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**LARRY PARSONS**

v.

Docket No. 91-DOH-414

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/  
DIVISION OF HIGHWAYS and  
WEST VIRGINIA DEPARTMENT OF ADMINISTRATION/  
DIVISION OF PERSONNEL**

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

Grievant Larry Parsons, employed by Respondent West Virginia Division of Highways (DOH) as a Maintenance Crew Leader I (MCL-I), on April 22, 1991, filed this claim for reclassification and backpay. It was denied at the lower levels and Grievant appealed to Level IV. The West Virginia Division of Personnel (Personnel) was added as a respondent prior to hearing and hearing was held December 9, 1991. At that hearing Grievant represented himself, as he has throughout these proceedings.<sup>1</sup>

While Grievant alleges that he has been working out of classification, doing the work of a Maintenance Crew Leader II (MCL-II), since November 1988, his testimony supports that the only time he consistently did the work of an MCL-II

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<sup>1</sup>No brief was received from Grievant. Briefs were received from Personnel and DOH on February 11 and 12, 1992, respectively.

was throughout calendar-year 1989. He stated that an Assistant Supervisor for a county does the work of an MCL-II and he was given the duties of an Assistant Supervisor while that slot was vacant in Lincoln County ("I was on call all the time. I worked all the crews, both substations; I worked th[ose] people calling out emergency situations and when the county supervisor went on vacation I was in charge."). That is, the prior Assistant Supervisor retired at the end of 1988 and the county was without one until January 1990, at which time Grievant's duties were reduced back to those of an MCL-I.

Respondents are in agreement that the hallmark of the MCL-II classification is that its holder supervise two crews of workers, while an MCL-I is in charge only of the one crew he works with.<sup>2</sup> While they do not concede that Grievant was carrying out the duties of an MCL-II during 1989, they submitted no evidence contradicting Grievant's testimony that he was doing such work. Rather, at issue on the merits of the claim is whether Grievant is entitled to full backpay and reclassification. DOH claims, moreover, that the merits should not be reached because the claim was untimely in that it was not filed within ten days of when Grievant last worked out of classification, see W.Va. Code §29-6A-4; that

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<sup>2</sup>Whether that is strictly consistent with the specifications for the classifications need not be analyzed here, accordingly.

is, DOH claims that he was required to file at the latest in January 1990.

The essential facts on the timeliness issue can be readily stated. In October 1988 Grievant began proceedings under the Civil Service System Classification Review Policy, requesting reclassification to MCL-II. The request was approved by DOH's in-house personnel office, which began paying Grievant the higher salary, but was disapproved by the West Virginia Civil Service Commission (since 1989 Personnel) and, effective January 2, 1989, Grievant's salary was readjusted to the original level.<sup>3</sup> Cynthia Morrison, Clerk at the Lincoln County Maintenance Office, testified at Level IV<sup>4</sup> that, upon being directed by DOH's "personnel office" to do the paperwork necessary to remove the raise, at Grievant's behest she asked

what steps that you [Grievant] could go through after that, if you could file a grievance, and she said that we can't tell you that you couldn't file a grievance, because that's your right, but there would be no purpose in it since the same people that the misclassification went through would be the same people that the grievance [would go] through; it wouldn't change. It would go through the same hands. The grievance would go through the Division of Highways.... I called the District Engineer's office [that of Samuel Beverage] and was told the same thing, that the grievance procedure would go through the same steps as the misclassification and therefore the answer would be the same; there would be no purpose in filing a grievance.

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<sup>3</sup>While the record is not clear, apparently Grievant was not required to repay the additional salary he had been already paid.

<sup>4</sup>The quotation is prepared upon the undersigned's listening to the taped record.

At Level III she had testified consistently, there indicating that the individual she spoke to in DOH's personnel office was Lois White, although she did not state what position Ms. White filled. Grievant's testimony at Levels III and IV was consistent and in agreement with Ms. Morrison's as to what she relayed to him. He also testified that, upon being advised properly about the viability of a misclassification grievance, he filed this grievance.

DOH proposes the following conclusions of law:

Ignorance of the existence of the grievance procedure for state employees will neither toll no[r] excuse the failure to file a timely grievance. Gaskins v. Department of Health, Docket No. 90-H-032 (April 12, 1990).

The facts and circumstances in this case do not indicate that the Respondent [DOH] should be equitably [e]stopped from relying on a timeliness defense since there is no evidence that a managerial employee promised the matter would be rectified or even that a conversation was had with a managerial employee. [5]

It has been held by the Supreme Court of Appeals of West Virginia that equitable estoppel may be available "if

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<sup>5</sup>DOH's brief also notes, "At or around this same time period, a grievance in the Lincoln County organization was being processed through the fourth level. Elkins v. Department of Highways, Docket No. 89-DOH-93 (July 13, 1989)." While Larry Pauley, DOH's Lincoln County Supervisor in 1989, testified that it was "common knowledge" that Ms. Elkins was pursuing a grievance, there was no evidence that Grievant knew about Ms. Elkins' case, for he was not asked about it at hearing. It is further noted that Mr. Pauley's testimony failed to indicate in any case that it was known that Ms. Elkins' case involved an alleged misclassification and, finally, there is no indication in the Elkins decision that Ms. Elkins, prior to filing her grievance, had processed a claim through the reclassification procedures, as had Grievant.

the employee's otherwise untimely filing was the result ... of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge"; estoppel may be granted where the employee establishes "actual and reasonable reliance on the defendant's [employer's] conduct or representations[.]" Indep. Fire Co. v. Human Rights Com'n, 376 S.E.2d 612 (1988).<sup>6</sup> DOH is correct that the information relayed by Ms. Morrison may not have come from a proper managerial employee. The issue is not, however, whether the individuals with whom Ms. Morrison spoke in the two offices actually had authority to provide information on grievances. Rather, at issue is whether they "should unmistakably have understood" the information would delay Grievant's filing and whether Grievant reasonably relied on that information. Based on the testimony presented it is determined that both issues must be decided in Grievant's favor. This matter is not like Gaskins, where the employee's supervisor essentially advised her that no relief would be administratively available; the implication was that her only recourse was pursuant to a grievance. Here, Grievant was advised that pursuing a grievance itself would be purposeless; this case has parallels to Moore v. Mason County Bd. of Educ., Docket No. 26-88-210 (Mar. 1, 1989), where the employee waited to file her grievance

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<sup>6</sup>While that case involved filing a claim before the West Virginia Human Rights Commission, the same principles may apply to a grievance. See discussion in Gaskins.

because her supervisor told her an earlier filing was improper.<sup>7</sup> Equitable estoppel is accordingly appropriate in this matter.

On the merits DOH proposes,

An employee who, with full understanding that he has no guarantee of related additional compensation, voluntarily agrees to "fill in" at a higher classification level for an interim period may not later successfully claim that he should have been classified at that level for that time. Thornton v. West Virginia Workers' Compensation Fund, Docket No. 90-WCF-077 (December 26, 1990).

As DOH's proposal recognizes, an employee is not entitled to further compensation for accepting a "fill-in" slot with no expectation of additional pay; the hallmark of such an agreement is that the employee is free not to accept the additional duties. See also Freeman v. W.Va. Dept. of Health and Human Resources, Docket No. 90-H-237 (Dec. 26, 1990); Wolfe v. W.Va. Tax Dept., Docket No. T-88-011 (July 28, 1989). It is here held that, where a grievant has established that he worked out of classification, doing the duties of a higher classification, his employer has the burden of establishing that he agreed to "fill in," *i.e.*, that in essence he accepted the extra duties without expectation of additional compensation. No such showing was made

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<sup>7</sup>DOH's contention that "there was no evidence that a managerial employee promised the matter would be rectified" is misplaced. While such assurances of an employer to its employee can support equitable estoppel, see Steele v. Wayne Co. Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1989); Blevins v. Fayette County Bd. of Educ., Docket No. 10-87-161 (Oct. 22, 1987), the appropriateness of equitable estoppel is not limited to those circumstances.

here. Grievant is accordingly entitled to additional compensation for carrying out HCL-II duties during 1989.<sup>8</sup>

Grievant argues that, even though his duties have been changed back to those of an MCL-I, he is entitled to reclassification. He presents no support for such contention and none is found. As Personnel argues in its brief, the definition of "Demotion" of Section 3 of the Administrative Rules and Regulations of the West Virginia Civil Service System recognizes that an employee's classification can be lowered due to changes in duties.<sup>9</sup>

There is a final issue in this matter. At the Level IV hearing Grievant also contended that his application for the Assistant Supervisor position was not properly considered. Respondent objected, contending the issue had not been raised at the lower levels and that any such claim would be untimely. Upon ascertaining that Grievant had not

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<sup>8</sup>Grievant conceded that he was given a temporary upgrade to HCL-II during the last part of 1989, although the record is clear that his temporary upgrade was not for the full ninety days allowed for such. The backpay due him would accordingly be the difference between his HCL-I wages and the HCL-II wages for the time in 1989 he was not earning HCL-II wages.

<sup>9</sup> Demotion: A change for cause in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower step in the pay range assigned to the classification. The two types of demotions are a) Disciplinary Demotion.... (b) Demotion without Prejudice - A change in classification of an employee to a lower classification or a reduction of pay due to work necessity.

previously made the argument, the undersigned stated that she would consider in her decision whether Grievant could raise the issue as he did.

The following is determined: Grievant's contention clearly constitutes a claim utterly separate from the grievance at issue here and there is no statutory basis for raising such issue at Level IV. Accordingly, should Grievant wish to pursue the issue he must bring a new claim at Level I and, in that he did raise it the day of the Level IV hearing, December 9, 1991, should such a grievance be filed (and he must do so if at all within ten working days of receipt of this decision), it will be considered to have been filed December 9, 1991. DOH's contention of untimely filing may have validity since the Assistant Supervisor position was filled in December 1989; however, in that Grievant may be able to establish that tolling or equitable estoppel are appropriate, see Indep. Fire Co. v. Human Rights Com'n, he is not foreclosed from filing the grievance.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

#### Conclusions of Law

1. Equitable estoppel is granted in this matter pursuant to the principles enunciated in Indep. Fire Co. v. Human Rights Com'n, 376 S.E.2d 612 (W.Va. 1988); that is, the evidence established that the employees of DOH who

advised Greivant erroneously that his grievance would be decided by the same individuals who had rejected his request for reclassification under the Civil Service System Classification Review Policy should unmistakably have understood that imparting that information would cause Grievant to delay his filing a grievance and Grievant actually and reasonably relied on their representation that filing a grievance would be pointless.

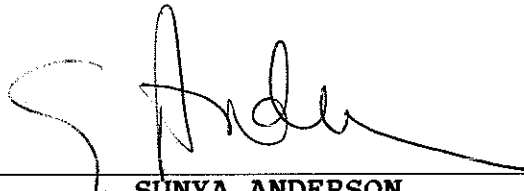
2. Grievant established he was working out of classification, doing the duties of a Maintenance Crew Leader II while classified as a Maintenance Crew Leader I, during calendar year 1989, when the position of Assistant Supervisor for Lincoln County was vacant.

3. Where a grievant establishes that he has been working out of classification, he is entitled to any appropriate backpay unless his employer establishes that he voluntarily "filled in," as enunciated in Thornton v. W. Va. Workers' Comp. Fund, Docket No. 90-WCF-077 (Dec. 26, 1990), Freeman v. W.Va. Dept. of Health and Human Resources., Docket No. 90-H-237 (Dec. 26, 1990), and Wolfe v. W.Va. Tax Dept., Docket No. T-88-011 (July 28, 1989). The evidence did not establish that Grievant so voluntarily filled in during the vacancy of the Assistant Supervisor.

4. In that the duties of a Maintenance Crew Leader II were removed from Grievant at the beginning of January 1990, he has established no basis for the requested relief of reclassification to that classification.

Accordingly, the grievance is **GRANTED** insofar as Grievant has established entitlement to compensation in the amount of the difference between what he was paid in 1989 and what he would have been paid as a Maintenance Crew Leader II for that year. The grievance is otherwise **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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**SUNYA ANDERSON**  
**ADMINISTRATIVE LAW JUDGE**

March 17, 1992