



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

KIRK EPLING

v.

Docket No. 89-H-109

W.VA. DEPARTMENT OF HEALTH

DECISION

Grievant Kirk Epling, a Supervisor I at Spencer State Hospital for Respondent West Virginia Department of Health, filed a grievance at Level I on January 13, 1989, alleging as follows:

I feel that my denial of back wages, pursuant to the [Civil Service Commission (CSC)] Back Wage Computation Policy of July 20, 1988, is unfair and arbitrary. Relief sought is reconsideration and payment of back wages.

More specifically, Grievant seeks back pay, due to the misclassification of his position, for a period ending June 1, 1988, when he achieved reclassification to his present title.¹ This claim was denied at each of Levels I, II and III before being submitted at Level IV on March 21, 1989. The lower level denials were not adjudications of the merits

¹This reclassification, ordered by CSC by memorandum dated May 2, 1988, was effected as a result of a petition therefor filed by Grievant on September 3, 1987.

of Grievant's complaint, but instead findings of procedural deficiency. Specifically, Grievant was found to be untimely in his pursuit of this matter under CSC Back Wage Computation Policy §III.A., which provides, in pertinent part:

[E]mployees. . . must file the request with the appointing authority within thirty (30) calendar days from the effective date of this policy.

On March 28, 1989, the Supreme Court of Appeals in West Virginia, in AFSCME v. CSC, #17929 ("AFSCME IV"),² at pp. 15-16, declared the CSC Back Wage Computation Policy null and void and that "[b]lack pay is to be awarded according to the mandates of this opinion." Further, the Court held that "[m]isclassification disputes by civil service employees are grievable exclusively under" W.Va. Code §§29-6A-1 et seq., the state employees grievance procedure. In that regard, certain claims pending in CSC were ordered immediately transferred to the West Virginia Education and State Employees Grievance Board for Level IV consideration, and "all other claims arising prior to July 1, 1988," were granted

²This was the fourth in a series of West Virginia Supreme Court pronouncements on the dispute between the American Federation of State, County and Municipal Employees (AFSCME) and others as petitioners and the Civil Service Commission of West Virginia (CSC) and others as respondents. The first three are popularly known, respectively, as AFSCME I, AFSCME II, and AFSCME III. AFSCME I, a 1984 decision, may be found at 324 S.E.2d 363, and AFSCME II (1985), at 341 S.E.2d 693. AFSCME III is a May 20, 1988 unpublished per curiam order.

leeway to be submitted at Level I of the grievance procedure "within ninety days" of March 28, 1989.

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

FINDINGS OF FACT

1. Grievant successfully sought, from the West Virginia Civil Service Commission, reclassification of his position with Respondent from Health Service Worker II to Supervisor I. The reclassification was announced May 2, 1988, and effective June 1, 1988.

2. On January 13, 1989, Grievant filed this grievance at Level I of the state employees grievance procedure, requesting back pay for a certain period ending June 1, 1988, which he alleged to be the period of his misclassification.

CONCLUSIONS OF LAW

1. The instant grievance, which seeks only back pay as relief, can appropriately be characterized as a "misclassification dispute," see AFSCME v. CSC, #17929 (W.Va.S.Ct.App. Mar. 28, 1989) ("AFSCME IV"), pp. 15-16, which arose prior to July 1, 1988.

2. The Court in AFSCME IV fashioned an equitable remedy for state employees with misclassification disputes which arose before July 1, 1988, by opening a jurisdictional window on W.Va. Code §29-6A-11, which holds the state employee grievance procedure normally applicable only to claims arising on or after July 1, 1988. That window, existing only from March 28, 1989, until ninety days thereafter, offers access to that procedure to the aforementioned employees.

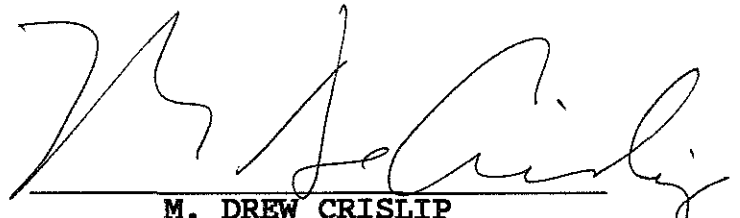
3. The Court in AFSCME IV was particularly concerned with the cumbersome administrative procedures and delays employees seeking reclassification and/or back pay had experienced with CSC. Therefore, even though the window is a very specific remedy, valid only for a set ninety-day period, it would be contrary to the equitable principles undergirding AFSCME IV to require individuals such as Grievant, who had a misclassification-related dispute which arose prior to July 1, 1988, and who had already filed a complaint under the state employees grievance procedure prior to March 28, 1989, to re-file their grievances at Level I to preserve their claims.³

4. Inasmuch as AFSCME IV mandates that cases such as the instant one shall be initiated at Level I, and since no

³This Decision should not be interpreted to preclude such re-filing, however.

consideration of this matter on its merits has occurred at lower levels, the appropriate remedy is remand to Level I for further action consistent with the Supreme Court's decision.

Accordingly, this case is REMANDED, and Respondent ordered to consider Grievant's claim in light of the mandate of AFSCME IV.



M. DREW CRISLIP
HEARING EXAMINER

Dated: April 13, 1989