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**GLENATTA OWENS and  
VINA KAY CHURCH**

**v.**

**Docket Nos. 90-ABCC-003/004**

**WEST VIRGINIA ALCOHOL BEVERAGE CONTROL COMMISSIONER**

**D E C I S I O N**

Grievants, both retail-outlet employees of Respondent Alcohol Beverage Control Commission (ABCC) within the same administrative district<sup>1</sup> but in different stores, were laid off effective September 30, 1989. Grievant Church returned to work December 1, 1989,<sup>2</sup> and Grievant Owens remains on layoff status. Each initiated a complaint at Level IV on January 2, 1990;<sup>3</sup> thereafter, it was established that the claims could be decided upon the record below, additional

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<sup>1</sup> ABCC has divided the State of West Virginia into eleven administrative districts.

<sup>2</sup> According to her Proposed Finding of Fact 2, Grievant Church "returned to work at the Williamson store on December 1, 1989, although questionably notified to do so. . ." (emphasis supplied). The significance of the underlined portion of this quote escapes the undersigned; however, see Level III, T. 24-25. In light of the outcome herein, the matter will not be further discussed.

<sup>3</sup> Both cases were denied or properly waived at each of the three lower steps of the grievance procedure. After they were filed at Level IV, the cases were consolidated for all purposes.

documentary evidence, stipulated facts, and proposed findings of fact and conclusions of law, all to be submitted no later than March 30, 1990.<sup>4</sup> A conference was convened on April 26, 1990, for the purpose of the parties' reviewing and summarizing the evidence<sup>5</sup> and making closing arguments,<sup>6</sup> with one final item of evidence to be offered no later than April 30.<sup>7</sup> That date having arrived, the matters are finally mature for resolution.

The record, as presented at Level IV, does not clearly establish into which West Virginia Division of Personnel (Personnel) employment classification either Grievant was placed,<sup>8</sup> but it does confirm that each of them was the least

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<sup>4</sup> Only Grievants offered fact-law proposals.

<sup>5</sup> Grievant Church's Level III transcript, and some additional documentary evidence, was submitted by her representative on April 23. Respondent's counsel joined Grievants' consultant in moving that this late-submitted information be considered, and it has been. The representatives further agreed that the substance of Grievant Church's Level III case also related to Grievant Owens' situation.

<sup>6</sup> Prior to this conference, Grievants, via letter, had moved the joinder of Personnel as an additional respondent. At the conference, this motion was withdrawn, and ABCC agreed that Personnel was not needed as a party.

<sup>7</sup> This "item" was a Fall 1989 layoff plan submitted by ABCC to the West Virginia Division of Personnel (Personnel) for approval, and Personnel's responsive rejection letter.

Neither Grievants nor Personnel desired, despite invitation, to offer anything else whatsoever post-conference.

<sup>8</sup> Grievant Church was referred to as "cashier" at her Level III hearing, but it is unclear whether this is an  
(Footnote Continued)

senior person within that category within her assigned store. It is also uncontroverted that ABCC had in its employ personnel less senior than both Grievants and within the same district and job classification who were not laid off on September 30, 1989. Respondent's explanation is that its retail outlets are its organizational units and that its layoff policy is centered upon this and the independence of the individual store.

In reply, Grievants point out that Section 13.04(d) of the July 1, 1989, Rules and Regulations of the West Virginia Civil Service System (CSS),<sup>9</sup> required ABCC to "submit to. . .[CSS] for approval a description of the unit or units to which a layoff will apply" and explained, "The organizational unit may be an entire agency, division, bureau, or other organizational unit."<sup>10</sup> Also, as stated in their joint Proposed Findings of Fact, at 4, Grievants have shown that "The organizational units properly established and approved by. . .[CSS] in ABCC for layoff purposes on February 1, 1982, are [its] Districts and not individual stores." ABCC

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(Footnote Continued)

official Personnel designation or merely an informal working title.

<sup>9</sup> As of July 1, 1989, CSS's name was changed to the West Virginia Division of Personnel. Any reference to CSS or Personnel in this Decision should be understood to be to the same entity.

<sup>10</sup> Although Personnel's Rules and Regulations have since been amended, the July 1, 1989, version was that in effect at the time Grievants were laid off.

attempted to refute this, at Level III, by reiterating its individual-store "policy" and by presenting an organizational chart approved by CSS on February 22, 1989.<sup>11</sup> However, neither the chart nor its cover letter highlights stores as organizational units for layoff purposes anymore than it so identifies Respondent's districts or other divisions. Indeed, the cover letter reveals that CSS was reviewing Respondent's structure for another purpose altogether.<sup>12</sup> Finally, it was stipulated at Level IV that the February 1, 1982, CSS determination that districts are the appropriate "layoff units" is still extant.<sup>13</sup>

Despite this stipulation, at the Level IV conference, ABCC opined generally that neither Personnel nor its predecessor had the authority, at least as of September 30, 1989,

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<sup>11</sup> Apparently, this was admitted into evidence at one of the lower stages of the grievance procedure. Grievants provided the undersigned with a copy and also the chart's February 22, 1989, cover letter from CSS.

<sup>12</sup> CSS had been petitioned by ABCC to exempt two of its positions, i.e., Stores Division Director and Enforcement Division Director, from classified-service coverage due to their alleged policymaking components. CSS granted Respondent's request as to the former post only.

At the Level IV conference, ABCC, in essence, withdrew from its position that the February 22, 1989, organizational chart had relevance to layoffs. ABCC further opined that this chart was "basically the same" as the one approved by Civil Service in 1982 along with the district/layoff unit concept.

<sup>13</sup> The February 11, 1982, letter from Civil Service, announcing its February 1 decision to approve districts as ABCC layoff units, also advised as follows: "Any subsequent changes that you wish to make in your organizational structure must have the approval of. . .[Civil Service]."

to promulgate and/or enforce a regulation such as Section 13.04(d) (July 1, 1989). ABCC contends that, if Section 13.04(d) is given effect in this case, it will allow Personnel to usurp powers reserved in the Secretary of the West Virginia Department of Tax and Revenue, parent administrator of ABCC, see W.Va. Code §5F-2-1(f)(9), by Code §5F-2-2(d), as follows:

The layoff and recall rights of employees within the classified service of the state as provided in. . . [Code §§29-6-10(5),(6)] shall be limited to the organizational unit within the agency or board and within the occupational group established by the classification and compensation plan for the classified service. . . .

It is noted that this provision seems to offer instruction to the Secretary, rather than authorize him to take action. At any rate, ABCC interprets the statute to indicate that only the occupational group, and not the organizational unit, need be established by "the classification and compensation plan for the classified service," i.e., Personnel, and that ABCC thus retains the power to establish layoff units in a reasonable and not arbitrary or capricious manner.<sup>14</sup> The phrase "occupational group established by the

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<sup>14</sup> The crux of ABCC's position is that a "common-sense approach" is needed, and that its districts are geographically too large to permit efficient use thereof as layoff units. While this point is not without merit from a practical stance, it is insufficient to invalidate Section 13.04(d) or Personnel's promulgation thereof. Further, at Level III, ABCC Stores Division Director Benny Eplin, while opining it would be impractical for store employees to live outside the immediate worksite area, T. 12-13, admitted  
(Footnote Continued)

classification and compensation plan for the classified service of" was added to the statute in 1989; it follows that the plain language of the statute does not require the organizational unit to be "established" by such a "plan." However, nor does it, expressly or impliedly, disallow or question Personnel's approval of ABCC's layoff units; in fact, Code §5F-2-2(d) includes the following caveat: "Except as provided in this subsection, nothing contained in this section shall be construed to abridge the rights of employees within the classified service of the state as provided in. . .[Code §§29-6-10, 29-6-10a]."

Code §§29-6-10(5),(6) respectively grant Personnel rather broad leeway to promulgate rules for "layoffs" and "recall."<sup>15</sup> Code §29-6-10(5) goes on to require an agency, when desiring to lay off an employee more senior to retained personnel in the same classification, to "demonstrate that the senior employee cannot perform any other job duties held by [such] less senior employees." These provisos must be understood as constituting employee protections, i.e., "rights" in Grievants, that have not been abolished by Code §5F-2-2(d). Furthermore, ABCC conceded that it had asked

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there is no related residency requirement imposed upon ABCC employees. T. 12. At Level IV, Grievant Owens, via her representative, expressed willingness to accept recall to any ABCC retail outlet within her work-district.

<sup>15</sup> More specifically, the State Personnel Board, a subentity of Personnel, is given this authority by the statute.

Personnel to approve an in-store layoff plan shortly prior to September 30, 1989, and that Personnel had rejected the plan at or about the time Grievants were released from employment. See n. 7.

In addition to those in the narrative, the following findings of fact and conclusions of law are rendered.

#### FINDINGS OF FACT

1. Grievants, retail-outlet employees of Respondent ABCC, were laid off September 30, 1989. Grievant Church returned to work December 1, 1989; Grievant Owens remains on layoff status.

2. Grievants, who worked in the same administrative district within Respondent's organizational structure but in different stores, were the least senior staff members in those stores within their West Virginia Division of Personnel (Personnel) employment classifications.

3. ABCC considers its stores the appropriate organizational unit for layoff procedures; however, Personnel's forerunner, the West Virginia Civil Service System (CSS), most recently approved the administrative district as that unit.

4. ABCC admits that if the local store is not the appropriate unit, and Personnel had authority at pertinent times to approve ABCC layoff procedures, neither Grievant should have been laid off on September 30, 1989.

### CONCLUSIONS OF LAW

1. Personnel had authority at relevant times, per W.Va. Code §29-6-10(5), to promulgate and enforce reasonable rules regarding layoffs of employees covered by Personnel protections. Cf. Code §5F-2-2(d); see also Code §5F-2-1(f)(9).

2. On September 30, 1989, Respondent's obligation was to obtain Personnel's approval of the organizational unit it desired to use for layoff purposes. Rules and Regulations of the West Virginia Civil Service System, Section 13.04(d) (July 1, 1989).

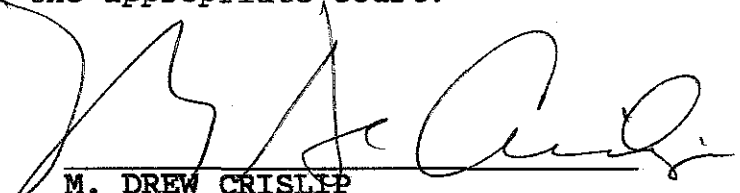
3. On September 30, 1989, Respondent's administrative districts and not its individual stores were the approved and appropriate organizational units for layoff purposes.

4. Grievants were both improperly laid off on September 30, 1989.

Accordingly, these grievances are **GRANTED**. ABCC is ORDERED to immediately reinstate Grievant Owens to the position she held prior to September 30, 1989, and to provide her with all back-pay and benefits, less any appropriate set-off, to which she would have been entitled had her employment with ABCC been uninterrupted. Further, ABCC is ORDERED to immediately reimburse Grievant Church for all pay and benefits, less any appropriate offset, she would have earned had her employment with ABCC been continuous from September 30, 1989, through December 1, 1989.



Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Mingo 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. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



M. DREW CRISLIP  
Hearing Examiner

Date: April 30, 1990