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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

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

ROGER CROOKSHANKS

v.

Docket No. 89-RS-597

**WEST VIRGINIA DIVISION OF REHABILITATION SERVICES
and WEST VIRGINIA DIVISION OF PERSONNEL**

D E C I S I O N

In August 1989, Roger Crookshanks filed the following grievance at Level I:

Grievance consists of two parts:

1. I am working out of classification under Civil Service Job Description. Division of Personnel disagrees with the findings of Position Description Questionnaire dated May 16, 1989, and the information provided by the Desk Audit dated June 6, 1989. To my understanding, the Division of Rehabilitation Services approved this reclassification.

2. I am asking for "back pay" lost due to failure of reclassification. I have been performing the responsibilities of a Recreation Director since July 1, 1984. I was recommended for promotion to Recreation Director April 11, 1985. To my knowledge, the only reason the recommendation was not carried out was due to the Governor's freeze.

I have served the Division of Rehabilitation Services and the State of West Virginia with dedicated service, loyalty, and professionalism, for almost fifteen years. I am proud of the work I have done over these years for WVRG, and I am very proud of the Therapeutic Recreation profession I represent. It saddens me that I must file a grievance in order to try to obtain what should have been given me. If this is an

example of the State's attitude toward an individual who bargained in good faith to avoid unnecessary use of time, money, and to not cause confusion or unrest, it explains the problems this State has keeping professional employees of integrity. After fifteen years of service, I feel as a man I have no choice but to pursue this grievance as far as permitted by law, or until I am properly classified and compensated.

After denials there and at Levels II and III, Grievant advanced his claim to Level IV on October 10, 1989, where it was scheduled for a December 1, 1989, hearing. Prior to that meeting, the undersigned advised the parties that, pursuant to W.Va. Code §29-6A-11,¹ it appeared if Grievant established entitlement to back pay in this forum, such would be limited to a period commencing no earlier than July 1, 1988.² All parties, through counsel, were given the opportunity to argue to the contrary, but instead agreed with the advisory.

The hearing was conducted and completed on the set day. At its outset, counsel for Respondent West Virginia Division of Rehabilitation Services (DRS) announced his client's

¹ "This article [establishing jurisdiction in this Grievance Board over state employee complaints] applies to all grievances arising on or after the effective date of this article [July 1, 1988]. . ."

² Notice is taken that Grievant, unfortunately for him, did not initiate his case during the ninety-day "jurisdictional window" period established by AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989), and so characterized by Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989). If he had done so, this Grievance Board would have been empowered with authority to consider his full backpay claim.

position that Grievant was entitled to the backpay he sought from July 1, 1988, and further, that DRS was willing to offer that money. It is unclear to what extent Respondent West Virginia Division of Personnel (Personnel) had a right to object to this proposal, but at any rate, it expressed no opposition thereto. Personnel did, however, oppose DRS' further recommendation that Grievant be reclassified to Recreation Director status, and Personnel is the entity of state government empowered with certifying such reclassifications. See Hayes v. DNR & CSS, Docket No. NR-88-038 (Mar. 28, 1989).³

Immediately post-hearing, the parties initiated a settlement conference among themselves, with negotiations continuing for a few days thereafter. Understanding was ultimately reached that Grievant could receive not only his backpay from July 1, 1988, from DRS, but also his position's upgrading by Personnel to Recreation Director status.⁴

³ At the time Hayes was decided, Personnel was known as the West Virginia Civil Service System (CSS).

⁴ Personnel has reported it may shortly commence a massive classification review of the entire staff of the DRS workunit in which Grievant serves, with the possible result of Grievant's being downwardly reclassified. Any such action on Personnel's part and the outcome thereof is purely speculative at this point, and at any rate is not properly part of this grievance. Furthermore, the undersigned is advised that Grievant and his counsel are aware of the potential study and its ramifications and correctly do not consider such to relate directly to the within case.

However, Grievant, despite his earlier concession regarding Code §29-6A-11, expressed unwillingness to enter into a compromise agreement, which would have the effect of dismissing his complaint, without adjudication on his July 1, 1984-June 30, 1988 claim for back wages.⁵

Grievant's attorney suggested that the undersigned enter such a decision, also noting therein the lack of a "case or controversy" over the post-July 1, 1988 and the reclassification issues. DRS' and Personnel's counsel were fully apprised of this proposal and expressed no objection thereto, despite the fact that a dismissal order, with arguably less appealability, see n. 5, appeared to perhaps be the "more correct" procedural approach. Both Respondents' attorneys represented that, to the best of their knowledge, the offers of relief previously made to Grievant were still outstanding.

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

⁵ Apparently, Grievant believes that even if the earlier period's backpay is unavailable in this forum, the same might not be so from a West Virginia circuit court reviewing the within Decision on appeal.

FINDINGS OF FACT

1. Grievant, by this case, seeks backpay from July 1, 1984, through such time as his position is reclassified, and reclassification.

2. Respondents have offered Grievant backpay from July 1, 1988, and the reclassification he seeks.

CONCLUSIONS OF LAW

1. There is no "case or controversy" regarding the backpay Grievant seeks from July 1, 1988, on, or his position's reclassification. Therefore, the West Virginia Education and State Employees Grievance Board is without jurisdiction to rule on those moot counts of Grievant's complaint. See Carney v. DRS, Docket No. VR-88-055 (Mar. 28, 1989).

2. This Grievance Board also lacks jurisdiction to grant a grievant backpay extending backward in time beyond July 1, 1988. See W.Va. Code §29-6A-11.⁶

⁶ The only exception being the AFSCME v. CSC window, see n. 2.

Accordingly, this grievance is **DENIED**. However, Respondents, if they have not already done so, are directed to forthwith make arrangements to provide Grievant with the remedy offered him, i.e., backpay from July 1, 1988, as if he had been classified as Recreation Director, less any appropriate setoff, and reclassification of his position to Recreation Director status.

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.

A handwritten signature in dark ink, appearing to read 'M. Drew Crislip', is written over a horizontal line.

**M. DREW CRISLIP
HEARING EXAMINER**

Dated: January 11, 1990