



JAMES PAUL GEARY
Chairman

ORTON A. JONES
DAVID L. WHITE
Members

C. RONALD WRIGHT
Director

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

OFFICES:

240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone: 348-3361

ROBERT C. SKEEN
JOHN M. WHITE
NANCY BOWERS
CARL H. HANNING
R. GEORGE WEEKLEY
FLORENCE R. DIVITA
MARY M. ASSEFF

Docket No. 91-CLER-371
Docket No. 91-CLER-372
Docket No. 91-CLER-373
Docket No. 91-CLER-374
Docket No. 91-CLER-375
Docket No. 91-CLER-376
Docket No. 91-CLER-377

v.

**WEST VIRGINIA DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL
RESOURCES/WORKERS' COMPENSATION FUND and WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION/DIVISION OF PERSONNEL**

D E C I S I O N

Grievants each complain,

From [a date certain] to present I have been employed by the Workers Compensation Fund [WCF] as a Field Auditor. . .while performing comparable duties of a[n] Employment Security Tax Examiner. . .
.. RELIEF: Request Field Auditor's position be upgraded to an equal pay grade of the Employment Security Tax Examiner along with backpay due me from [a date certain] to present based on the differential in pay grades/steps.

Following denials at Levels I, II and III,¹ they advanced their claims to Level IV, for decision on the lower-level

¹ The Level I denial was due to lack of authority.

Grievants originally advanced their cases to Level IV in August 1991; Personnel then was joined in all as an indispensable party per WVESEGB Rule 4.19, and the matters were promptly remanded to Level III for joint hearing and detailed decision, which were accomplished by late November.

The undersigned has been advised by both Respondents' attorneys that, "at client request," they did not
(Footnote Continued)

record of proceedings (primarily, the Level III hearing), on December 2.² The parties' fact-law proposals were filed by January 17, 1992, rendering the case ready for disposition. The grievances were filed separately but, practically speaking, have been consolidated.³

The preliminary issue of jurisdiction must be addressed. All Grievants save one request relief which relates back to a point in time earlier than July 1, 1988.⁴ It is

(Footnote Continued)

participate in the Level III hearing. Troublingly, employees of WCF and Personnel who acted as advocates at Level III also there offered testimony; this procedure was certainly of questionable propriety but will not be further addressed in this Decision.

² Puzzlingly, Mr. Skeen was the only Grievant and the only witness for Grievants who appeared at Level III, although it is noted that Grievants live in various regions of West Virginia.

³ In December, Grievants' counsel wrote the undersigned that his clients' classification title had been amended to "Investigator" and that they were, as of December 1, being compensated at pay-grade 10 of Personnel's then newly-instituted wage system. He also advised that TEs were paid at pay-grade 11 under the revised schema (which reduces the number of pay-grades for state employees from more than 30 to 23). Respondents have stipulated that this correspondence's contents, to the extent retold herein, are correct; accordingly, notice may be taken that Grievants' current pay-range is \$18,384.00 - \$29,952.00 per year, while the TEs' is \$19,668.00 - \$32,040.00 per annum.

This new data has not been considered as evidence by the undersigned except insofar as it shows that as of December 1, 1991, Grievants were reclassified; therefore, it must be found that the remedy they seek herein has November 30, 1991, as its end-point, since there is no information of record as to their duties or those of other employees after that date.

⁴ Mr. Skeen - September 26, 1983
Mr. White - May 21, 1975
Mr. Hanning - March 31, 1975

(Footnote Continued)

settled that this Grievance Board cannot entertain any claims which arose "prior to July 1, 1988." Crookshanks v. W.Va. Div. of Rehav. Svcs., Docket No. 89-RS-597 (Jan. 11, 1990) (interpreting W.Va. Code §29-6A-11).⁵ Therefore, to the extent that Grievants seek any relief for any point in time earlier than June 30, 1988, it must be disallowed.

Grievants contend that their work, primarily reviewing West Virginia employers' records to confirm or effect compliance with Workers' Compensation premium-payment and other requirements, is analogous to that of Employment Security Tax Examiners (TEs) employed by the West Virginia Division of Employment Security (ES).⁶ According to Grievants, the TEs' main function is to ensure employers' correct following of laws regulating unemployment compensation and their financial support thereof. The overall record reflects that there indeed are, and have been since at least July 1, 1988, several similarities between the two

(Footnote Continued)

Mr. Weekley - February 1, 1986

Ms. Divita - January 4, 1985

Ms. Asseff - October 1, 1973

Only Ms. Bowers' remedy request commences with a post-July 1, 1988, date, namely, December 1, 1988.

⁵ The only exception, provided for by the Supreme Court of Appeals of West Virginia in AFSCME v. CSC, 380 S.E.2d 43 (1989) ("AFSCME IV"), is inapplicable here. See Epling v. W.Va. Dept. of Health, Docket No. 89-H-109 (Apr. 13, 1989) (recognizing "jurisdictional window" opened by AFSCME IV).

positions.⁶ The Level III evaluator himself noticed them although he characterized them as "primarily generic in nature."

This case neither includes a pure misclassification charge⁷ nor seeks a reclassification remedy despite characterizations to those effects throughout the record. Rather, it is a "comparative worth" claim⁸ and thus an adjunct of the "equal pay for equal work" theory. Code §29-6-10

⁶ Respondents pointed out differences, as well, but it cannot be overlooked that at least some of them were rather unconvincing. For instance, Michael Moore, ES' Field-Audit Unit Chief, testified that he had met with WCF officials to discuss consolidating some WCF and ES functions, and had learned that WCF did not have a "formal audit program" like ES'; however, he also stated that WCF "wanted to have one," suggesting that one might be in the offing and that some form of "program" was in place (although Mr. Moore's definition of "audit" was derived from certain federal guidelines). Also, Personnel, in its brief at 5, cited TE Sharon H. Lowe's utilization of a laptop computer as indication of the TEs' more-complex tasks. Ms. Lowe's testimony, though, was that she is the only TE who does so and that her use of the portable device is an experimental project.

⁷ This is not to say that, should Respondents discern that Grievants have been or are misclassified, that that fact may properly be ignored by them. See this Decision's order paragraph, infra.

Of course, in proving misclassification, whether one meets the educational or experiential requirements of the aspired-to classification is irrelevant. AFSCME v. CSC, 341 S.E.2d 693 (W.Va. 1985) ("AFSCME II"), n. 6.

As an aside, it is noted that a state agency's traditional non-use of a given Personnel classification does not per se preclude its employee from claiming he properly should be classified thereunder. See Captain v. W.Va. Divn. of Health, Docket No. 90-H-471 (Apr. 4, 1991).

⁸ Although Grievants have not articulated it as such their comparative-worth theory is one of pure discrimination.

mandates that Personnel's pay-plan shall have as its basis "equal pay for equal work."⁹ Grievants assert that although they are similarly situated to (pay-grade 18) TEs in that their job duties are comparable, they are compensated at the lower pay grade 12, and that there is no justification for the disparity.¹⁰ They do not necessarily assert their positions' entitlement to being slotted at pay-grade 18.

At Level III, Respondents focused on the West Virginia Division of Personnel (Personnel) classification specifications in question, "Field Auditor-WCF" (FA) and TE. It is so that Grievants' classification, FA, requires only a high-school diploma¹¹ while the TEs' insists upon a college degree with eighteen hours of accounting courses. Respondents also argued that these categorizations and their particulars were arrived at, respectively, with the input of WCF and ES and that that learned advice, in combination with

⁹ The reader's attention is invited to Largent v. W.Va. Dept. of Health, Docket No. H-88-015 (Sept. 15, 1989), in which Code §29-6-10's "equal pay for equal work" mandate was found fulfilled when nurses whose actual salaries varied widely were nonetheless compensated within the same pay-grade's range.

Of course several factors may affect a given classification's proper pay-grade. See, e.g., Aultz v. W.Va. Divn. of Hwys., Docket No. 90-DOH-522 (Feb. 28, 1991).

¹⁰ Apparently, Personnel considers six-levels' gap between pay-grades as indicative of significant difference in responsibility-level and/or other accoutrements of a classification. See, e.g., Aultz, n. 12.

¹¹ The new "Investigator" specification, see n. 3, apparently requires a college degree, although qualified experience may substitute therefor on a year-to-year basis.

Personnel's expertise, must be credited. Finally, Respondents stressed Personnel's position of preeminence in classification and compensation matters in state government. See, e.g., Code §29-6-10, Personnel's Administrative Rules & Regulations, §5.01.

Regardless of what the classification specifications instruct or require, the true inquiry here is: How did the actual duties of FAs and TEs, from July 1, 1988, through at least November 30, 1991, (see n. 3) compare, in terms of not only content identicality or similarity, but also in the areas of complexity, responsibility-level and other criteria that cumulatively determine at what pay-grade a classification is compensated? Cf. Walsh v. W.Va. Workers' Comp. Fund, Docket No. WCF-88-002 (Apr. 20, 1989).¹² It cannot be said that Grievants have demonstrated absolute entitlement to back-pay or other relief; however, that does not end the inquiry, for Grievants have by a preponderance of evidence erected significant questions regarding their proper pay-scale (through November 30, 1991) which deserve Respondents' further attention, and the undersigned is empowered to

¹² In Walsh, the grievants, classified as "Industrial Rehabilitation Counselors," employed by WCF and salaried at pay-grade 13, were found to be performing essentially the same duties as pay-grade 19 "Rehabilitation Counselors" employed by the West Virginia Division of Rehabilitation Services. WCF and Personnel, the respondents, were ordered to commence paying grievants at pay-grade 19; reclassification was, with express intention, not ordered.

Also, see Aultz.

"provide such relief as is deemed fair and equitable." Code §29-6A-5(b).¹³

In addition to the findings of fact and conclusions of law contained in the foregoing narrative, the following conclusions are made.

CONCLUSIONS OF LAW

1. This Grievance Board is without jurisdiction to consider claims arising prior to July 1, 1988. Crookshanks v. W.Va. Divn. of Rehab. Svcs., Docket No. 89-RS-597 (Jan. 11, 1990).

2. "The principle of equal pay for equal work must be recognized in the pay plan for employees of the classified service. W.Va. Code §29-6-10." Gillenwater v. W.Va. Dept. of Health & Hum. Res., Docket No. 90-H-146 (Dec. 18, 1991), Conc. Law 4 (in part). Grievants have, by a preponderance of evidence, raised a significant question as to whether or not the difference in paygrades for Grievants (classified as "Field Auditors-WCF") and Employment Security Tax Examiners may have been in violation of this principle between July 1, 1988, and November 30, 1991.

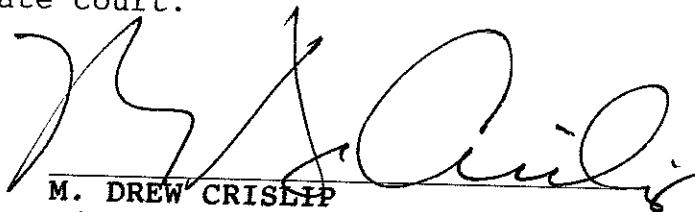
¹³ This case has some likeness to job-selection grievances in which a grievant has not proven his entitlement to the sought position by a preponderance of evidence but has established the existence of a flaw in the process such that, if the flaw had been absent, he reasonably might have been the chosen candidate. Cf. McClure v. W.Va. Workers' Comp. Fund, Docket No. 89-WCF-208 (Aug. 7, 1989); see also education-employee decisions, e.g., Estep v. Mingo Co. Bd. of Educ., Docket No. 90-29-492 (Feb. 28, 1991), and Slone v. Putnam Co. Bd. of Educ., Docket No. 89-40-665 (Feb. 7, 1990).

3. Administrative law judges of this Grievance Board are empowered to "provide such relief as is deemed fair and equitable." Code §29-6A-5(b).

Accordingly, this grievance is **GRANTED**, to the extent that Respondents are **ORDERED** to forthwith conduct a thorough investigative comparison of the actual duties performed by Grievants on the one hand and those on staff with the West Virginia Division of Employment Security as Employment Security Tax Examiners on the other, covering the period July 1, 1988, through November 30, 1991. If it is determined that the "comparable worth" of these positions was such that the pay-grade disparity was inappropriate, Grievants shall promptly be provided with any back-pay, including interest, to which they are entitled. Further, it is suggested, though not ordered, that any and all individuals intimately involved in this grievance on behalf of either Respondent not participate directly in this study and decision-making process. No further relief is granted.

Any party 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.

A handwritten signature in black ink, appearing to read "M. Drew Crisp". The signature is written in a cursive style with a large initial "M" and "D".

M. DREW CRISP
Administrative Law Judge

Date: February 20, 1992