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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
GASTON CAPERTON  
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**SAMUEL R. LEGG**

**v.**

**Docket No. 90-H-461**

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES,  
DIVISION OF HEALTH -and- WEST VIRGINIA DIVISION OF PERSONNEL**

**DECISION**

Samuel R. Legg, a Health Service Worker (HSW) for Respondent West Virginia Department of Health and Human Resources, Division of Health (Health), initiated the following claim at Level I on September 7, 1990:

Due to an error on behalf of personnel, [G]rievant was denied equal pay for equal work of other Health Service Workers. Grievant prays that equal pay be granted with any and all back-pay due.

After denials there and at Level II, both without discussion of substance due to lack of authority, Grievant advanced his claim to Level III. At Level III, Grievant's complaint was addressed and made the subject of a hearing and decision; however, the evaluator, citing inability to rule without the participation of the West Virginia Division of Personnel (Personnel) since Personnel was the agency with control over state employees' "compensation plan and promotion process,"

expressed only rather general thoughts on the merits thereof.<sup>1</sup>

This case was advanced to Level IV on October 24 and a hearing was convened on December 7. At the hearing, this Grievance Board was for the first time presented with a copy of the Level III decision. Through it and the evidence adduced that day including the testimony of Health's witness Lowell D. Basford, Personnel's Assistant Director (Classification and Compensation), the undersigned gained an understanding of Personnel's relationship to this case; however, not until post-hearing reflection did it become apparent that Personnel was an indispensable party-respondent. Accordingly, Personnel was so joined, pursuant to WVESEGB Rule 4.11, and advised of the opportunity to review the total record including that at Level IV and to itself participate in a supplemental hearing. It declined that opportunity and specifically stated it would stand on the record and the arguments posed by Health.<sup>2</sup> Grievant and Health agreed to submit fact-law proposals by January 25,

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<sup>1</sup> Either or both Grievant and/or Respondent should have taken steps to effect Personnel's joinder at least by Level III. However, remand for correction of this error, at this point following Level IV hearing, would certainly be an imprudent action and will not be ordered. See State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 438 (W.Va. 1986).

<sup>2</sup> Neither Grievant nor Health expressed a desire to present additional evidence or argument in light of Personnel's joinder.

1991, and the case has since then been ready for disposition.<sup>3</sup>

Grievant's case is easily explained. He applied for a position with Health in response to a vacancy notice for HSW/HSW Trainee. This precipitated his meeting with a Personnel counselor at a statewide testing center in the Charleston area. Originally, he was interested in a Trainee job; however, when the counselor learned Grievant had previous work experience in a health-related setting and that he met threshold requirements to enter employment as a full HSW, at a higher salary than a Trainee, she recommended that he instead take the qualification test for HSW. It was stipulated that this examination is not the one required of Trainees and that, even now, were Grievant to specifically seek a separate HSW Trainee job, he would need to take Personnel's Trainee test. It was also stipulated that under such a HSW/HSW Trainee vacancy notice, Health is not required to hire any certain number or percentage of either HSWs or Trainees but, as openings occur, may hire in either or both categories as appropriate based upon applicants' qualifications and desires. Finally, the uncontroverted testimony is that there is almost no distinction between HSW and Trainee in terms of job duties. It was noted that a new

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<sup>3</sup> Grievant's proposals were not received until January 28, although they were mailed January 25. Despite the slightly-belated filing, they have been considered.

HSW with background, like Grievant, still needs orientation to unfamiliar duties, and that some Trainees, even those without related experience, catch on so quickly that they very shortly need little supervision.

Several persons were hired as Trainees under the same vacancy notice Grievant answered. They began employment with Health at a salary lower than Grievant's, and after one year, they were all promoted to HSW status. Upon their promotion, they were given the one-step salary increase required by Personnel's Rules and Regulations; this raised their annual salary to an amount higher than Grievant's, and this is the crux of his complaint.<sup>4</sup> Grievant claims that the Personnel counselor should have advised him that, even though his salary would be lower for a year, he would have a salary higher upon promotion from Trainee to HSW than that he would earn after a year if he started work as a HSW.

Mr. Basford testified that one who was familiar with applicable Personnel regulations would have known, at the time Grievant and the Trainees were hired, that this scenario would unfold. However, he opined that it is not the

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<sup>4</sup> Grievant was hired at Pay Grade 5, Step 1E, and the Trainees in question started at Pay Grade 3, Step 1E. At the end of six months of service, both Grievant and the Trainees were advanced to Step 1P in their respective pay grades. Following one year of service, Grievant remained at a Pay Grade 5, Step 1P, while the Trainees were promoted to HSW status, Pay Grade 5, Step 1A.

Until the Trainees became full HSWs, their salaries were lower than Grievant's; upon their promotion, they were making \$709.00 more per annum than he.

role of Personnel's counselors to be familiar with and/or to disseminate such information in the pursuit of their duties; rather, the counselors are to attempt to assist applicants with the job search. Their task, continued Mr. Basford, includes advising candidates on the most advanced position classification and thus the highest-possible starting salary for which they qualify. Grievant's unwavering testimony is that, had he known of this disparity, he would have persisted in his original aim to become a HSW Trainee, taken a lower salary for the first year, and arrived at the higher level thereafter.<sup>5</sup>

Grievant is not specifically attacking any of Personnel's Rules and Regulations herein; rather, he is complaining that Health, or Personnel as Health's agent, should have provided him with all applicable information about the Rule prior to his choosing the HSW over the Trainee option. It is always appropriate for this Grievance Board to review a situation to discern whether or not an employer, whether that be an employee's direct (in this case, Health) or statutory (in this case, Personnel, see, e.g., Hayes v. DNR & CSS, Docket No. NR-88-038 (Mar. 28, 1989)) employer has engaged in an unfair and remediable "aggrieved application of. . .practices," Code §29-6A-2(i), i.e., an abuse of its

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<sup>5</sup> No timeliness defense was raised, and even if it had been, it is accepted that Grievant initiated this claim shortly after becoming aware that the newly-promoted HSW's were being paid at a rate higher than his own.

discretion. It appears that Personnel indeed abused its discretion in this scenario. Grievant was eminently believable; it is accepted that had full career information been disclosed to him, he would have taken the Trainee path for the first year of employment with Health. This Decision should not be read to indicate that Personnel abuses its discretion each time one of its counselors fails to provide an applicant with information relevant to state employment; such determinations must be made on a case-by-case basis. In this situation, the subject is not a peripheral or distant factor, but one directly relevant to the advice upon which Grievant relied to pursue the HSW and not his originally-pursued Trainee route. Simply put, the counselor not only should have been aware of Grievant's immediate-future prospects in this regard, he should have informed Grievant thereof. Mr. Basford protested that several thousand folks are met with by only a few counselors each year; this is accepted, and it is further accepted that there was no ill intent on the part of the counselor or Personnel itself. Personnel's even-innocent negligence in not ensuring its counselors' familiarity with and publication of its own Rules, however, to the extent that they were so basic and pertinent to Grievant's hiring as HSW instead of as Trainee, is great enough to sustain this finding of abuse of discretion.

An appropriate remedy must be fashioned. See Code §29-6A-5(b). Grievant should not have to suffer the loss of

salary occasioned by the incomplete advice he received; however, that conclusion has an important corollary: Grievant should also not be permitted to retain the difference between HSW and HSW Trainee salary during his initial year of employment, since such would, under the facts of this case, be tantamount to "unjust enrichment." Therefore, Grievant is ordered to forthwith raise Grievant's salary to the level of the newly-promoted HSWs who were hired as Trainees under the same vacancy notice as Grievant; to provide Grievant with an amount of money to cover the salary differential from the time of their advancement to HSW status until Grievant's salary is raised; and to offset this award to Grievant by the difference in salary he received above the then-HSW Trainees during his first year of employment. In other words, Grievant's compensation package, from the time of his initial employment with Health, should be recomputed as if he had entered work as a HSW Trainee and been promoted to a HSW at the end of one year. If in these circumstances Grievant is required by Personnel to complete the HSW Trainee test, he shall be given opportunity to do so within two weeks of the date of this Decision. In addition to those contained in the foregoing, the following findings and conclusions are made.

#### FINDINGS OF FACT

1. Grievant is a Health Service Worker (HSW) for the West Virginia Department of Health and Human Resources, Division of Health (Health). During his tenure with Health,

he has always been a HSW, although he originally applied for a HSW Trainee position under a vacancy announcement titled "HSW/HSW Trainee."

2. In conjunction with this application, Grievant met with a West Virginia Division of Personnel (Personnel) job counselor. The counselor, learning that Grievant had a health-care background, urged him to instead take Personnel's test for HSW, which was different from the HSW Trainee test. Grievant did so and was hired in the higher-paying HSW position; several other persons were hired as HSW Trainees under the same notice.

3. After the end of one year's service, these HSW Trainees were promoted to full HSWs. At that time, their salary was increased to an amount in excess of Grievant's wages. The Trainees' promotion and their resultant wage levels was required by Personnel's Rules and Regulations which have been effective at all times pertinent hereto.

4. Had Grievant known that had he kept to his original course of becoming a Trainee, his salary after one year would have been higher than that of one who entered Health's service as a HSW even though the HSW's pay was greater for that first year, he would have persisted in that original course.

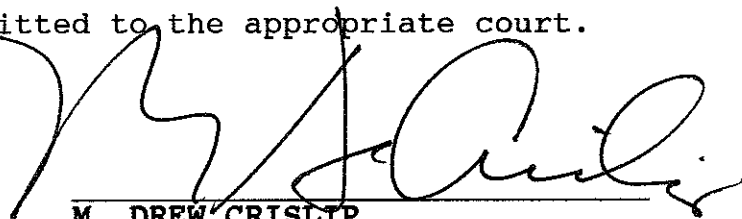
#### CONCLUSION OF LAW

Personnel's failure to ensure that its job counselor was familiar with its basic Rules and Regulations and that

he had published those, as discussed in this Decision, to Grievant, was an abuse of its discretion.

Accordingly, this grievance is **GRANTED**. Respondent is ordered to take action as set forth in the last paragraph of the narrative portion of this Decision.

Any party may appeal this decision to the Circuit Court of Mason 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: January 28, 1991