

**SHARON RANDALL, ET AL., .**

**Grievants, .**

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.

**v. . Docket Number: 94-PSC-001**

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**WEST VIRGINIA PUBLIC SERVICE .**

**COMMISSION, .**

**Respondent. .**

## **DECISION**

### **I. Procedural History**

This grievance comes about because of the consolidation at level four of three separate grievances filed at level one of the Grievance Procedure for State Employees, West Virginia Code §§29-6A-1, et seq. In March 1993, Sharon Randall, Barry Hudnall, Jerry Walker, Robert Runner, Gary Hellems, Gary Butcher, Gary Miller, Lee Roy Dean, Jr., Patrick Barker, Ronald Adkins, Thomas Marlow, Roger Bowen, Samuel Doss, Jeffrey Birch and Fred Foster, all Utility Inspectors in the Public Service Commission's (PSC) Motor Carrier Section of its Transportation Division, each filed a grievance alleging that they were victims of salary discrimination when compared to the other Utility Inspectors assigned to the PSC's other three sections in the Transportation Division. They also claimed that they had not been receiving job vacancy notices from the PSC as required by law. These claims were consolidated and answered at level two on October 28, 1994, by Franklin Crabtree, Director of the Transportation Division. Mr. Crabtree denied the claims relating to salary discrimination and recommended that the PSC attempt to take all practical steps in notifying its

employees of job openings. Appeal to level three was made and a denial of the claims was issued on March 7, 1994, by the PSC's Chairman Boyce Griffith. Appeal of this decision was received by the Grievance Board on March 14, 1994, and the case was assigned to Administrative Law Judge Lewis G. Brewer. The case was styled Randall v. PSC, Docket No. 94-PSC-001.

In early May, 1994, the PSC gave raises to all of its Utility Inspectors. Samuel Doss, Robert Runner, Jerry Walker, Patrick Barker, Robert Hatfield, Edward Pritt and Argul Stull each filed grievances on different dates in May 1994, challenging the amount of the raise that they had received. A level one decision denying each grievance was issued on May 31, 1994. Thereafter, by separate letter dated either June 8, 1994, or June 15, 1994, each grievance was also denied at level two. The seven grievances were consolidated at level three and a hearing was held on October 24, 1994; after that, the claim was denied at that level on December 15, 1994. An appeal to level four was perfected on December 22, 1994, and the case was assigned to the Undersigned. This grievance was styled Doss, et al. v. PSC, Docket No. 94-PSC-1136.

As noted, salary increases were issued to the Utility Inspectors on or about May 1, 1994. Inspector Barry Hudnall received a \$2,940.00 salary increase at this time. During the processing of the grievances filed at level one in May 1994, it was found that the amount awarded to Mr. Hudnall was in error and that his raise should have been \$504.00. In Mr. Griffith's December 15, 1994, level three decision, it was concluded that Mr. Hudnall's raise was to be rescinded and his salary was, therefore, reduced. Mr. Hudnall filed a grievance over this reduction in his salary on December 27, 1994. This claim was denied at the lower three levels and appeal was made to this Grievance Board on February 28, 1995. This case was assigned to Administrative Law Judge Mary Jo Swartz and styled Hudnall v. PSC, Docket No. 95-PSC-086.

Ultimately, after many continuances in each appeal, Grievants' counsel requested that the three cases be consolidated for hearing at level four. This motion was granted and by Order dated March 7, 1995, the three cases were consolidated and styled Randall, et al. v. PSC, Docket No. 94-PSC-001. An evidentiary hearing was conducted in the Grievance Board's Charleston, West Virginia office, on May 10, 1995. The case became mature for decision on that date. The record also includes the transcripts and exhibits from the level three hearings previously held by the PSC.

## II. Claims Presented

The PSC's Transportation Division comprises four sections: Motor Carrier, Gas Pipeline Safety,

Railroad Safety and Solid Waste. Each of these sections has different numbers of Utility Inspector Is, IIs and IIIs. Grievants are all Utility Inspectors assigned to the Motor Carrier Section. They claim that the PSC has engaged in discriminatory pay practices as the starting salaries within their section are lower than the starting salaries in the other three sections. Second, they contend that the raises issued in May 1994, were improper because they were not based upon merit, and because they were not evenly distributed. Third, Grievants contend that the PSC has violated W. Va. Code §29-6-24 by not assuring they are properly notified of all job openings. Grievants work out of their homes and the job vacancy notices have not been mailed to them. Finally, Mr. Hudnall claims that the PSC was not justified in rescinding the \$2,940.00 raise given him in May, 1994, and that the reduction in his pay amounted to reprisal.

The PSC avers that the differences in the salaries between the inspectors in the four sections are based upon the differences in the job duties; therefore, it contends that no discrimination has been shown. It also maintains that the job posting issue is now moot as it started sending job vacancy notices to the homes of the inspectors in early 1993. It contends that the raises given in May 1994, were proper and that they were not merit raises. Finally, it asserts that the deduction in Mr. Hudnall's salary was appropriate given that the initial amount of the raise was derived in error. It maintains that it would have been unfair to all of the other employees for it not to have rescinded the raise.

III.

### Discussion

#### A. Job Postings

Grievants argue that they would have bid upon and received various Utility Inspector positions had they been properly notified of the vacancies. They argue that the PSC was required to send notices of job vacancies to their home so that they would be informed of vacancies. As relief, they seek monetary damages in the amount of the differences from their respective current salaries and the salaries they would have received had they known of the various job vacancies. The record contains numerous copies of West Virginia Division of Personnel Job Postings Summaries from 1993 through 1995, copies of various Public Service Announcements of job vacancies and copies of Career Opportunity notices of the PSC. Most of these job postings contain reference to several

vacant positions throughout state government. The PSC argues that this issue is moot as it began sending notices of job vacancies to Grievants in early 1993.

Grievants are correct that pursuant to W. Va. Code §29-6-24, and the Division of Personnel's Administrative Rule, 143 C.S.R. 1.9.06, job openings in classified positions are required to be posted by the appointing authority. Both this Code Section and Rule require that job vacancy notices be posted within the building or facility where the duties of the job are to be performed and "throughout the agency." As noted, Grievants work out of their homes.

Whether it could be determined that the PSC is, and was, required to send notices of job openings to Grievants' homes pursuant to Code §29-6-24 and Personnel's Administrative Rule, Grievants have not proven by a preponderance of the evidence that they have suffered any harm. The conclusory claim that Grievants would each be in a higher paying job had they each received copies of various job postings at their home is not sufficient evidence to support a finding of monetary damages based upon a comparison of their current salaries and that of other unidentified positions. No Grievant has shown a particular entitlement to any specific position at an identified salary. To provide Grievants, as a group, with any amount of monetary damages, based upon this claim, would be entirely speculative and inappropriate.

#### B. Grievant Hudnall's 1994 Raise

Grievant Hudnall was given a \$2,940.00 raise in salary effective May 1, 1994. The PSC reduced his salary effective January 1, 1995, after learning in another employee's level two grievance hearing that his raise was as large as it was. The PSC contends that Grievant Hudnall's raise should have been \$504.00, and it made a mistake in granting him a larger raise. Therefore, it lowered his salary by \$2,436.00. The PSC argues that it was legally permitted, if not obligated, to reduce his salary after it discovered its error.

Grievant Hudnall appears to make several arguments why the PSC should not have lowered his salary. He argues that he had relied upon receiving the increased salary amount; therefore, the PSC should be estopped from reducing it. He also contends that the lowering of his salary was the result of retaliation because the error was discovered during the grievance process. Finally, he seems to aver the PSC could not establish that his raise was made in error because no documentation used in the decision-making process could be produced.

Regardless of whether the PSC produced documentation to verify that Grievant Hudnall's raise

was higher than intended, the Undersigned finds, based upon the testimony presented, that such was the case. Second, the record does not establish that the lowering of his salary was the result of retaliation because his exercise of a protected right was not the proximate cause of his salary being decreased. His salary was not lowered because he filed a grievance or participated in a grievance hearing. While Grievant Hudnall had joined the grievance filed in March 1993, there is no evidence to establish that this was the motivation for the decreasing of his salary after it was learned that a mistake had been made. His salary was decreased based upon information discovered during a grievance hearing but not because of he had joined in the grievance.

Finally, the PSC cannot be estopped from correcting its negligent act or clerical error, although it is understandable that Grievant Hudnall had come to rely upon receiving the increased salary for approximately six months. "The doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine of estoppel against the state." McFillan v. Beckeley County Planning Commission, 190 W. Va. 458, 465 (1993), citing, Samsell v. State Line Development Co., 174 S.E.2d 318 (W. Va. 1970). Here, the equities do not call for an application of the doctrine of estoppel.

#### C. 1994 Raises

In late April or early May 1994, the PSC gave its Utility Inspectors raises that it designated as merit raises. The official forms that were sent to the Division of Personnel for the approval of these raises showed that they were salary advancements/merit raises. Many Utility Inspectors received a raise of approximately \$500.00 per year, while a few employees received larger raises of between \$2,000.00 and \$3,000.00 per year, to bring their salaries to a minimum level for all inspectors. The testimony on behalf of the PSC establishes that these raises were not based upon merit; moreover, no current performance evaluations had been performed. Grievants contend that these raises should have been based upon merit, and because they were not, they were discriminated against in that they received smaller raises than other Utility Inspectors. They rely upon language contained within both the Division of Personnel's Administrative Rule, 143 C.S.R. 1, and in an undated, PSC Employees' Handbook that indicates all salary advancements are to be based upon performance, supported by performance evaluations. Grievants seek an increase in salary based upon the conclusion that all of the raises should have been comparable to the larger ones given the minority of inspectors. The PSC denies that any discrimination has been established.

The evidence establishes that the raises complained of were not intended to be merit raises. The Legislature had appropriated some additional funds to the PSC in order for it to meet its financial responsibilities for the 1994 fiscal year. Close to the end of that fiscal year, the PSC concluded that it had more money than it needed and would be required to relinquish it at the end of the fiscal year if not spent. Therefore, it gave its Utility Inspectors raises. The evidence also supports the finding that the Employee Handbook relied upon by Grievants was not in effect at this time.

Grievants do not contend that the 1994 raises should be rescinded; therefore, it is not necessary to determine whether the PSC acted appropriately under the applicable administrative regulations in giving the raises, though they were not merit raises but classified as such. [\(See footnote 1\)](#) The remedy they seek does not flow from the argument presented. Therefore, their request for relief must be denied.

Further, the argument that the raises were discriminatory must also fail. Grievants seek to compare themselves to those employees who received substantially larger raises than they. However, the key distinction is that the larger raises were given to those employees who were not paid consistent with what the PSC thought the minimum salary should be for the position of Utility Inspector I, \$18,000.00. Grievants have not established that they were not paid at this level at the end of the 1994 fiscal year. Therefore, they have not established that they were treated differently than other similarly situated employees.

#### D. Salary Compared to other Utility Inspectors

##### 1. Starting salary

Grievants, all Utility Inspectors assigned to the PSC's Motor Carrier Section in its Transportation Division, claim that they are being discriminated against because the starting salaries for positions within their section have been lower than the starting salaries for positions within the other three sections. They claim that their current salaries are also lower than those of the other inspectors because of the cumulative effect of having been assigned lower starting salaries, plus being granted lower pay raises. They seek to have their salaries increased to levels comparable with that of the other inspectors, attorney fees and an order prohibiting the PSC from maintaining discriminatory pay practices. The PSC denies that any discrimination exists between the salaries paid to the various inspectors in the four divisions. It also argues that its Utility Inspectors are not required to be paid consistent with the Division of Personnel's pay plan because it has exempted them from coverage by

general order. Boyce Griffith, the PSC's chairman testified that he attempts to pay all of the inspectors consistent starting salaries.

The majority of Utility Inspectors hired by the PSC have started as Utility Inspector Is. The Motor Carrier Section also has the most employees, and the most Utility Inspector Is, twenty-three. The Solid Waste Section has been assigned seven Utility Inspector Is. The evidence establishes that the highest starting salary given to a Utility Inspector I in the Motor Carrier Section was \$16,656.00. This employee was hired on August 3, 1992. The highest starting salary of any Utility Inspector I assigned to one of the other three sections was \$23,604.00, and this employee was hired on March 31, 1992. Only two Utility Inspector Is have been hired into the Railroad Safety Section, one was hired on October 16, 1991, at a salary of 22,608.00, and the other was hired on November 1, 1991, at a salary of \$19,536.00. [\(See footnote 2\)](#)

The first Utility Inspector I hired within the Motor Carrier Section was hired on August 2, 1971, at a salary of \$6,840.00. Next, the PSC hired an employee for the Railroad Safety Section on March 1, 1972 at the same salary. The next employee was hired on May 03, 1977 at \$7,656.00. After that, most Utility Inspector Is were hired between 1982 and 1993. Eight employees were hired between 1985 and 1987 at \$12,768.00; one of these employees was assigned to the Gas Pipeline Safety Section (the only Utility Inspector I who started in this section). Ten employees, including three in the Solid Waste Section, were hired between 1991 and 1993 at the same salary, \$14,424.00, while nine other employees have been hired between 1991 and 1993 at a salary higher than \$14,424.00. Of approximately thirty-six Utility Inspector Is who have been hired by the PSC, many of them have started at the same or comparable salaries to their peers hired at similar times. However, of those employees, six of the eleven hired but not assigned to the Motor Carrier Section have started at a salary of greater than \$19,000.00. Also, none of these six employees was hired after August 3, 1992, when the Utility Inspector I hired in the Motor Carrier Section with the highest starting salary (\$16,656.00) was hired.

Pursuant to W. Va. Code §24-1-1(f)(5), the PSC has the authority to exempt its employees from the "salary schedules or pay plan" adopted by the Division of Personnel under Code §29-6-10. The PSC has exempted the Utility Inspectors positions from the Division of Personnel's pay ranges and has established, by General Order, pay ranges of its own for these classifications. In 1982, the pay range for Utility Inspector I was set at \$12,768 to \$23,040.60. In 1991, this range was changed to

\$14,424.00 to \$25,212.00. [\(See footnote 3\)](#) Between 1982 and 1991, most of the Utility Inspector Is were hired at or slightly above the starting salary of \$12,768.00. In 1991 and thereafter, ten employees were hired at the minimum for the position or slightly higher, and eight employees were hired at a salary significantly higher. Of these eight employees, two were assigned to the Motor CarrierSection and given salaries of \$15,756.00 and \$16,656.00. Of the other six employees, the lowest starting salary was \$19,400.00.

It is not readily apparent from the testimony of Commissioner Griffith whether the PSC has exempted its Utility Inspectors from the pay plan **and** salary schedules of the Division of Personnel. Copies of the PSC's General Orders establishing its Rules of Reorganization were introduced into the record. The latest Order, dated April 27, 1995, contains the following findings of fact and conclusion of law:

#### Findings of Fact

1. The Commission believes it is necessary that its existing pay scales for its exempt employees be upgraded to reflect current conditions.
2. In 1993, the Division of Personnel undertook a reclassification of all Commission employees, which resulted in changes in job titles and salary ranges.
3. Following an appeal of the Commission, the Division of Personnel agrees that Personnel's pay ranges would not apply to the Commission's exempt employees.
4. This order is issued, in part, to clarify the exempt employees by their new job titles and Commission salary range.
5. This order adopted as a range, the current minimum and the maximum range as set forth in General Order 195.20, adjusted by 105%.
6. Regarding job titles, the Commission has simply translated the old, previously exempted titles to their new titles. No new class of employee has been exempted.

#### Conclusion of Law

The Commission concludes, as a matter of law, that it is reasonable for its [sic] to establish the annual salary ranges reflected in attachment A for its exempt employee positions as provided for under West Virginia Code §2[4]-1- 1(f)(5) and West Virginia Code §24-1-4.

The previously adopted General Orders included in the record contain substantially similar findings and conclusions. Based upon the language of these General Orders, it is found that the PSC has



exempted its employees in the Utility Inspector classification series from the salary schedules adopted by the Division of Personnel. It is further found that the PSC hasnot exempted these positions from coverage of the Division of Personnel's entire pay plan. Therefore, the rules on starting or entry salary, pay on promotion, demotion, reclassification, etc., are still applicable to the PSC.

[\(See footnote 4\)](#)

At first glance, it appears that Grievants are correct that the Utility Inspectors in the Motor Carrier Section have been started at lower salaries than inspectors in the other three sections of the Transportation Division. However, upon a closer review, apparently the only significant differences in starting salary can be traced to the six positions referenced above. The documentary evidence from the PSC's personnel files is not sufficient for the Undersigned to determine why these six individuals were paid higher starting salaries than their peers. [\(See footnote 5\)](#) Also, there was no explanation given by any of the PSC's witness to explain or justify the salary given these employees. There is no evidence that the nature of the work these employees perform is different from that of any of the other Utility Inspectors. The statistical evidence, the Utility Inspector I classification specification and various documents from the inspectors' personnel files represent the majority of the evidence presented on behalf of Grievants to support their claim on this issue.

Although Grievants have submitted evidence to show that some Utility Inspector Is hired by the PSC have been started at higher salaries than their peers in the Motor Carrier Section of the Transportation Division, they have not established by a preponderance of the evidence that they have been victims of discrimination. Generally, pursuant to the Divisionof Personnel's Administrative Rule, classified employees are to be hired and are hired at the entry level salary for their classifications. The PSC has followed this practice for many of its Utility Inspector Is by hiring them at the entry level of the salary range it has created pursuant to general order. However, classified employees may be hired above the minimum salary, pursuant to the Division of Personnel's rule, if certain circumstances exist. Employers may start newly-hired employees at salaries above the minimum, up to or above the minimum dependent upon the individual's qualifications above those established for the position or upon substantiated severe or unusual hiring difficulties. Grievants have not shown that such was not true in regard to the six employees who have been started at substantially higher salaries than they. Therefore, their argument on this issue cannot be upheld.

## 2. Current Salary

Grievants contend that the PSC has discriminated against them by paying the Utility Inspectors in the other three sections higher salaries. They assert that the difference in salaries is based upon starting salaries being higher for those in other sections and larger raises being given to those in the other sections over time. [\(See footnote 6\)](#) Again, the PSC simply denies that any discrimination has occurred.

It has been recognized that a state employee's salary, at any given time, is a product of his history of employment and changes to his starting salary. Salmons v. W. Va. Dept. of Trans., Docket No. 95-DOH-004 (Apr. 20, 1995); Tomlinson v. W. Va. Dept. of Trans., Docket No. 94-DMV-209 (Oct. 20, 1994). Grievants have presented salary figures for all of the Utility Inspectors employed by the PSC and the date of each employee's last raise that was given in either 1991 or 1992. The documents also establish the amount of the raise for each employee. It is noted that all these raises were not the same. The majority were classified as merit raises, but others were given as a result of the employee gaining permanent status, having transferred from one section to another, or having had his position reclassified. The salary information also covers all three positions within the Utility Inspector series.

Again, Grievants basically contend that the salary information speaks for itself. It is understandable how a Utility Inspector assigned to the Motor Carrier Section would question the salary he/she receives after looking at a list of the salaries of the other inspectors. For example, there are only three (out of twenty-two) inspectors making less than \$20,000.00 per year in the other three sections combined. And while it is true that these three employees are Utility Inspector Is, there are twenty inspectors in the Motor Carrier Section who make less than \$20,000.00 per year. This includes seven Utility Inspector IIs who were all employed prior to the date the three Utility Inspector Is who make more than \$20,000.00 were hired. Further, of the nine Utility Inspectors who were found eligible and who received a merit raise in 1991, who work in either the Gas Pipeline Safety and Railroad Safety Sections, the lowest raise was \$900.00. However, only five out of twelve Utility Inspectors in the Motor Carrier Section received a raise greater than \$900.00 at the time of their last increase. In general, the salaries for the Utility Inspectors in the three sections other than Motor Carrier may be higher than those in Motor Carrier.

Even though Grievant's concerns are understandable, the evidence does not establish that their salaries have been the product of discrimination. The evidence in no way explains how any of these employees have come to make the yearly salaries they do. Grievants have each received more than

one salary increase since their date of hire. A cursory review and comparison of their salaries, at a set point in time, with that of other employees, cannot support a finding by a preponderance of the evidence that they have been discriminated against. Even in the classified service of state government, governed by the many regulations of the Division of Personnel, all employees holding the same classification with similar years of service do not receive identical salaries. Salaries can vary based upon many factors and Grievants have not established that the differences in their salaries, when compared to those of other PSC employees, are not based upon permissible factors. Therefore, this claim is denied.

### Findings of Fact

1. As of early 1993, Grievants have received copies of all notices of job openings, by mail, at their homes.
2. Effective January 1, 1995, Grievant Hudnall's salary was reduced by \$2,436.00 per year, as his salary was increased by that amount, by mistake, effective May 1, 1994.
3. The raises given by the PSC to its Utility Inspectors in April or May, 1994, were not intended to be merit raises although they were designated as such.
4. Through the raises referred to in finding of fact number 3, the PSC assured that the salaries of all of its Utility Inspectors were at least \$18,000.00 per year.
5. Generally, the PSC attempts to hire Utility Inspectors at or near the minimum annual salary that it has adopted for those positions.
7. Not all of the Utility Inspectors employed by the PSC make comparable salaries based solely upon a comparison of their hire date and work section assignment.
8. The PSC, by General Order, has exempted its Utility Inspector positions from coverage under the Division of Personnel's salary schedules.

### Conclusions of Law

1. Grievants bear the burden of proving their claims by a preponderance of the evidence. W. Va. Code §29-6A-6.
2. Grievants' claim concerning a violation of W. Va. Code §29-6-4 is moot.
3. Assuming Arguendo, Grievants' claim that they should have received notices of job openings at

their homes is not moot, their claim for damages resulting from any alleged violation of W. Va. Code §29-6-4 has not been established to a reasonable degree of certainty.

4. Grievant Hudnall has failed to establish any violation, misapplication or misinterpretation of law with regard to a reduction in his salary effective January 1, 1995.

5. Grievants have failed to establish that they have been discriminated against with regard to either their starting or current salaries. See, Goff v. State Board of Education, Docket No. 93-DOE-446 (Sep. 9, 1994).

Therefore, this grievance is hereby **DENIED**. 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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**ALBERT C. DUNN, JR.**

**Administrative Law Judge**

**February 28, 1996**

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[Footnote: 1](#)

*The evidence establishes that the PSC submitted the appropriate Personnel Action Forms to the Division of Personnel to have these raises approved. These documents requested that the raises be approved as salary advancements/merit raises. Obviously, the Division of Personnel approved these requests. The appropriateness of this action is not at issue.*

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[Footnote: 2](#)

*One other employee was hired in 1972 as an Inspector I at a salary of \$6,840.00. This employee, based upon his hire date and classification is not considered to be similar for purposes of this discussion.*

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[Footnote: 3](#)

*In 1995, this range was changed to \$15,060.00 to \$26,473.00.*

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[Footnote: 4](#)

See 143 C.S.R. 1, Section 5, entitled Compensation Plan and Salary Regulations.

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[Footnote: 5](#)

*The evidence shows that one of these six employees transferred from the Lottery Commission to the PSC. This employee's salary was substantially higher at the Lottery Commission than the starting salary paid by the PSC.*

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[Footnote: 6](#)

*Interestingly, although the grievance in 1994 styled Doss, et al. v. PSC, concerned the issue of merit raises given in 1994, the amounts of these raises were not made part of the record. It appears that most of the Utility Inspectors recieved a raise near the amount of \$500.00. See, level two transcript, 2/21/95, grievance of Barry Hudnall.*