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PAMELA HAYES

v.

Docket No. NR-88-038

**W.VA. DEPARTMENT OF NATURAL RESOURCES and
W.VA. CIVIL SERVICE SYSTEM**

DECISION

Grievant Pamela Hayes is a Natural Resources Administrator I (NRA I) for Respondent West Virginia Department of Natural Resources (DNR). Claiming her position should be classified instead at the higher level of NRA II,¹ Hayes filed this complaint at Level I on July 27, 1988; it was denied there and at Levels II and III² before arriving at

¹ After careful review of the evidence in this case, it is still unclear whether it is the employee or the job that is the direct subject of classification and/or reclassification. Compare, e.g., Civil Service Classification Descriptions (Appendices A and B) with Civil Service Rules and Regulations (Appendix C). For purposes of this Decision, the position and not the person will be considered that subject.

² Technically, the grievance was dismissed at Level III upon the motion of the West Virginia Civil Service System. Based on the related subsequent ruling at Level IV, as recounted infra, this case could appropriately be remanded to Level III for consideration on its merits; however, since that would unnecessarily delay resolution of a matter
(Footnote Continued)

Level IV October 17. A Level IV hearing was conducted November 22 and December 2, and with the submission of proposed findings of fact and conclusions of law by February 10, 1989, the matter is ripe for disposition.

PRELIMINARY MOTIONS

On November 22, the undersigned was presented with the motion of the West Virginia Civil Service System (CSC) to dismiss this case from the docket of this Grievance Board, which motion was joined in by DNR. As pertinent, the motion was as follows:

[CSC] moves to dismiss. . .[this] grievance in that the issue involved is excluded from. . .
.[W.Va. Code §]29-6A-2. . . .

[Code §]29-6-10(1). . . grants. . . [CSC] the authority to promulgate rules and regulations for the preparation, maintenance and revision of a position classification plan for all positions in the classified service. The maintenance and revision of the position classification plan includes the authority of the Director of Personnel to allocate each position to its proper classification in the plan. The authority to take such action is vested with. . .[CSC] and. . .[its] Director of Personnel by statute and may not be usurped by the appointing authority of any agency. The issue involved in this grievance is the proper classification of the position occupied by Pamela Hayes. It is the position of. . .[CSC] that the authority to determine the proper allocation of said position rests solely with. . . [CSC] and the Director of Personnel, not with. . . [DNR].

(Footnote Continued)

already heard at Level IV, it will proceed to decision. See State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 438 (W.Va. 1986).

Herein the undersigned has attempted only to capture the essence of certain relevant portions of the testimony and not to quote it directly.

[Code §]29-6A-2. . .excludes from the definition of grievance "any other matter in which the authority to act is not vested with the employer. . . ." Because. . .[DNR] cannot grant the relief sought,. . .[DNR] does not have the authority to act in this particular issue.³

To insure the procedural due process rights of the employees and as an effective mechanism for resolving classification issues. . .[CSC] has promulgated rules and regulations dated July 20, 1988, to implement the Civil Service Classification Review Procedure. This was done in response to the directive of the West Virginia Supreme Court of Appeals in. . .[AFSCME v. CSC (AFSCME III), No. 17929 (May 20, 1988)]. In that decision [CSC was]. . .directed. . .to promulgate rules to include. . .[CSC] as the fourth level in the Civil Service Classification Review Process. That procedure was a result of a Memorandum of Understanding between. . .[CSC] and AFSCME in the case. . .[known as AFSCME I (AFSCME v. CSC, 324 S.E.2d 363 (W.Va. 1984))]. That agreement, as approved by the Court, set in place a four step classification appeal procedure for use by employees in the classified and classified-exempt service. In accordance with the Administrative Procedures Act the second level of the procedure provides for a hearing before the Civil Service Classification and Compensation Division at which the employee and the appointing authority may submit any relevant documentation and evidence regarding the issue of classification of the position.

³ In light of this representation, and DNR's agreement therewith, the undersigned is at a loss to explain the significance of Section 5.06, CSC Regulations:

Whenever substantial changes occur in the duties and responsibilities assigned to a position or to correct a position misclassification, the Director or the appointing authority may reallocate the position to its proper class. . .

(emphasis in original).

However, because of the effective stipulation of all parties as to CSC's authority over reclassification matters, Section 5.06 will not be further discussed herein.

Grievant's response included the following arguments and references:

The . . . Legislature, in enacting. . . [W.Va. Code §]29-6A-1 intended the matter of reclassification to be grievable. It states that the purpose of the grievance act is to provide an "equitable consistent resolution of employment grievances raised by non-elected state employees who are classified under the state civil service system."

So everyone who files a grievance will be covered by Civil Service classifications to begin with.

. . . [W.Va. Code §]29-6A-2(i) defines grievance as "a violation, misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination."

A problem with classification is definitely a grievable matter because it strikes at the heart of "compensation" and "terms and conditions of employment."

The exclusion language "or any other matter in which authority to act is not vested with the employer," relied upon by. . . [CSC] does not expressly preclude grievances over reclassification given: (a) under Civil Service's Classification Review Policy, the first step is with the personnel officer in your respective agency. Therefore, it can be resolved and the authority to act is vested with the employer; (b) . . . [CSC], by statute, is given an integral role in the grievance process.

. . . [Pursuant to W.Va. Code §]29-6A-4(c). . . [CSC] gets a copy of the grievant's level two decision and . . . may submit evidence at the level three hearing.

. . . [Through Code §]29-6A-4(d). . . [CSC] gets a copy of the grievant's. . . fourth step [complaint] and may submit evidence to the hearing examiner.

. . . [Under Code §]29-6A-7. . . [CSC] may appeal an unfavorable ruling to the circuit court.

. . . [Code §]29-6A-11. . . [s]pecifically

legislates that this statutory procedure [Code §§29-6A-1 et seq.] supersedes and replaces the existing grievance procedure of. . .[CSC]. Even though. . .[CSC] had already decided classification matters were not grievable, we can argue that the legislature wanted broad relief for all grievances.

It is acknowledged that the Supreme Court of Appeals of West Virginia, in AFSCME III,⁴ ordered CSC to establish a classification review procedure; however, that was prior to the West Virginia Education and State Employees Grievance Board's assumption of jurisdiction over state employee grievances. W.Va. Code §29-6A-2(i) defines such "grievances" to include "any violation, misapplication or misinterpretation regarding compensation, . . .terms and conditions of employment, [or] employment status. . . ." And, Code §29-6A-11 provides that §§29-6A-1 et seq. supersede CSC's then-authorized internal grievance procedure,⁵ with nothing

⁴ Apparently, AFSCME III, a per curiam writ of mandamus, has never been formally reported.

⁵W.Va. Code §29-6A-11: "This article applies to all grievances arising on or after the effective date of this article [July 1, 1988]. This article supersedes and replaces the civil service grievance and appeals procedure currently authorized under the rules and regulations of the Civil Service Commission upon the resolution of all grievances and appeals pending in the civil service grievance system on the effective date of this article. [July 1, 1988]."

The Grievance Board notes that a number of classification disputes arose prior to July 1, 1988, see AFSCME III, and theoretically are subject to CSC's review procedure. Further, the State Supreme Court, prior to that date, "authorized" CSC to establish the classification review process. Id.; also see n. 5.

in AFSCME III even implicating that classification matters should be considered outside the purview of that procedure.⁶ CSC's extensive role in state employee matters before this Grievance Board, see, e.g., Code §§29-6A-4(c), (d), 29-6A-7, is also a noteworthy factor. Additionally, §§29-6A-1 et seq. have been interpreted liberally to allow for maximal employee access, and such practice and philosophy augers against the exclusion of classification-related petitions.⁷

Simultaneously with CSC's submission of its motion, Grievant filed a motion to join CSC as a party-respondent "so that full relief can be granted." In support of this motion, Grievant invited attention to two West Virginia Education [and State] Employees Grievance Board cases, Singh v. WVU & WVU Medical Corp., Docket No. 30-86-145-2 (May 18, 1988), and Walker v. Kanawha Co. Bd. of Educ. & W.Va. Dept. of Educ., Docket No. 20-86-157-1 (July 7, 1986). In Singh, it was found appropriate to join a third party as a respondent "when the rules, policies, procedures, etc. of that

⁶ The Court mentioned that CSC deleted classification complaints from its grievance procedure effective April 1984. However, as part of its holding it pointed out that "CSC has a mandatory duty to enforce. . .the 'equal pay for equal work' principle by operating the Grievance and Classification Review Procedure (emphasis supplied), suggesting an integrated practice.

⁷ Also noted is the confusion that bifurcated proceedings would create should classification disputes not be found "grievances" per Code §29-6A-2(i), in those instances where state employees have grievances seeking not only reclassification but also other relief.

party affect the grievant's scope of employment." At p. 3, n. 1. Accordingly, since Singh functioned "under the daily supervision of corporate employees who issued the letter of warning and recommended the demotion" that was the subject of that grievance, the WVU Medical Corporation was added to the case. In Walker, it was "acknowledged that grievant is not an employee of the Department of Education but. . .the Kanawha County Board of Education relied upon the determination made by the Department that grievant did not qualify. . .[for] advanced salary classification. . .[and] to deny grievant the right to challenge the underlying ruling. . .would be to put. . .[him] in a "Catch 22" situation and frustrate the intent" of W.Va. Code §§18-29-1 et seq. At p. 6, n. 7. The relevant import of both cases is that third parties may, in certain circumstances, meet the Code §18-29-2(f) definition of "employer."⁸

In the case at bar, CSC is clearly not Grievant's employer in the traditional sense; however, it has exclusive control over a significant component of her job, specifically its classification status which she now grieves, and works hand-in-hand with DNR in that regard. In essence, CSC effects placement of Grievant's position in its category;

⁸ But cf. Maynard v. Bd. of Educ. of the Co. of Wayne, 357 S.E.2d 246, 251 (W.Va. 1987); Proctor v. Putnam Co. Bd. of Educ., Docket No. 40-88-182 (Feb. 1, 1989), n. 11.

While Singh and Walker are both based on West Virginia education employee grievance law, that law is parallel to the law of the instant case.

this placement is requisite to the job's filling; the job's filling is effected by DNR.

Based on the foregoing, this matter is a "grievance" and CSC is appropriately designated an "employer"⁹ under the provisions of W.Va. Code §§29-6A-1 et seq.; further, CSC is an indispensable party to this action, see WVESEGB Rule 4.11; see also Henderson v. W.Va. Div'n of Voc. Svcs., Docket No. VR-88-023 (Feb. 28, 1989). Accordingly, CSC's motion was denied and Grievant's granted by Order of this Grievance Board entered November 23, 1988.¹⁰

MERITS OF GRIEVANCE

Grievant's case is centered about allegations of her job's inappropriate categorization as NRA I and deserved title of NRA II. At no time did she challenge the general CSC classification descriptions for either area, which are

⁹ This finding disposes of CSC's argument that the language "any other matter in which authority to act is not vested with the employer," Code §29-6A-2(i), precludes this Grievance Board's jurisdiction in this case.

¹⁰ The rulings solemnized by this Order were announced to Grievant, DNR and CSC on November 22, 1988, prior to the commencement of Level IV hearing on the merits of this grievance.

This Grievance Board is aware that, in an analogous context, the philosophy differs. Federal job classification disputes such as the instant one are considered to be solely within the bailiwick of the U. S. Office of Personnel Management and not the purview of the U.S. Merit Systems Protection Board. See, e.g., Knab v. NASA, 13 M.S.P.R. 509 (1982).

Appendices A and B,¹¹ promulgated under Civil Service Rules and Regulations, as recounted as Appendix C.

Grievant presented voluminous documentary information, and extensive testimony, in an attempt to outline the substance and quantity of her normal responsibilities. Neither DNR nor CSC characterized her as without qualification to be an NRA II; each simply contended her position and the NRA I classification specifications match accurately. DNR further argued that in its organizational structure,¹² see Appendix D, Site Investigation/Response (SIR), which Grievant heads, is a unit under the Division of Waste Management and thus is directed by an NRA I; sections within the Division, e.g., Hazardous Waste Management, are led by NRA II's. Grievant's rebuttal was that her work not only meets the NRA II description, it is comparable to the actual

¹¹ Both classification descriptions were "Established: 6/2/75; Revised: 8/7/75, 2/1/83, 12/3/85, 2/3/87; Effective: 2/3/87." It is presumed that these descriptions are relevant to all aspects of this grievance, despite Grievant's bald and contested comment that "the duties under the title NRA I, which I currently hold[,] have increased since February 1, 1986, when I accepted the position." Grievant's Exhibit 17-A.

Classification descriptions are not the same as individual job descriptions. Compare Appendices A and B with Grievant's Exhibits 13 and 31 (DNR vacancy announcement bulletins).

¹² DNR's Division of Waste Management has one free-standing unit, Site Investigation/Response, and three sections, Hazardous Waste Management, Solid Waste Management and Compliance Monitoring/Enforcement. Some and perhaps all of these sections have subordinate units.

Respondent cited W.Va. Code §20-1-14 as authority for its establishment of this structure.

duties performed by NRA II's within the Waste Management Division. She conceded, however, that she is "aware that some of. . .[her] duties are similar to and/or the same as those performed by other NRA I's. . .and I. . .[am] not making any claim to exclusivity in the performance of these duties" but added that she "also perform[s] duties which are performed by NRA II's. . .and make[s] no claim as to the exclusivity of these duties as well." Grievant's Exhibit 17-A.

Grievant's evidence included the following:

a) information that under DNR's pre-November 7, 1986, structure, SIR was considered a "section" along with Hazardous Waste Management, Solid Waste Management, Groundwater/UIC, and Compliance Monitoring & Enforcement;

b) memoranda from Grievant to SIR personnel, involving delegation of authority, directions regarding leave time and vehicle use, and specific work assignments;

c) SIR management and/or quality assurance plans, legislative rules, objectives, grant applications, reports to the United States Environmental Protection Agency (EPA), and other documents, ostensibly prepared or reviewed by Grievant, although most do not indicate this in writing or by other means;

d) memoranda and letters to Grievant from DNR superiors or EPA officials, relating to cooperative agreements between EPA and DNR and to Grievant's unquestioned duties as

training coordinator and training liaison with EPA for DNR's Division of Waste Management;¹³

e) other documents/letters from EPA officials copied to Grievant, or mentioning her in an explicit or implicit role of rather significant responsibility;¹⁴

f) other material, including 40 C.F.R. Part 300-Subpart F, apparently presented to show the level of responsibility of SIR's mission and/or the quality of Grievant's work.

At Level IV hearing, Max Robertson, DNR's Deputy Chief of Waste Management and Grievant's immediate supervisor, testified that while Grievant is "in control" of SIR, SIR is appropriately a "unit" since its program is not developed to the point that its elevation to "section" status is warranted. He further explained that the three Waste Management Section heads, see Appx. D, are Assistant Division Chiefs and report directly to Division Chief Dr. B. Douglas Steele. Robertson continued that SIR has no site clean-up responsibility¹⁵ and that Grievant has no staffing or

¹³ See Grievant's Proposed Findings of Fact #25 regarding her training duties. Cooperative agreements are arrangements whereby specific project responsibilities are shared.

¹⁴ Post-hearing, Grievant submitted what purported to be the Affidavit of Benton M. Wilmoth, an EPA official. Inasmuch as this document was merely an unsworn letter, and for other reasons, it has not been considered.

¹⁵ Grievant presented unrefuted evidence that she has
(Footnote Continued)

disciplining authority. He agreed with Grievant that SIR has four subunits, namely, Pre-Remedial, Remedial, Emergency Response, and CORE (Administration).¹⁶

Rob Jelacic, NRA II and Hazardous Waste Management Section Head, testified that his area of responsibility was "permitting of all hazardous waste facilities in the state." He stated that he was not "completely familiar" with Grievant's duties as he "hadn't kept up." Hazardous Waste Management has three units, according to Jelacic, all headed by NRA I's; including these three, Jelacic has thirteen subordinate employees. He further testified that he makes staffing decisions and that he has delegated personnel interviewing responsibilities to his unit leaders.

Jerome Sebrick, NRA I and unit leader under Jelacic, conducts technical review of applications and supervises four technical employees and one secretary, none of whom have subordinates for whom they are responsible. He said he "hadn't been advised" that he is without authority to reprimand the named five, but he considers himself unable to terminate their employment.

Mary Hale Channell, Engineering Technician II, is assigned to the SIR Unit. She testified she is directly

(Footnote Continued)

been involved in the much-publicized clean-up at the Artel Chemical Company plant at Nitro, West Virginia, although detailed specifics of her involvement were not provided.

¹⁶ CORE is apparently an acronym.

supervised by both Grievant and Max Robertson, and that those two individuals "talk a lot" although she was not sure how much of their contact was "supervision" of Grievant by Robertson. When asked whether Grievant is in charge of coordinating the SIR program/unit, she responded "I guess." She did state that Grievant issued her work assignments, which include "collecting and administering the Hazardous Waste Emergency Response Fund and other projects from time to time, most recently a survey of other states and how they fund emergency response and what their non-national priorities are." Ms. Channell offered the opinion that SIR was not fully operational and added her hope that it would be such within one year.

Kenneth W. Ellison, Division of Waste Management NRA I and Underground Storage Tank/Leaking Underground Storage Tank (UST/LUST) Unit Head, is responsible, among other things, for coordination of the LUST Trust Fund, a "federal fund similar to Superfund"¹⁷ with which DNR has entered into a Cooperative Agreement with EPA. He supervises an Engineering Technician II (ET II), a Geologist and a Secretary and another subordinate technician is scheduled to be hired. He testified that the ET II is in a supervisory role over

¹⁷ Superfund is an EPA-managed fund for hazardous waste site clean-up authorized by the Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA), 42 U.S.C. §§9601 et seq.

the Geologist. He further explained that prior to Fall 1987, his unit had only three employees including himself, and it has grown significantly since then in size and responsibility. He anticipates that DNR will soon ask that EPA grant the UST/LUST unit state primacy, or primary responsibility before the federal government, in its area, and that his unit will become a section; when asked if he, as an NRA I, performs duties similar to those of an NRA II, he responded, "That's a difficult question -- 'yes' is a general answer now because my program has been growing real fast." He added that, at the time of the hearing, he felt his job was "closer to an NRA II" due to "the rapid advancement of my area."

Dr. B. Douglas Steele was the first and to date has been the only Chief of Waste Management. He was formerly employed with DNR's Division of Water Resources and testified that "sections" under DNR's new organizational structure are "a level up" from "sections" under the former system. He said that he thought it necessary that NRA II's head up the current sections, and that he was "not familiar" with any relationship between DNR's "Superfund program staff" and SIR.

Grievant's explanation of her job at Level IV included a written narrative response to the Level I Decision, Grievant's Exhibit 17-A, which reads, in pertinent part:

[SIR]. . . is currently composed of four basic programs. These are called pre-remedial program, the remedial program, the emergency response

program, and the . . . [CORE] program. The basic functions of each of these programs is as follows:

Pre-remedial program - the function of this program is to conduct investigations at abandoned and inactive hazardous waste sites. Its scope has been expanded also to the investigation of actively regulated sites as well, not just "abandoned/unregulated" sites, and the performance of hazard ranking scoring not previously conducted. All work is conducted under federal grants.

Remedial program - the function of this program is to provide state oversight at hazardous waste sites listed on the National Priority List. This work will be fully funded under a federal grant.

Emergency Response program - provides for the development of the State's Hazardous Waste Emergency Response Fund and for the performance of response work in the state and in coordination with the . . . EPA.

[CORE] program - the basic function of this program is an administrative program to provide expanded participation in all phases of CERCLA activities. CERCLA refers to the Comprehensive Environmental Response, Compensation and Liability Act which provides the funding under which the majority of the SIR programs operate.

According to Grievant, the Pre-Remedial group "investigates potential hazardous waste sites and prioritizes these sites for further action." She stated that she had delegated direct supervision of this program and its workers to Mr. Riley Sain, Environmental Analyst II, see Grievant's Exhibit 3, and that prior to this delegation she was immediate supervisor for Sain and three other employees in this

area, including Ms. Channell, who has since been "temporarily reassigned" to CORE.¹⁸

Grievant's explanation of the Remedial Program's work is that it "oversees the work of the . . . EPA and/or responsible parties for cleanup activities at hazardous waste sites within the state." Grievant is "fully responsible for this program at the present time" but does "utilize other staff members if necessary to assist me occasionally." She characterized Emergency Response as "currently undergoing extensive program development" and as having "two phases -- emergency response which is currently operational and . . .to 'organize, plan and control the Hazardous Waste Emergency Response Fund program.'" Grievant performs the work in this area, "with the assistance of one staffer."

CORE, the "newest addition to the function of SIR," is also in development for the most part, according to Grievant. She stated its design to be coordination of "program management and supervision, cooperative agreement administration, fiscal management, legal assistance, state [S]uperfund contract administration, health and safety, and clerical support." Ms. Channell and Grievant are the only employees within CORE.

¹⁸ Apparently, another employee, "Ackers," has joined SIR and the Pre-Remedial program since this delegation.

For each of these four SIR subunits, Grievant, in her Exhibit 17-A and at the Level IV hearing, enumerated her responsibilities in some detail. Neither DNR nor CSC challenged her claims in this regard, save that there was some disagreement as to the level of responsibility she exercises in staffing and certain other areas.

DNR contends that "the job descriptions for NRA I and II are substantially similar; the critical difference is that an NRA II must be given 'wide latitude for independent action,' while the work of an NRA I is 'reviewed for results obtained' rather than reviewed 'under general direction.'" DNR Proposed Findings of Fact #35; also, see Grievant's Exhibit 12. DNR continues, in its written final argument, that:

[V]ast differences in responsibility . . . differentiate a section from a unit under . . . [DNR's] organizational structure.

[D]uties, such as grant preparation, reviewing contracts and maintenance reports, forwarding FOIA [Freedom of Information Act] requests, etc. are either technical or clerical in nature rather than supervisory or administrative.

In evaluating . . . [the] grievance, . . . the actual differences in responsibilities and authority assigned to NRA I's as compared to NRA II's within the Division [must be considered].

[DNR] has chosen to confer either section or unit status upon an entity based upon the level of operational development achieved by that entity.

Grievant's view is that actual job responsibilities, not DNR's organizational structure or the size of an entity thereunder, should control position classification. DNR

iterated in closing that SIR was a "section" and equal to other areas, including Hazardous Waste Management, under its former stratification but that SIR, under the new structure, has not been developed to the point the other areas have and is thus appropriately classified a unit.¹⁹ At Level IV, opinions were offered that SIR might become a section, might maintain its unit status, or might be absorbed by other entities. Notably, a proposed restructuring of SIR as a section was prepared in chart form by Grievant, Grievant's Exhibit 2, and presented to EPA as part of a grant application, see Grievant's Exhibit 16, which presentation strongly implies DNR's approval of the proposal.

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

¹⁹ The Level II decision does state that NRA "job specifications . . . are not based solely on the name or status of a particular unit, the number of people supervised, or the amount of duties performed . . . [but on] the responsibility assigned and the independence accorded the employee in the discharge of his/her assigned duties." Grievant was an NRA I under the old structure, as was Jelacic as head of Hazardous Waste Management and other supervisors of what were then known as sections. However, it occurs to the undersigned that work necessary to coordinate the development of programs within a DNR unit might easily be as responsible as that required to manage an already-established section.

FINDINGS OF FACT

1. Grievant has been employed by the West Virginia Department of Natural Resources (DNR) as head of its Site Inspection and Review Unit (SIR) since February 1, 1986. This position is, and has been at all pertinent times, classified as Natural Resources Administrator I (NRA I) by the West Virginia Civil Service System (CSC).

2. SIR is a subentity of DNR's Division of Waste Management.

3. By this grievance, Grievant seeks reclassification of her position to the higher level of NRA II. Inasmuch as reclassification decisions are directly under CSC's jurisdiction, CSC was joined as a party-respondent. See Conclusion of Law 2.

4. An NRA I "employee. . . assists in the planning and supervision of a . . . [DNR] program. . . and plays an important role in formulating policies and programs. . . ." He or she also "has latitude for the exercise of independent judgment in carrying out responsibilities. . . such as insuring proper enforcement of existing statutes, rules and regulations. . . [and] may relieve a superior of administrative details and make decisions on routing²⁰ operating

²⁰ It is presumed this might be a typographical error
(Footnote Continued)

procedures." His or her "[w]ork is reviewed for results obtained and for compliance with laws. . . [etc]."

5. An NRA II "employee. . . has complete charge of a specialized [DNR] program. . . including responsibility for determining general work planning, execution and direction of all operations. . . [thereof]." He or she "may assume responsibility for administrative details of a superior. . . [and] make[] decisions on routing²¹ operation procedures, and direct[] and supervise[] administrative and management activities necessary to insure effective operations." His or her "[w]ork is performed under general direction, with wide latitude for independent action."

6. Grievant meets all "knowledge, skill and ability" and "minimum training and experience" requirements for the NRA II classification.

7. DNR's organizational structure since November 7, 1986, has provided that "units" are headed by NRA I's and "sections" by NRA II's. Despite the fact that SIR was called a section under DNR's pre-November 7, 1986, stratification, it was not downgraded in any way by its categorization as a unit under its currently-utilized plan.

(Footnote Continued)
and the word could be "routine."

²¹ See n. 17.

8. DNR distinguishes units from sections by the level of development of the program or programs for which the entity is responsible. Unit heads within the Division of Waste Management report directly to a Deputy Chief of the Division, while section leaders are considered Deputy Chiefs and report to the Division Chief.

9. SIR has four subunits, namely, Pre-Remedial, Remedial, Emergency Response and CORE (Administration). Of these four, only Pre-Remedial is fully operational, with a full-time staff of four. Grievant has delegated direct supervisory authority of this subunit to a subordinate.

10. Grievant expends significant effort toward "developing" Remedial, Emergency Response and CORE. One employee besides Grievant is assigned full-time to CORE; Grievant is the lone staff member in the remaining two areas, although she utilizes other employees therein occasionally.

11. Grievant is the training coordinator, and training liaison with the United States Environmental Protection Agency (EPA) for DNR's entire Division of Waste Management.

12. DNR has provided EPA with information strongly implying that its intention is to recategorize SIR as a section. Grievant's Exhibit 16.

13. Grievant supervises five employees within SIR and indications are toward growth of staff within the unit.

14. DNR is West Virginia's lead agency for management of funds covered by the Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA), 42

U.S.C. §§9601 et seq., including "Superfund." Grievant's Exhibit 16. Within DNR, SIR has primary if not sole charge of this area. See Grievant's Exhibit 18.

15. SIR has no hazardous waste site clean-up authority but does prioritize sites for action by EPA, the United States Army Toxic and Hazardous Materials Agency and perhaps other agencies, directly supervises the work of these organizations and engages in other significant activities involving such sites. This requires significant technical and administrative expertise to be exercised by Grievant.

16. Grievant is the sole DNR employee with authority to amend Pollution Reports submitted to EPA, either before or after their official publication.

17. Grievant is involved in DNR's cooperative agreements with EPA and other agencies. This involvement entails significant responsibility on Grievant's part.

18. Grievant prepares grant applications related to any of the four SIR subunits.

19. Grievant is technically supervised directly by Max Robertson, but Robertson's actual supervision is minimal and his approval of her recommendations, reports, decisions concerning personnel and other work is virtually automatic.

20. Grievant's responsibilities are similar to those of Rob Jelacic, NRA II and Section Chief, Hazardous Waste Management. They are also similar to those of Kenneth W. Ellison, NRA I and UST/LUST Unit Head. Mr. Ellison reasonably anticipates elevation to NRA II in the near future.

21. Grievant "has complete charge of a specialized [DNR] program. . . including responsibility for determining general work planning, execution and direction of all [related] operations."

22. Grievant "makes decisions on . . . operation procedures, and directs and supervises administrative and management activities necessary to insure effective operations."

23. Grievant's "work is performed under general direction, with wide latitude for independent action."

24. Grievant's work more closely matches CSC's classification description for NRA II than that for NRA I.

CONCLUSIONS OF LAW

1. Employee complaints seeking position reclassification are "grievances" per W.Va. Code §29-6A-2i.

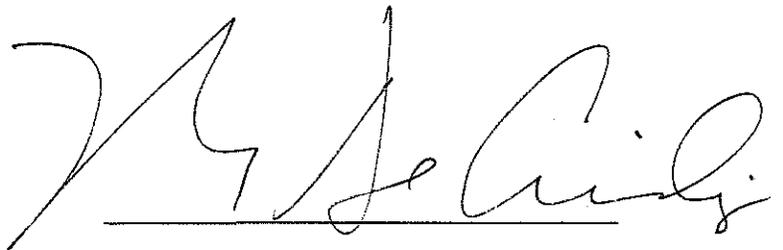
2. CSC alone has the authority to place DNR's positions in their respective classifications; therefore, CSC is an "employer" per Code §29-6A-2(f) and an indispensable party-respondent. See WVESEGB Rule 4.11.

3. A grievant must prove his or her case by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

4. Grievant has proven, by a preponderance of the evidence, that her position more closely matches CSC's classification description for NRA II than that for NRA I.

Accordingly, this grievance is **GRANTED** to the extent that Respondents are **ORDERED** to take necessary action forthwith to reclassify Grievant's position from NRA I to NRA II.

Any 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.



M. DREW CRISLIP
HEARING EXAMINER

Dated: March 28, 1989

APPENDIX A

NATURAL RESOURCES ADMINISTRATOR I

Nature of Work: An employee in this class assists in the planning and supervision of a natural resources program within the Department [of Natural Resources], and plays an important role in formulating policies and programs for area of assignment.

Employee has latitude for the exercise of independent judgment in carrying out responsibilities of the program to which assigned, such as insuring proper enforcement of existing statutes, rules and regulations. Employee may relieve a superior of administrative details and make decisions on routine operating procedures.

Work is reviewed for results obtained and for compliance with laws, rules, regulations, and policies.

Required Knowledge, Skills, and Abilities:

Basic knowledge of the principles and practices of natural resources management.

Basic knowledge of the principles and practices of personnel management and public administration.

Ability to plan, direct, coordinate, and supervise the work of lower level employees.

Ability to review reports and to make investigations and recommendation on the basis of such reports.

Ability to establish and maintain effective working relationships with other divisions of the Department, local and state officials, and the general public.

Ability to give and receive oral and written instructions in a clear, concise manner.

Minimum Training and Experience Requirements:

TRAINING: Graduation from an accredited four-year college or university with a degree appropriate to the field of assignment.

SUBSTITUTION: Additional employment as described below may be substituted for the required training on the basis that two years of experience is equal to 30 semester hours of college.

EXPERIENCE: Three years of employment in the field of assignment, one year of which must have been in a supervisory, administrative or professional capacity.

SUBSTITUTION: Graduate study in an appropriate field may be substituted on a year-for-year basis for the required non-supervisory experience.

APPENDIX B

NATURAL RESOURCES ADMINISTRATOR II

Nature of Work: An employee in this class has complete charge of a specialized program within the Department [of Natural Resources], including responsibility for determining general work planning, execution and direction of all operations pertaining to the specialized field.

Employee may assume responsibility for administrative details for a superior. The employee makes decisions on routing operation procedures, and directs and supervises administrative and management activities necessary to insure effective operations.

Work is performed under general direction, with wide latitude for independent action.

Required Knowledge, Skills, and Abilities:

Basic knowledge of the principles and practices of natural resources management.

Basic knowledge of the principles and practices of personnel management and public administration.

Ability to exercise independent judgment and delegate authority and to plan, direct, coordinate, and supervise the work of lower level personnel.

Ability to give and receive oral and written instructions in a clear, concise manner.

Ability to establish and maintain effective working relationships with co-workers, local and state officials, and with the general public.

Ability to review, investigate and submit comments and recommendations relative to improved policies, practices or programs within the assigned specialized field.

Minimum Training and Experience Requirements:

TRAINING: Graduation from an accredited four-year college or university with a degree appropriate to the field of assignment.

SUBSTITUTION: Additional employment as described below may be substituted for the required training on the basis that two years of experience is equal to 30 semester hours of college.

EXPERIENCE: Four years of employment in the field of assignment, two years of which must have been in a supervisory, administrative or professional capacity.

SUBSTITUTION: Graduate study in an appropriate field may be substituted on a year-for-year basis for the required non-supervisory experience.

Section 5. Classification Plans

5.01. Preparation of Plans-The Commission, after conferring with the appointing authorities concerned, shall formally adopt and make effective a comprehensive classification plan for all positions. The plan shall be based on an investigation and analysis of the duties and responsibilities of each position, and each position shall be allocated by the Director of Personnel, after consultation with the appointing authority concerned, to its proper class in the classification plan. When complete, the classification plan shall include for each class of position an appropriate title, a description of the duties and responsibilities, and the minimum requirements of training, experience, and other qualifications.

5.02. Revision of Plans-Existing classes of positions may be abolished or changed, or new classes added, in the same manner as the classification plans were originally adopted.

5.03. Incumbents of Reallocated Positions-When a position is reallocated to a different class, the incumbent shall not be deemed eligible to continue in the position unless he would have been eligible for original appointment, promotion, transfer, or demotion, to a position of the new class while serving in the position as previously allocated. If ineligible to continue in such position, he may be transferred, promoted, or demoted by appropriate action in accordance with such provision of this rule as the Director may deem to be applicable. In any case in which the incumbent is ineligible to continue in the position, and he is not transferred, promoted, or demoted, the provisions of the rule regarding separations shall apply.

5.04. Class specifications-The class specification shall be considered in allocating positions and shall be interpreted as follows:

(a) Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.

(b) In determining the class to which any position shall be allocated, the specifications for each each class shall be considered as a whole. Consideration shall be given to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.

(c) A class specification shall be construed as a general description of the kinds of work characteristics of

positions properly allocated to that class and not as prescribing what the duties of any position shall be, nor as limiting the expressed or implied power of the appointing authority now or hereafter vested with the right to prescribe or alter the duties of any position.

(d) The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated shall not be taken to mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

(e) The statement of minimum qualifications expresses the minimum background in terms of education, experience, skills and knowledges which would be required of any new appointee to a position in the class as partial evidence of ability to perform the work properly and is to be so construed.

(f) Qualification requirements in the specification for any class, as interpreted herein, shall constitute the basis and source of authority for the tests to be included in examinations for the class and for the evaluation of the qualifications of applicants and for the acceptance or rejection of applications of examinees for the class.

5.05. Reclassification

(a) Upon its own initiative, or at the request of an appointing authority, the Commission may reclassify positions by the creating or abolishment of classes, or the revision of the definition of the work of the classes brought about by changing work methods, new technology or reorganization.

(b) For each position affected the appointing authority shall provide a current description of the duties and responsibilities assigned.

(c) The employee in the position at the time of a reclassification shall be entitled to continue to serve in that position, provided that any licensure or certification requirements are met.

(d) Any incumbent in a position reclassified under this section shall have the right to a review of the action under the procedure established in Section 5.07 of these rules.

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**BOARDS AND COMMISSIONS
ON WHICH THE DIRECTOR SERVES**

- WV Natural Resources Commission
- WV Public Land Corporation
- WV Oil & Gas Conservation Commission
- WV Water Development Authority Board
- State Soil Conservation Committee
- WV Whitewater Advisory Board
- Governor's Commission on West Virginians Outdoors
- Ohio River Basin Commission
- Interstate Oil Compact Commission
- Southern States Energy Board
- Southern Environmental Resources Conference Governing Board
- Appalachian National Scenic Trail Advisory Council



January 1987

