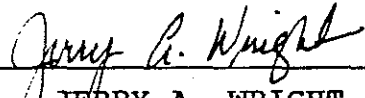
2. State employees who perform the same work should be compensated in a uniform manner, W.Va. Code §29-6-10. AFSCME v. Civil Service Commission of West Virginia, supra; Henderson v. W.Va. Division of Vocational Services and W.Va. Civil Service Commission, supra.

3. The disparity between grievants' pay and that of DVR employees in the Rehab Counselor positions is a violation of the provisions of W.Va. Code §29-6-10.

Accordingly, the grievance is GRANTED and the West Virginia Workers' Compensation Fund and the West Virginia Civil Service Commission are hereby ORDERED to place the grievants, Tina Walsh and Jane Taylor, in pay grade 19 and to further compensate them for any loss of wages they incurred dating back to July 1, 1988.



Either 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.

  
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JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: April 20, 1989