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**LOWELL SATTERFIELD**

**v.**

**Docket No. 91-ENGY-070**

**WEST VIRGINIA DIVISION OF ENERGY**

**DECISION**

After working from October 1988 on a temporary, ninety-day basis, Grievant was regularly employed by Respondent West Virginia Division of Energy<sup>1</sup> as a Technical Assistant (TA) in its Abandoned Mine Lands and Reclamation Section (AML or Section) in December 1988. Grievant complains at level four that, throughout his employment, he was misclassified as a TA while performing the duties of an Abandoned Mine Lands Construction Inspector (AMLCI, CI or Inspector) until his reclassification, sometime after filing this grievance, as an Environmental Inspector (EI), effective August 16, 1991. Grievant seeks \$18,340.04 in back wages and a monthly increment of \$471.00 per month from August 16, 1991, until Respondent equalizes his salary to that of his peers performing comparable duties.

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<sup>1</sup>Subsequent to the filing of this grievance, this entity was officially renamed the West Virginia Division of Environmental Protection.

Some background information is necessary. In late August 1988, a State civil service report reflected that Grievant had tested for a CI position. According to the report, Grievant's eligibility for an entry-level CI position (at Step 1-E for \$16,572.00 per year) was dependent upon "verification of 120 semester hours." Resp. Ex. No. 15. At that time the CI title was ranked at Pay Grade (PG) 16. When Respondent employed Grievant to work in its AML "Emergency Program" in Fairmont, West Virginia, as a TA at PG 14 in late 1988, it ranked him far above that position's entry-level Step 1-E of \$15,132.00 per year; instead, it placed him at Step 8 (out of twelve possible steps) for an annual post-probationary salary of \$21,456.00.<sup>2</sup> Grievant made no claim throughout this action that he possessed the requisite qualifications for a CI position or rating at the inception of his employment.

In late August 1990, Respondent posted and Grievant applied for a position as a CI. The vacancy was filled by a present CI via lateral transfer. The vacancy thereby created was posted perhaps on two or more occasions, the last time in October 1990, and Grievant again applied. However, the second vacancy was not filled. In the same time-frame, October 1990, Respondent petitioned the West Virginia Division of Personnel (Personnel) for permission to update its inspectors and related supervisory positions, due, in part, to the reorganization within State

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<sup>2</sup>At the time Grievant was hired, a TA's maximum salary was \$27,627.00 while a CI's was \$30,285.60.

government and other factors. It proposed to eliminate its "redundant job classes" by deleting eight inspector/supervisory titles/positions and concurrently creating only four. In mid-December, Grievant became aware that Personnel had approved Respondent's proposal to upgrade the CI and other Inspector classes to EI, PG 18. Shortly thereafter, Grievant filed the within action in late December 1990.

Apparently, Grievant determined that since he had not been selected for the CI vacancy, he would not benefit from the ensuing two-PG upgrade from CI to EI. Grievant stated in his lengthy, typewritten complaint via eighteen separately-numbered "counts" that he had been the victim of discriminatory hiring practices and other employment-related injustices. Among other things, he claimed that he was well qualified for the sought-after CI position and noted that he had temporarily "held the title" of CI from October until December 1988, had acquired "hands-on experience" as a CI during his two-year tenure as a regular employee and had obtained "additional training and schooling, pertaining to the position of" CI since October 1988. He also asserted that political motivation prompted Respondent's actions in transferring an employee already holding a CI title to the vacant Inspector's position, i.e., that some employees with union alliances were favored while he, who had no such connections with the "labor union which represents state employees," was deliberately being deprived of advancement possibilities within the agency. He continued that, in any event, the original CI vacancy "still exists" because Respondent "cannot

fill a vacancy with a person of the same classification or title."

In addition, Grievant also accused Respondent's "officials" of having past and present affiliations with the United Mine Workers of America and of having included him on "their hit list, which is known to exist." He sought advancement to EI at the Fairmont office and "the highest rate of pay for this classification, with an automatic five percent merit raise, annually." He also raised other discrimination-based complaints and requested that he be given the proper tools and equipment to perform his work, including uniforms, coats, boots, and vehicle supplies, as he contends other inspectors and supervisory employees performing similar duties have.<sup>3</sup>

On January 8, 1991, David Broschart, Grievant's supervisor, answered the grievance, count by count, in a three-page, type-written response. Mr. Broschart generally denied wrongdoing and labor-union influences on Respondent's part with respect to the CI vacancies. He claimed the first CI position had been properly and appropriately filled but that some posting problems had delayed filling the second. He noted that Grievant was presently slated for an interview for the existing vacancy. Mr. Broschart also disputed Grievant's claim of having performed the "exact same duties" as a CI and responded that Grievant's primary duties entailed

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<sup>3</sup>Grievant also mentioned that he had filed a separate complaint in another forum because he had not been employed by Respondent as a Mine Safety Instructor.

complaint investigations and initial field evaluation of problem areas. He has performed minimal project inspections of emergency construction projects. We have had a total of 44 emergency projects since the Emergency Program was started in September 1988. According to Daily Project Reports over this two (2) year period, [Grievant] has assisted in the inspections of six (6) emergency projects, of which he wrote 13 inspection reports out of the 43 inspection reports that were written up on the six (6) projects. There was one regular AML project that [Grievant] helped on, but he only wrote two (2) of the 100 inspection reports on the East Fairmont Project. This was due to the regular inspector being on leave time.

He contended that while CIs also perform complaint investigations, their primary function is to inspect reclamation projects under contract to DOE. He also disputed Grievant's claim that he had performed the work of two emergency inspectors while one CI position remained vacant and listed the names of the actual six inspectors and their emergency projects from "August 1990 to present." Mr. Broschart also commented that Grievant did not hold a civil service classification during his ninety-day temporary employment with Respondent. While he acknowledged that Grievant had attended several "technical classes along with other field and clerical staff of the . . . Section," he stated that those classes were not necessarily relevant to an Inspector's position.

With respect to Grievant's allegations about work necessities, Mr. Broschart explained that Grievant had received the same supplies as had other workers from 1988 to present and that no field employees had received boots or uniforms since legislative budget cuts in 1987. He wrote that those items were presently on order and that an attempt would be made in January 1991 to secure other needed items for all employees. Finally,

he stated that Grievant's misclassification claim should be submitted to Personnel for an evaluation of the percentage of time Grievant performed each of his distinct duties and a determination of the appropriate "rate of pay." He mentioned that "there is no policy on guaranteed merit raises" and that he was unaware of back-pay policy, an area of which Personnel would also have to make determinations.

AML's Director James Pitsenbarger issued a written level two decision on January 28, 1991. Among other things, he noted that Grievant presently meets the qualifications for a CI position, but that the original CI vacancy had been properly filled with an employee who had an undergraduate degree in biology and twelve years' experience with Respondent. He confirmed that Respondent's filling the latter-advertised, present Inspector's vacancy had been delayed due to posting problems and efforts to restructure the inspector's and supervisor's classifications. He concluded that Grievant had not met his burden of proof "that he was discriminated against, denied the opportunity for advancement and that the agency practiced illegal hiring procedures," and denied the grievance.

Grievant advanced his complaint to level four in February 1991, because, according to him, Respondent had not timely scheduled a level three hearing.<sup>4</sup> As is the general practice of the Grievance Board when a case is procedurally insufficient,

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<sup>4</sup>Grievant's filing materials were voluminous, i.e., multiple pages of charges and also formally-written requests for transcripts, extensive documentary evidence and the like.

the case was remanded to level three for further action.<sup>5</sup> William "Bolts" Willis, Respondent's next grievance evaluator, rendered a level three determination July 16, 1991, following a July 9 hearing. Mr. Willis' brief decision merely addressed the misclassification claim. He recommended that Grievant be reclassified immediately because Respondent and Personnel had agreed that Grievant "is performing the duties of an Environmental Inspector." At the time Grievant initiated the within complaint, he had been earning \$23,544.00 per year. Following the level three decision, Respondent set into motion a mid-August reclassification of Grievant to EI at PG 18 and upgraded his salary to \$26,328.00.

In the meantime, Grievant once more appealed to level four. Consequently, the undersigned inquired of the parties as to what issues were remaining in the grievance. By letter dated September 5, 1991, Grievant's attorney replied that Respondent's "unilateral action" to reclassify Grievant upon Personnel's findings that he performed the duties of an inspector had not wholly resolved the grievance. He stated that the remaining issues were whether Grievant was entitled to a "retroactive" Inspector's promotion to December 1988 with back pay and

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<sup>5</sup>Grievant moved to strike the remand order. Although Grievant indicated on his original filing materials that he was represented by counsel, he obviously prepared all of his grievance documents himself, including his request that the remand be rescinded. The undersigned denied his request and also advised him to act through his counsel. Later, an attorney other than the one Grievant originally named notified the undersigned that he would be counsel of record.

interest; whether Grievant "is [or should be] receiving pay which is comparable to other employees similarly situated" who average \$33,000.00, and whether Grievant has received "the working tools and equipment" which have been furnished to other inspectors.<sup>6</sup>

Grievant essentially concedes he was not qualified to be classified as an inspector when he was originally employed in State government by Respondent. However, central to Grievant's allegations that he is entitled to the relief sought with respect to back wages and present salary as an inspector is a claim that he performed the duties of a CI throughout his employment and a belief that the concept of "equal pay for equal work" means that a potential back pay award and present inspector's salary must be on a par with other inspector's salaries, past and present. As support for his demands, he submitted in his level four brief a wage analysis and comparison of his own monthly salary at various times from 1988 through August 1991 with that of a CI who was hired, he contends, at approximately the same time. He claims the difference in those salaries throughout the designated times of his and the other worker's

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<sup>6</sup>A level four hearing was conducted in October 1991; at that time no further mention was made by Grievant about tools and equipment. Thereafter, responsive briefing was completed by the parties in late December 1991. Again, no mention was made of that issue by Grievant or Respondent. Since Grievant's allegations on the matter are unsupported in the record, and since he did not pursue it in any fashion in the level four proceedings, it is presumed he has abandoned that claim. Accordingly, it will not be addressed further.

employment represent the amount of back wages due and a present \$471.00 monthly salary shortfall.

Respondent disputes Grievant's claim that he had been misclassified since the inception of his employment. It claims that the complaint investigation and information gathering duties which Grievant performed were appropriate duties for a TA, even though those tasks could have been assigned to either a TA or a CI. In this case, Respondent asserts, Grievant had never been assigned to full-performance inspector's duties. Respondent points out that since Grievant had been placed in the lower-ranked TA class for which he qualified, it was then able to assign him a greater salary step than a TA's or an inspector's entry-level step one. As a result, Grievant's salary was much higher than it would have been had he qualified for the Inspector's class. In other words, Respondent essentially argues that Grievant had been overpaid if misclassified as a TA and that he had not been economically disadvantaged, if such a misclassification had indeed occurred.

Respondent also contends that, even if Grievant had been misclassified since 1988, his claim for back wages "is time-barred by AFSCME IV" and laches because he knew of a potential claim in 1988 but did not file a grievance until 1991. Finally, Respondent urges that Grievant's EI salary had been set according to Personnel's regulations and that Grievant had not shown it to be contrary to those regulations or otherwise unlawful or improper.

First, it must be pointed out that the ninety-day grievance filing directive of "AFSCME IV," AFSCME v. CSC, 380 S.E.2d 43 (W.Va. 1989), does not apply to this case. Among other things, AFSCME IV determined that persons with long-standing or past misclassification claims which arose prior to July 1, 1988, the effective date of W.Va. Code §§29-6A-1 et seq., the grievance procedure for state employees, were not necessarily barred from recovering back wages prior to then and, moreover, provided such persons a ninety-day "window" in which to file such claims pursuant to the statute. Grievant's employment and claim arose after the enactment of Code §§29-6A-1 et seq., and he was not bound to file a claim within the jurisdictional window created by AFSCME IV. Accordingly, it is determined that Grievant's misclassification claim is timely filed since an employee's out-of-class working status is ongoing in nature.

However, Grievant did not meet his burden of proof that he had been improperly classified since the inception of his employment. Employee and employer generated documents, e.g., work logs, project records, and even Grievant's own signed performance evaluations, Resp. Ex. Nos. 1 and 3-8, provide overwhelming proof that while Grievant's mainly office-oriented, complaint-related duties were associated with and perhaps supportive of the duties of an AMLCI, he had not engaged in the full-performance, on-site inspection tasks and report-writing duties required of a field construction inspector. The "Nature of Work" section of the former AMLCI job specification is reproduced, in part, as follows:

Under general direction, an employee in this class investigates citizen complaints pertaining to problems with abandoned coal mines, assists in the preliminary review of sites for appropriate methods to abate the hazards and monitors construction activities once a construction contract has been awarded at the site. . . . Employee makes on-site evaluations of construction activities to ensure contractor compliance with approved construction plans and specification, and is required to make independent decisions on change orders, adequacy of inspection materials and methods, and verifies appropriateness of payment request on multimillion dollar projects.

Clearly, Grievant's investigative and data-collecting duties did not rise to the level of difficulty or responsibility required of an AMLCI.

Rather, Grievant's duties were not "substantially similar" to those of staff CIs but more akin to those of a worker who was training for a CI position. In the past, Respondent had carried such training positions, at PG 12, for two of its other field inspector's functions, i.e., surface mining reclamation and water resources, but it had no "Inspector-in-training" class/position for the AML Section.<sup>7</sup> It was not unreasonable or contrary to regulations for Respondent to utilize the TA class (two PGs higher than the "in-training" titles/classes) in Grievant's case to provide Grievant the highest possible salary in 1988 and to meet its own ongoing agency obligations in the AML Section. More importantly, this situation provided Grievant a means of occasionally assisting an Inspector with construction

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<sup>7</sup> Respondent now has one generic Inspector-in-training class for all pertinent areas, that is, abandoned mine lands construction, water resources and surface mining reclamation.

projects while learning about and qualifying for that class while stationed in the Fairmont office.

Notably, the vast difference in the "Nature of Work" section for the CI and EI job specifications is readily discerned. For example, the CI

performs technical and field inspection work in environmental protection programs to determine compliance with applicable laws, regulations, permits, best management practices and/or contracts within an assigned region of the state. Employee has the authority to follow-up violations with initiation of civil or administrative proceedings or criminal prosecution. . . . Work requires travel and outside work in varying weather conditions and over difficult terrain. . . . May be assigned to an area of specialization as detailed above. Performs related work as required.

Unlike the CI specification, the generic EI class does not require the incumbent to function primarily as an on-site construction/contract monitor but permits the worker to assume a wider range of related technical-oriented duties in an environmental protection program. Thus, it appears that, while Grievant's technical- and research-oriented duties do not approximate the duties of a CI, they do come within the purview of the EI class. This justifies Grievant's reclassification to EI notwithstanding that he never substantially performed the work of a CI, even though his job duties have not changed.

In addition, Respondent's argument that Grievant deserves no back wages even if he had not been properly classified in 1988 is persuasive. Clearly, if Grievant had been just minimally qualified for an inspector's position in 1988, Respondent would have been obligated to rank him at entry-level step one for salary purposes. Indeed, Respondent urges in its laches

argument that if Grievant's misclassification claim is valid, and Grievant knew from the inception of his employment that he was misclassified but failed to earlier complain, Respondent has been substantially prejudiced because it now has no way to recover the excess \$10,000.00 in wages that Grievant earned in the TA class that he would not have earned in the CI class.

Notwithstanding Respondent's laches argument, this record establishes that Respondent apparently did all in its power to rank Grievant in a class, pay grade and salary step which would bring him the highest possible wages at the time he was initially employed, an economic benefit he would not have had if Respondent had initially classified him as an inspector. It has been previously determined that a formerly misclassified employee is due no back wages if that employee had suffered no economic or wage loss. Cutlip v. W.Va. Div. of Health, Docket No. 90-H-379 (Dec. 28, 1990). See also, n. 5, Adams v. W.Va. Workers' Comp. Fund, Docket No. 91-WCF-480 (Mar. 2, 1992), and Loomis v. W.Va. Div. of Human Serv., Docket No. 91-DHS-172 (Feb. 27, 1992).

Finally, Grievant produced no evidence that he had not been properly placed in PG 18 at the appropriate salary step upon his reclassification to EI. In addition, his argument that he was entitled to the same present wages as a person who qualified for a CI's position at a high-ranking step in 1989 is totally without merit. "[Personnel] Regulations which allow hiring employees at a level higher than the minimum, in certain specified circumstances, are valid." Largent v. W.Va. Dept. of Health, Docket No. H-88-012 (Sept. 15, 1989). Just as Grievant

benefitted from an advancement to step eight in the TA class when he was hired due to his qualifications for that position, so did the person who was hired as a CI in 1989 benefit from an advancement above the entry-level step due to qualifications. Further, there is no obligation on Respondent's part to now equalize the two salaries. In practice, equal pay for equal work simply means that all persons working within one classification should receive a salary found within the class's range of salaries, be it salary steps or otherwise. Largent.

The factual and legal determinations contained in the foregoing discussion and analysis are incorporated in and made a part of the following formal findings of fact and conclusions of law.

#### Findings of Fact

1. From the inception of his employment, Grievant, not qualified to be classified as an inspector, primarily worked in an office performing technical-related duties of handling initial, information-gathering AML complaint investigations, duties which might be shared by inspectors and TAs. However, Grievant only occasionally and minimally participated in an inspector's primary function of field inspections and related report writing, much as an inspector-in-training might do.

2. Prior to Respondent's revision of its various inspector and supervisor classes, it did not have an AML Inspector-in-training class, although it did have such titles for other related inspector's training positions which were ranked at pay grade 12, two PGs lower than Grievant's former TA class.

3. Grievant's hands-on experience and related activities while serving as a TA for two years qualified him for an inspector's position.

4. After Grievant filed a complaint about his employment status, a position analysis confirmed that he should be reclassified as an Environmental Inspector, a generic title whose incumbents may perform either technical or field-based work or both. The reclassification was accomplished in mid-1991 and he was placed in the appropriate pay-grade level and step for salary purposes.

#### Conclusions of Law

1. The record does not support that Grievant suffered any loss of wages prior to his reclassification as an Environmental Inspector; therefore, he is not entitled to back wages. See Cutlip v. W.Va. Div. of Health, Docket No. 90-H-379 (Dec. 28, 1990). See also, n. 5, Adams v. W.Va. Workers' Comp. Fund, Docket No. 91-WCF-480 (Mar. 2, 1992), and Loomis v. W.Va. Div. of Human Serv., Docket No. 91-DHS-172 (Feb. 27, 1992).

2. Grievant failed to prove that his salary upon promotion/reclassification to Environmental Inspector was not correctly determined or that he was entitled to money relief under any theory of this case. See Largent v. W.Va. Dept. of Health, Docket No. H-88-012 (Sept. 15, 1989).

Accordingly, the grievance is **DENIED** in its entirety.

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. And 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.

  
NEDRA KOVAL  
Administrative Law Judge

Date: June 30, 1992