



**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

**DONALD CARNEY**

v.

Docket No. VR-88-055

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

**DECISION**

Grievant Donald F. Carney, until his retirement December 30, 1988, was employed by Respondent West Virginia Division of Rehabilitation Services (DRS) as a Rehabilitation Counselor. His complaint, that

[t]here is a disparity of treatment in the assignment of Senior Rehabilitation Counselors in District III as of July 1, 1988. . . [and f]urthermore, I have been inappropriately classified as a Rehabilitation Counselor as of July 1, 1988,

and the relief it sought, his reclassification "as a Senior Rehabilitation Counselor at pay grade 19 with an annual salary of \$27,627.00," was denied at Levels I, II and III before its filing at Level IV on October 31, 1988. A Level IV hearing was conducted December 5, 1988, and the parties agreed that all briefs and proposed findings of fact and

conclusions of law would be submitted no later than February 1, 1989.<sup>1</sup>

On February 6, 1989, DRS filed a "Motion For Dismiss," arguing that Grievant's retirement moots the claim since it "prohibits him from obtaining the relief he requested."<sup>2</sup> The undersigned directed the parties to provide evidence and/or argument on this motion, which resulted in the following:

- 1) An effective stipulation that Grievant indeed retired from DRS on December 30, 1988;
- 2) An affidavit of one James P. Quarles, Chief of DRS' Personnel Department, indicating Grievant's salary was \$25,207.80 per year as of July 1, 1988, and declaring it would not have changed through December 30, 1988, had he been classified as Senior Rehabilitation Counselor as of July 1, 1988.

By letter of March 1, 1989, the undersigned advised Grievant and his attorney, L. Robert Pettini, that "the viability of a case if the only now-available relief is a retroactive change of title" in DRS' personnel records seemed questionable. Grievant was further invited to advise this Grievance Board, no later than March 10, if relief beyond this title change was sought and/or to by then present factual and/or legal argument supporting the

---

<sup>1</sup> At that 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 (Mar. 28, 1989).

<sup>2</sup> The undersigned was unaware of Grievant's retirement, or his plans therefor, until this time. Neither his intentions to exit DRS' employ nor his actual or potential salary were topics of the Level IV hearing.

continuing viability of his claim. Additionally, all parties were asked to explain the pertinence of the \$27,627.00 figure.

On March 13, the undersigned received correspondence from Pettini, as follows in pertinent part:

In response to your[] [letter] of March 1, 1989. . . Grievant maintains. . . his retirement does not moot this proceeding and that pursuant to. . . [W.Va. Code §] 29-6A-2(i) that his grievance yet presents a viable issue even in the absence of any pecuniary issue -- wars have been fought for less, and Mr. Carney might not have retired had it not been for. . . [DRS'] outrageous misconstruction of criterion set forth under the classification of Senior Rehabilitation Counselor.

Finally, in response to. . . the affidavit recently submitted by James P. Quarles, be advised that Grievant objects to any consideration of the matters therein inasmuch as. . . [W.Va. Code §] 29A-5-2(c) affords to Grievant not only the right to submit rebuttal evidence, as you had invited, but also the right to cross-examine witnesses and I cannot cross-examine a piece of paper.

This case should be decided on the merits as presented in the close of the hearing herein.

Although no one offered the asked-for information regarding the \$27,627.00 figure, Grievant's February 20, 1988 assertion that "his classification as Rehabilitation Counselor instead of as a Senior Rehabilitation Counselor is a viable grievance issue regardless of the absence of any pecuniary issue" and his March 1 statement that "his grievance yet presents a viable issue even in the absence of any pecuniary issue" clearly imply admission of the accuracy of the salary information presented by DRS. Further, Grievant did not, as invited, advise the undersigned if further relief beyond the retroactive personnel file change is

sought, so it must be presumed it is not.<sup>3</sup> Finally, Grievant's attorney has been given ample opportunity to present evidence and to submit factual and legal arguments in opposition to the retirement-based dismissal of this case. Save brief and quite broad statements of Grievant's position, he has chosen not to do so. No prejudice is thus perceived in disallowing his cross-examination of affiant Quarles.

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

#### FINDINGS OF FACT

1. Grievant was employed by the West Virginia Division of Rehabilitation Services (DRS) as a Rehabilitation Counselor until his retirement December 30, 1988.

2. In July or August, 1988, Grievant initiated this complaint, claiming he should have been classified as Senior Rehabilitation Counselor as of July 1, 1988, with an annual salary of \$27,627.00.

---

<sup>3</sup>In his February 20 letter, Pettini characterized attorney fees as one of Grievant's entitlements, to which the undersigned responded, "if. . . . [Grievant's] case is mooted [because the relief he seeks is unavailable to him due to his retirement], it would be the same situation as a withdrawal and an attorney fee award would clearly not be appropriate." Pettini did not mention attorney fees in his more recent correspondence.

3. Unrefuted evidence shows that Grievant's per annum salary from July 1 through December 30, 1988, was \$25,207.80, and that it would have been the same had he been classed a Senior Rehabilitation Counselor during that period.

4. The only relief Grievant seeks is a retroactive change of his employment title from Rehabilitation Counselor to Senior Rehabilitation Counselor in DRS' personnel records. Despite an invitation to do so, Grievant has declined to argue the relief he seeks is broader in scope.

#### CONCLUSIONS OF LAW

1. Grievant is an "employee" within the meaning of W.Va. Code §29-6A-2(e), his retirement notwithstanding. See Turner v. McDowell Co. Bd. of Educ., Docket No. 33-86-049 (Apr. 14, 1986); Code §29-6A-3(g); see also Poole v. Nicholas Co. Bd. of Educ., Docket No. 34-88-162 (Dec. 6, 1988), and Mayo v. Harrison Co. Bd. of Educ., Docket No. 17-88-014-2 (Aug. 31, 1988) (grievant no longer in respondent's service at time grievance filed nonetheless implicitly held an "employee" for purposes of grievance procedure).

2. The relief Grievant seeks, if granted, would have no practical effect other than to justify his point of view in this controversy, since he is no longer in Respondent's

actual employ. Such de minimis relief has been held to be unavailable from the West Virginia Education and State Employees Grievance Board. Bentz v. W.Va. Div'n of Voc. Rehab. Svcs., Docket No. VR-88-057 (Mar. 28, 1989);<sup>4</sup> also, see Smith v. Marshall Univ., Docket No. BOR 2-87-229-1 (June 29, 1988).

3. Inasmuch as the relief Grievant seeks is wholly unavailable to him in this forum, this grievance must be denied. See Bentz; see also WVESEGB Rule 4.9.

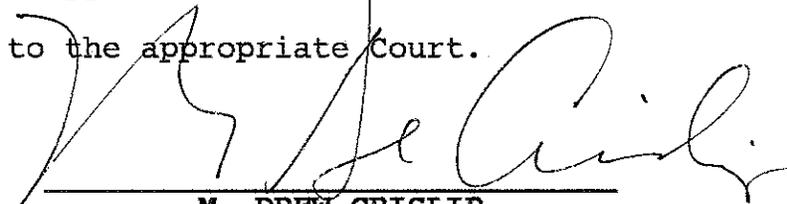
Accordingly, this grievance is **DENIED**.<sup>5</sup>

---

<sup>4</sup> The facts in Bentz are closely matched to those in the instant grievance.

<sup>5</sup> Inasmuch as the grievance is denied, DRS' "Motion For Dismiss" is technically mooted.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Brooke 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:** March 28, 1989