NANCY RUSH, ET AL.,

Grievants,

v. DOCKET NO. 94-HHR-279

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants instituted this grievance on or about January 14, 1993, alleging that "[t]he above employers violated the following in implementing the Reclassification Project (approved 11/21/91) for the Division of Health and Human Resources [. . .] [e]mployers violated a 1989 'Settlement Agreement' entered into between the employers and AFSCME which provided for a wage differential in perpetuity for certain employees as settlement of a back wage claim." (See footnote 1) Levels I and II of the grievance procedure were waived. A Level III hearing was held on December 15, 1993, and a decision was rendered denying the grievance on July 5, 1994. Grievants appealed to Level IV on or about July 12, 1994, and a hearing wasconducted on September 22, 1994. The parties submitted post-hearing briefs on or about December 14, 1994, at which time this case became mature for decision. (See footnote 2)

Background

A brief history of this case is helpful in understanding the circumstances under which the parties entered into the subject Settlement Agreement ("Agreement") and the practical effects of the Statewide Reclassification Project ("reclassification") on the grievants.

The grievants in this case are and were employees of Respondent Department of Health and Human Resources ("DHS") (See footnote 3), and had filed grievances alleging that they had been

worked out of classification for years by the agency. The grievants had substantial back pay claims arising out of the recognition in the AFSCME quadrilogy (See footnote 4) that the proper remedy for employees who had been worked out of classification was to provide them with back pay in order to compensate them under the "equal pay for equal work" principle.

As a result of the AFSCME cases, DHS was faced with literally hundreds of substantial back pay claims. By DHS' own calculations, these back pay claims averaged approximately $10,390 per claim, excluding pre-award interest. DHS recognized that it had a multi-million dollar exposure (G Ex. 11). DHS was also faced with severe financial hardships at that time (Carter, Tr. 37-38) (See footnote 5). In short, there were questions as to how the agency could afford to pay the claims it faced. Efforts were undertaken to reach a compromise resolution which would take into account the substantial interests of all the parties. During the course of numerous meetings, the concept of spreading the payments out over a long period of time was discussed (Arceneaux, Tr. 121, 125; Smith, Tr. 130). Finally,after approximately one year of negotiations, a Settlement Agreement was entered into by the parties (G Ex. 1) (See footnote 6). The Agreement, as it pertains to the grievants herein, states as follows:

SETTLEMENT AGREEMENT

> The following are terms of agreement between Division of Human Services and AFSCME, who represents 222 individuals alleging entitlements to back wages related to "misclassification".
>
> AFSCME and the Division of Human Services, hereafter known as the parties to this agreement, do hereby agree to the following:
>
> GROUP A = Each person, who filed a letter, grievance or misclassification with Civil Service or Joe Smith, formerly Personnel Director for the Division of Human Services, requesting back pay as a result of working out of classification prior to January, 1987, shall receive an annual increase of approximately seven hundred and ninety five dollars (795.00), adjusted to the nearest Civil Service pay step.
>
> GROUP B = Each person, who filed a letter, grievance or misclassification with Civil Service or Joe Smith, formerly Personnel Director for the Division of Human Services, requesting back pay as a result of working out of classification from January,

> 1987 up to "90-day window period", March 28, 1989, shall receive approximately three hundred and ninety seven dollars (397.00) adjusted to the nearest pay step in their pay grade. . . .

All employees, including the grievants in this case who fall within Groups A and B, who elected to settle their grievances upon the foregoing terms, accepted the terms of the Agreement andindividually signed a Release and Settlement of their back pay claims (Level III, G Exs. 3, 4). (See footnote 7)

Thereafter, 1/24th of "approximately $795 per year" was included in each bi-monthly pay statement of the grievants from January 1, 1990, until the reclassification of DHS on December 16, 1992. The reclassification caused a readjustment in the pay of classified state employees who were below the minimum pay step for their new classification. (See footnote 8)

The Grievants were affected in the same manner as all classified state employees by the reclassification and adjustment in salary pursuant to Division of Personnel Administrative Rule 6.04(f)(2)(a) (currently designated as 5.04(f)(2)(a)).

Arguments

___Grievants allege that the reclassification, as implemented, terminated their annual payments under the Agreement, and seek to enforce the terms of the Agreement calling for an "annual payment of approximately $795 . . .", which they allege should have continued after the 1992 reclassification and accompanying adoption of a new pay plan.

Respondent argues that it adhered to the Administrative Rules promulgated by the State Division of Personnel ("DOP"), and has notviolated any express or implied terms of the Agreement. Respondent further argues that the language of the Agreement, specifically "annual payment of approximately $795 . . .", provided for a one-time increase in the Grievants' base pay, which was afforded them under the terms of the Agreement, and does not require a wage differential of $795 for the Grievants in perpetuity when their wages are compared to employees who did not opt to accept the settlement.

Issue

Whether the "annual increase" called for by the Agreement survives the 1992 reclassification of DHS employees and the accompanying adoption of a new pay plan?

The undersigned finds that Respondent DOP followed all applicable laws, rules, and regulations in the implementation of the reclassification of DHS employees in 1992. Respondents reliance on Roach v. W. Va. Dept. of Transporta-tion/Div. of Highways, Docket No. 94-DOH-232 (Nov. 29, 1994), however, is misplaced as this case is easily distinguished from Roach. The Agreement created an obligation upon Respondents which is not "discretionary", as are merit raises and other types of salary adjustments discussed in Roach, and the holding in Roach is not controlling in the instant grievance.

The parties, at Level IV and in their post-hearing submissions, attribute different meanings to the word "annual" as it is used in the Agreement. The undersigned finds that neither the term "annual", nor the Agreement are ambiguous. "The fact that the parties attribute variant meanings to the same terms in acontract does not necessarily imply existence of ambiguity where there otherwise is none." Smith v. Smith, 351 S.E.2d 593 (Va. 1986).

Where the terms of a contract are clear and unambiguous, they must be applied and not construed. Orteza v. Monongalia County General Hosp., 318 S.E.2d 40 (W. Va. 1984). A valid written agreement using plain and unambiguous language is to be enforced according to its plain meaning and should not be construed. R.E.S., Inc. v. Trio Foods Enterprises, Inc., 395 S.E.2d 217 (W. Va. 1990). The expressed intention of the parties to contract shall be controlling and courts cannot rewrite the contract for them. Correct Piping Co. v. City of Elkins, 308 F. Supp. 431 (D.C.W. Va. 1970).

The parties stipulated that "[t]he 1989 settlement agreement was entered into for release and settlement of pending back pay classification grievances which were a result of AFSCME I, II, III, and IV, Supreme Court cases." See Joint Stipulations. Forbearance in the enforcement of a legal right is a traditional consideration in contract law. Cochran v. Ollis Creek Coal Co., 206 S.E.2d 410 (W. Va. 1974). Grievants claim they are no longer receiving the benefit of their bargain with Respondents because they are no longer receiving an annual payment in compensation for their back wage claims.

Considering the contract as a whole, it is apparent that the employees who opted into the settlement agreement did so in an effort to recoup back pay to which they may have been

entitledfollowing the AFSCME decisions. The Agreement clearly states that "[e]ach person . . . requesting back pay as a result of working out of classification prior to January, 1987, shall receive an annual increase of approximately seven hundred and ninety five dollars (795.00), adjusted to the nearest Civil Service pay step" (emphasis added).

At the time of settlement, these employees, in consideration of abandonment of their claims to back pay, agreed to accept a pay adjustment of $795.00 on an annual basis to eventually recoup an amount approximating their alleged back pay entitlement. If one accepts DHS' rationale, grievants who opted to settle their back pay claims, averaging $10,390, ultimately received less than $2,400 in back pay.

As a result of reclassification, the Grievants' base salaries have been adjusted to the minimum pay level for their new classification. Reclassification was a prospective measure to increase state employees' salaries across the board in an effort to make state employment more attractive to qualified individuals who might otherwise seek employment in the private sector. Largent v. W. Va. Division of Health, ___ S.E.2d ___ (W. Va. 1994). The reclassification put Grievants, and employees who opted out of the Agreement, on an equal pay footing. But raising Grievants' salaries, along with all other employees, prospectively, does not abolish the agency's commitment to compensate Grievants for past wrongs. Grievants' salaries would have been adjusted to their current rate regardless of whether they had entered into theAgreement and/or previously received a $795 increase. Grievants are still entitled to be compensated for back pay due under the terms of the Agreement. (See footnote 9) If grievants are no longer receiving the annual pay adjustment, they are not now receiving any consideration for settling and relinquishing their back pay claims. The annual pay adjustment needs to be preserved regardless of reclassification, otherwise no consideration is afforded these employees flowing from the back pay claim.

Respondent has offered no justifiable reason why it cannot effectuate the terms of the Agreement under the reclassification pay plan. The Agreement provides for an adjustment to the nearest pay step to accommodate the annual $795 increase in pay. The same type of adjustment, previously implemented, can be made under the reclassification pay scale to meet the contractual obligation to these employees.

The reclassification placed employees who were doing the same work within the same classification, but within that classification there may be pay differences if those differences are

based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other specifically identifiable criteria that are reasonable and that advance the interests of the employer. Largent, supra., p. ____. The Agreement is a specifically identifiable criteria which would allow for pay differences within the grievants' classifications. The interests of the employer are the same as when the employer agreed to enter into settlement with the grievants: an attempt to be fair, to avoid a potentially devastating financial blow to an already fiscally-troubled agency, and to settle grievants' claims.

Finding of Fact

The Statewide Reclassification Project and the subsequent reclassification of grievants and equalization of pay at the minimum pay grade level for their classification as implemented served to vitiate the Agreement and grievants ceased receiving the benefit of their wage claim settlement as of December 16, 1992, when DHS was reclassified.

Conclusions of Law

1. The terms of the Settlement Agreement are clear and unambiguous, and must be applied and not construed. Orteza v. Monongalia County General Hosp., 318 S.E.2d 40 (W. Va. 1984).

2. The expressed intention of the parties to the contract shall be controlling and courts cannot rewrite the contract for them. Correct Piping Co. v. City of Elkins, 308 F. Supp. 431 (D.C.W. Va. 1970).

3. The express intention of the parties in entering into the Settlement Agreement was to compensate grievants for potential back pay claims for working out of classification, following the decisions in AFSCME I, II, III and IV, supra.

4. There is flexibility in the Statewide Reclassification Project and pay plan for adjusting salaries within a classification based on various factors, including the existence of a separate, legal Settlement Agreement providing for such pay adjustment to the grievants' base salary. See Largent v. W. Va. Division of Health, ___ S.E.2d ___ (W. Va. 1994).

Accordingly, this grievance is **GRANTED** and Respondents are hereby **ORDERED** to comply with the terms of the Settlement Agreement and adjust grievants' base salary by the appropriate amounts depending upon their inclusion in Group A or B, and, in addition, to compensate grievants by a lump-

sum payment equal to the difference between their current salary and the adjustment amount as indicated by Grievants' Exhibit 6 for the period December 16, 1992 to the pay period immediately preceding the adjustment provided for above, plus allowable interest.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: February 7, 1995

Footnote: 1 *Other issues were raised in the original grievance filing, however, the parties stipulated at Level IV that the issue to be addressed in this case is limited to the 1989 Settlement Agreement.*

Footnote: 2 *Respondents moved to be dismissed at Level III and Level IV. The undersigned finds that both Respondents are either real parties in interest or indispensable parties to the outcome of this grievance, and therefore, their motions are DENIED.*

Respondent DHS also raised the affirmative defense of laches, arguing that, if Grievants are now contesting the terms of the Agreement executed in 1989, they have waited too long to bring their claims. It is clear from the record that the Grievants are not contesting the terms of the Agreement as it was written in 1989. Rather, Grievants are challenging Respondent's position that the reclassification implemented in December 1992, in effect, vitiated the Agreement. Grievants filed their grievance in January, 1993, well within the time frame allowed after reclassification went into effect in the Department. Therefore, Respondent's laches claim must fail.

Footnote: 3 *At the time of the Agreement, the Department was referred to as DHS and will be referred to as DHS throughout this decision.*

Footnote: 4 *As summarized by the West Virginia Supreme Court in "AFSCME IV", American Federation of State.*

County and Municipal Employees v. Civil Service Commission of West Virginia, 380 S.E.2d 43 (W. Va. 1989), "AFSCME I", AFSCME v. Civil Service Commission, 324 S.E.2d 363 (W. Va. 1984), recognized that "work performed 'out of classification' was compensable." "AFSCME II", AFSCME v. Civil Service Commission, 341 S.E.2d 693 (W. Va. 1985), "settled the back pay question . . .", by recognizing that full back pay was a remedy for working employees out of classification. "AFSCME III", a per curiam order dated May 20, 1988, AFSCME v. Civil Service Commission, No. 17929, Order entered May 20, 1988, "directed the Civil Service Commission ("CSC") to submit a plan for implementing on [sic] prior decisions." In AFSCME IV, "AFSCME successfully challenge[d] the sufficiency of [the plan] implemented by CSC by way of a motion for contempt.

Footnote: 5 *Transcript references are to the Level IV hearing and are noted by the witnesses' name and page number (Witness, Tr. ___).*

Footnote: 6 *A separate Settlement Agreement was entered into between the agency and the Communication Workers of America ("CWA") which terms mirror those of the Agreement discussed herein.*

Footnote: 7 *The figures, $795 and $397, were averages used in drafting the Agreement. Each employee in the Group actually received a differing amount depending on his base pay at the time of the Agreement and the resulting figure after the pay step adjustment. G Ex. 8.*

Footnote: 8 *Pursuant to Division of Personnel Administrative Rule 5.04(f)(2)(a) (formerly 6.04(f)(2)(a)), the salaries of employees already at the new minimum would be unchanged.*

Footnote: 9 *While there is no evidence, and the undersigned does not suggest, that the reclassification was undertaken in part to eliminate Respondents' obligation under the Agreement, the effect of holding that a reclassification is justification for wiping out settlement agreements could be extended to any settlement that a state employer enters into with its employees, i.e., settlements reached for back pay as a result of misclassification grievances.*