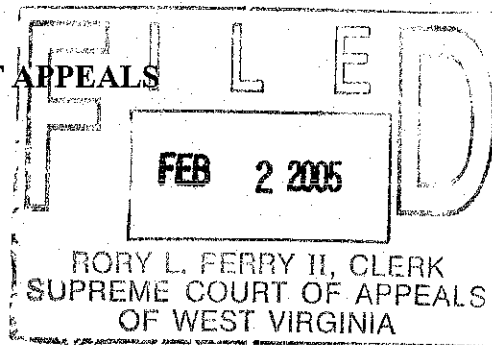


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No. 32162

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



VICKIE L. VANCE,

Appellant,

v.

WEST VIRGINIA BUREAU OF  
EMPLOYMENT PROGRAMS,  
ELKINS JOB SERVICE,

Appellee.

---

BRIEF OF APPELLEE

---

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BRIEF OF APPELLEE

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I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal involves an employee of the Bureau of Employment Programs, Vickie Vance, who grieved the functional change in her job approximately three and one-half years ago, on June 18, 2001. She did not lose any pay; did not experience any decline in her civil service classification; did not lose any seniority or bumping rights; and, did not experience any change in her Elkins work location. Indeed, after her functional change from Office Manager to Systems Coordinator, Vance's civil service classification was upgraded from Employment Programs Manager II, paygrade 16, to Employment Programs Manager III, paygrade 17; the Bureau initiated a five percent salary increase for her; and, she was permitted to stay in the same budgetary cost center of the Bureau. Moreover, the Bureau did not deem the change in Vance's job to be disciplinary.

At Level One of the grievance procedure, Vance's immediate supervisor lacked the authority to grant the relief requested. Therefore, she appealed to Level Two. At Level Two, the functional change in Vance's position was upheld, but the grievance was granted insofar as Vance was informed that she would retain the same civil service classification and pay grade; that she would remain in the same budgetary cost center of the Bureau; and, that she would retain her seniority and bumping rights. Vance appealed to Level Three, requesting that the functional change in her position be rescinded. That request was denied at Level Three.

Vance appealed to Level Four and on April 30, 2002, the West Virginia Education and State Employees Grievance Board denied her grievance:

Grievant has identified no harm she incurred as a result of the transfer. To the contrary, she remained in the same classification and pay grade (both of which have been elevated), her work location remains the same, and she has retained all seniority and other rights she has acquired as a long-term employee. At level four Grievant continued to express concern regarding her job security and seniority rights. Mr. Dailey testified at hearing that there are no plans to eliminate Grievant's position. The level two decision stated that Grievant would retain her seniority-based bumping rights in the event of a reduction in force. Grievant is understandably upset by the involuntary transfer, but has not demonstrated she has suffered harm that is recognized within the grievance procedure.

(4/30/02 Decision at 7-8.)

Upon appeal, the Circuit Court of Kanawha County affirmed the Grievance Board's Decision by order entered on March 30, 2004. On or about July 28, 2004, Vance filed a Petition for Appeal seeking review by this Court. On November 10, 2004, this Court voted three to two to grant the appeal. Pursuant to this Court's order of December 1, 2004, the Bureau now responds to Vance's Brief which it received on January 3, 2005.

## II.

### STATEMENT OF FACTS

Vance is a long-time employee of the Bureau of Employment Programs at its Elkins Job Service Office. (Level III Tr. at 19-20.) Beginning in September 1989, Vance held the functional position of Office Manager of the Elkins Job Service Office. (Level III Tr. at 20.) At the time that the underlying grievance arose, Vance held the civil service classification of Employment Programs Manager II, paygrade 16. (Level III Tr. at 43.)

On June 5, 2001, Vance's supervisor, Steve Frantz and Mr. Frantz's supervisor, Stephen Dailey, met with Vance and gave her a letter signed by the Commissioner of the Bureau of Employment Programs informing her that her position would be changed from that of Office Manager to that of Systems Coordinator effective June 26, 2001. (Level III Tr. at 87; Level III Grievant's Ex. 1.) The letter stated that the reason for the change was to maintain a balanced workforce and the high quality of services provided to the public. (Level III Grievant's Ex. 1.) The Bureau's decision was based on the need for a Systems Coordinator in Region Six of the State. (Level III Tr. at 113.)

The change in Vance's job function occurred after a series of events transpired. In the latter part of 2000, six or seven grievances were filed in a relatively short period of time by Elkins Job Service Office staff against Vance. (Level III Tr. at 118.) Indeed, the Elkins Job Service Office experienced the highest number of grievances when compared with the other Job Service Offices throughout the State. (Level III Tr. at 118; Level III Respondent's Ex. 4.) Although none of the grievances were granted as to the relief requested, an independent grievance evaluator in one of the grievances filed by six Elkins Job Service employees found that Vance's conduct had caused or

contributed to a hostile work environment at the Elkins Job Service Office. ( Level III Tr. at 114; Level III Respondent's Ex. 7 at 6. )<sup>1</sup>

During the year 2000, there was a high rate of the usage of sick leave by Elkins Job Service staff. (Level III Tr. at 120-121; Level III Respondent's Ex. 5.) This became a concern to the Bureau's management. (Level III Tr. at 120-121.) The concern was that if staff were not present at work, customer service would be detrimentally affected in the Elkins Job Service Office. (Level III Tr. at 111.)

In an effort to correct the problems, Bureau management met with Vance and offered her a development plan to address the management problems she was experiencing. (Level III Tr. at 115; Level III Respondent's Ex. 3.) Vance refused to sign off on the development plan. (Level III Tr. at 115-117.)

Thereafter, the Bureau brought in a consultant to conduct conflict resolution counseling with the staff and Vance. (Level III Tr. at 115, 117.) In addition, the Bureau conducted leadership training which Vance was required to attend. (Level III Tr. at 115.)

Despite efforts to break the impasse between Vance and her subordinates, the situation continued to fester. (Level III Tr. at 122.) It became clear that the staff and Vance could not work together. (Level III Tr. at 122.) The Bureau began to have concerns about the quality of service being delivered to the public by the staff which was supervised by Vance. (Level III Tr. at 112.)

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<sup>1</sup> The grievance filed by six employees sought as relief the removal of Vance from the Elkins Job Service Office. (Level III Respondent's Ex. 7 at 2.) Inasmuch as testimony during this "class action" grievance indicated that Bureau management was going to undertake training and other activities to address the work environment issues, the grievance evaluator did not find it appropriate to order the "removal" of Vance from the Elkins Job Service Office at that time. (Level III Respondent's Ex. 7 at 5-7.)

In early April 2001, Mr. Dailey was approached by the Region Six Work Force Investment Board about the need for a Systems Coordinator to act as liaison between the Board and all of the Comprehensive Site Coordinators located in the region.<sup>2</sup> (Level III Tr. at 88, 95-96.) The director of the Work Force Investment Board requested that Vance be moved into the Systems Coordinator position. (Level III Tr. at 126-127.)

Thereafter, during a managers' meeting in Beckley, Mr. Dailey, Mr. Frantz, and Vance discussed the management problems and the conflict with staff that she was having as Office Manager at the Elkins Job Service (Level III Tr. at 113-114.) During the discussion, Mr. Dailey asked Vance if she would be interested in accepting the duties of the Systems Coordinator in the Elkins office. (Level III Tr. at 88, 113-114.) Vance responded that she was not interested in the position. (Level III Tr. at 90.) Mr. Dailey urged Vance to give the matter some more thought. (Level III Tr. at 90.) Some time later, Vance again informed Mr. Dailey that she was not interested in the position. (Level III Tr. at 90.)

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<sup>2</sup> The Bureau is charged with implementing the Work Force Investment Act which is administered throughout seven designated regions in the State of West Virginia. (Level III Tr. at 90-91.) The record reflects that when Vance was offered the Systems Coordinator position, each region was to have a Systems Coordinator to act as a liaison between the local Workforce Investment Board, which is comprised of local individuals, and all Comprehensive Site Coordinators located in the region. (Level IV Tr. at 20-21.) At the time of the Level Four hearing in this matter, Region Four of the State had a Systems Coordinator. (Level IV Tr. at 20.) The salary of Region Four's Systems Coordinator was not paid by the Bureau of Employment Programs and the person who held the position was not a State employee. (Level IV Tr. at 20, 33.) In contrast, Vance's Region Six Systems Coordinator position was paid by the Bureau of Employment Programs *out of the same funding source from which her Office Manager position was paid*, and Vance was and is a State employee. (Level IV Tr. at 16, 20, 25.) At the time of the Level Four hearing, it was intended that Regions One, Two, Three, Five and Seven, the remaining regions, would have Systems Coordinators. (Level IV Tr. at 20-21, 22-24.) At that time, the Bureau did not have sufficient funds of its own to fill the positions. (Level IV Tr. at 22.)

Sometime thereafter, Quetta Muzzle<sup>3</sup>, then Director of the Employment Services Division, made a recommendation to then Bureau of Employment Programs Commissioner Robert Smith to change the function of Vance's job from that of Office Manager to that of Systems Coordinator of Region Six. (Level III Tr. at 108.) Mr. Frantz and Mr. Dailey were involved in discussions which led up to Ms. Muzzle's recommendation to Commissioner Smith. (Level III Tr. at 107-109, 126.)

On June 5, 2001, Mr. Dailey and Mr. Frantz gave Vance the letter from Commissioner Smith informing her of her position change from Office Manager to Systems Coordinator.<sup>4</sup> (Level III Tr. at 87; Level III Grievant's Ex. 1.) Because Vance was a valued employee, and because of her strength in dealing with local officials, it was determined that the shifting of responsibilities from Office Manager to Systems Coordinator was for the good of the Bureau's operations and would remove Vance from the problems she was facing as Office Manager. (Level III Tr. at 93, 95, 118.) The fact that Vance was having ongoing management problems while functioning as the Office Manager was considered. (Level III Tr. at 126-127, 135-136.) However, it was not the primary reason for the transfer of duties. (Level III Tr. at 126-127, 135-136.) The change in Vance's duties was considered by the Bureau to be non-disciplinary. (Level III Tr. at 6, 93.)

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<sup>3</sup> At the time that this appeal was filed with this Court, Ms. Muzzle was Acting Commissioner of the Bureau of Employment Programs. Ms. Muzzle has now retired and another acting commissioner has been put in place until Governor Joe Manchin makes an appointment to the position. At the time that Vance's grievance arose, Ms. Muzzle's director position reported to the Commissioner of the Bureau of Employment Programs. (Level III Tr. at 94; Level IV Respondent's Ex. 1.) Mr. Dailey reported to Ms. Muzzle. (Level III Tr. at 86-87; Level IV Respondent's Ex. 1.) Mr. Frantz reported to Mr. Dailey. (Level III Tr. at 86-87; Level IV Respondent's Ex. 1.) Vance reported to Mr. Frantz. (Level III Tr. at 86-87.)

<sup>4</sup> The Region Six Systems Coordinator position was not posted as a vacant position prior to Vance's placement in the job. (Level III Tr. at 70.)

The Bureau consulted with the West Virginia Division of Personnel regarding the change in Vance's job function. (Level III Tr. at 71-72.) After reviewing a description of the proposed job duties for Vance's Systems Coordinator position, the Division of Personnel determined that Vance would remain in the same civil service classification of Employment Programs Manager II, paygrade 16. (Level III Tr. at 71-72, 77-78, 80.) Based upon the Division of Personnel's determination, the Bureau decided that Vance could remain in the same budgetary cost center of the agency's operations. (Level III Tr. at 100.)

After some discussion with representatives from the Region Six Work Force Investment Board about the possibility of the Board funding fifty percent of Vance's salary as Systems Coordinator, it was determined that the Bureau would fund one hundred percent of Vance's salary out of the same federal funding source from which her salary as Office Manager had been paid. (Level III Tr. at 89, 94-95, 97-98, 101.) Indeed, the federal funding source from which Vance's Systems Coordinator salary was to be paid is the same funding source from which her salary has been paid during her entire tenure at the Bureau. (Level III Tr. at 101.)

At the time the Level Four hearing was held in February 2002, the Bureau had submitted paperwork to the Division of Personnel to have Vance's position upgraded to the classification of Employment Programs Manager III, paygrade 17. (Level IV Tr. at 6-7.) The upgrade would give Vance a five percent increase in salary. (Level IV Tr. at 7.) The State Personnel Board had approved the upgrade and the Bureau was merely waiting for the wheels of State government to turn so that the matter could be finalized. (Level IV Tr. at 27-28, 30-32.)

### III.

#### ARGUMENT

- A. **THE CHANGE IN VANCE'S JOB DUTIES FROM OFFICE MANAGER TO SYSTEMS COORDINATOR WAS A LAWFUL EXERCISE OF THE BUREAU'S DISCRETION, WAS NOT CONTRARY TO LAW OR POLICY, AND DID NOT HARM VANCE IN ANY WAY.**

The West Virginia Division of Personnel's Administrative Rule, Section 11.6(a) states:

Except as otherwise provided in subsection 10.4 of this rule, appointing authorities may transfer a permanent employee from a position in one organization subdivision of an agency to a position in another organizational subdivision of the same or another agency **at any time**. . . .

143 C.S.R. 1, § 11.6(a) (2000) (emphasis added).

Obviously, this rule provides State agencies, such as the Bureau, with considerable discretion regarding the transfer of employees. The Grievance Board has consistently ruled that state agencies have wide discretion in the reassignment of employees. *Jarvis v. Division of Rehabilitation Services*, Docket No. 01-RS-421 (October 5, 2001); *Forth v. Department of Transportation/Division of Highways*, Docket No. 98-DOH-433 (July 22, 1999). *See also Stoneking v. West Virginia Division of Corrections*, Docket No. 93-CORR-530 (November 30, 1994); *Titus v. West Virginia Division of Corrections*, Docket No. 93-CORR-528 (November 22, 1994).

Vance did not suffer any loss in pay or benefits; she remained in the same civil service classification, (indeed, at the time of the Level Four hearing her classification and pay were to be upgraded); she remained in the same budgetary cost center; her salary was to be paid from the same funding source; and, she remained in the same location at the Elkins Job Service Office. Given the need that the Bureau had for a Systems Coordinator in Vance's region of the State, the consideration

of the problems that Vance was having as Office Manager in managing her staff, and the lack of any harm to Vance, the transfer was well within the Bureau's discretion and did not violate the Division of Personnel's Administrative Rule.

Vance has persisted in arguing throughout the course of this case that the Systems Coordinator position is not as stable as that of Office Manager. Indeed, Vance claims in her Brief that her position could be "reclassified virtually at the will of the head of the Division of Personnel[.]" (Appellant's Br. at 3), and that her cost center "could easily be changed with little effort[.]" (Appellant's Br. at 3.) Moreover, Vance asks this Court to restore her benefits and any loss in seniority that she has suffered. (Appellant's Br. at 9.) However, Vance has not demonstrated that she has lost any benefits or seniority. In addition, any claims that her job could be reclassified or that her cost center could be changed are sheer speculation.

As Mr. Dailey testified below, any employee's cost center may be changed based upon funding availability. (Level III Tr. at 100-103.) Vance did not present any evidence that her position was any more likely to be changed than any other Bureau employee. Therefore, Vance's claim that her cost center could be changed is a hollow charge.

Vance's allegation that her civil service classification could be changed on a whim is also pure conjecture. Again, Vance did not present any evidence that her classification was more likely to be changed than any other Bureau employee. The Grievance Board Administrative Law Judge found Vance's attempts to cast her job as less secure to be speculative. (Level IV Tr. at 11, 24, 30.) The Administrative Law Judge credited Mr. Dailey's un rebutted testimony that there are no plans to eliminate Vance's position and that her Systems Coordinator position is equally as secure as that of Office Manager. (Level IV Tr. at 20, 29; 4/30/02 Decision at 7.)

If nothing else sheds light on the speculative nature of Vance's claims, it is the passage of time. It is now over three and one-half years since Vance's job was changed and she is still employed by the Bureau in the same job. The Grievance Board has been consistent in its holdings that "[t]he grievance procedure is designed to address specific problems or incidents and not general or speculative apprehensions of employees. . . ." *Wilds v. West Virginia Department of Highways*, Docket No. 90-DOH-446 (January 23, 1991). See also *Collins v. Department of Transportation/Division of Highways*, Docket No. 02-DOH-227/228 (January 30, 2003). To grant Vance relief for something which may or may not happen in the future is clearly inappropriate and was rightfully rejected as a remedy by the Grievance Board.

Vance also claims that her transfer violated a written transfer policy issued by the Bureau. The Bureau's Administrative Directive 6000.40 states in pertinent part:

In the event an involuntary transfer becomes necessary, the affected employee will be consulted prior to the fact, given written reasons why the need exists, and given at least a two week (14 calendar day) notice of the impending transfer, when possible. . . .

It is the responsibility of the unit supervisor to initiate through channels a request to fill an authorized vacancy, justifying any request for any involuntary movement or a specific individual['s] transfer . . . If the transfer is involuntary, the supervisor must provide documentation to all affected parties justifying the necessity of the transfer.

Vance asserts that the Bureau failed to consult with her prior to transferring her job duties and failed to provide documentation for the basis of the transfer. However, Vance's own testimony indicates that she was approached during a managers' meeting in April 2001 about the transfer to the Systems Coordinator position, which she ultimately declined. (Level III Tr. at 50.) The

Grievance Board rightfully found that this discussion with Vance satisfied the "consultation" requirement of the Administrative Directive, (4/30/02 Decision at 6.)

In addition, the letter notifying Vance of the "transfer" specifically states that the transfer was necessary "in order to maintain the high quality of service to our customers" (Level III Grievant's Ex 1.) While the letter is perhaps not the most voluble expression of a rationale for the transfer, as the Grievance Board found, the letter "meets the requirements of the [Bureau's] Policy Directive." (4/30/02 Decision at 6.) The fact that the Bureau did not specifically mention the personnel problems that Vance was experiencing as a reason for the change was beneficial to Vance. The change was not deemed to be disciplinary and Vance's employment record remains unsullied. It is, therefore, remarkable that Vance would complain about the Bureau's largesse. Simply put, the Bureau's failure to give an involved explanation which included Vance's management problems inured to her benefit.

Petitioner claims that her immediate supervisor, Mr. Frantz, did not initiate the transfer and therefore the Bureau did not comply with Administrative Directive 6000.40. Vance's reading of the Administrative Directive is hyper-attenuated in the extreme. Under Vance's interpretation, the Commissioner of the Bureau of Employment Programs could not, of his or her own accord, or on the recommendation of one of his or her Directors, make a personnel transfer without the initiation and approval of a lower level supervisor. This amounts to the proverbial tail wagging the dog. It also runs counter to West Virginia Code § 21A-2-6 which gives the Commissioner very broad supervisory and operational powers over the Bureau of Employment Programs and its employees.

Vance's transfer was initiated by the efforts of Mr. Dailey and his supervisor, Quetta Muzzle, the then Director of the Bureau's Employment Services Division. However, Vance's supervisor, Mr.

Frantz, was involved in the discussions which led up to Ms. Muzzle's recommendation to Commissioner Smith. Indeed, Mr. Frantz concurred with Mr. Dailey and Ms. Muzzle that the transfer was a good move. (Level III Tr. at 94.) Therefore, chain of command or "channels" were observed inasmuch as everyone in a position of authority over Vance was involved in the determination of the transfer and agreed that it was advisable.

Moreover, even if technical compliance was not observed in the initiation of Vance's transfer, substantial compliance was observed. This Court has recognized the doctrine of "substantial compliance" in various legal contexts. *See State ex rel. Catron v. Raleigh County Board of Education*, 496 S.E.2d 444 (W. Va. 1997) (*per curiam*) (finding substantial compliance in filing grievance); *Powderidge Unit Owners Association v. Highland Props., Ltd.*, 474 S.E.2d 872 (W. Va. 1996) (recognizing substantial compliance with Rule of Civil Procedure); *State ex rel. Cooper v. Caperton*, 470 S.E.2d 162 (W. Va. 1996) (finding substantial compliance with legal publication requirements); *Mahmoodian v. United Hospital Center, Inc.*, 404 S.E.2d 750 (W. Va. 1991) (finding substantial compliance with rules for revoking physician's staff privileges); *Hare v. Randolph County Board of Education*, 396 S.E.2d 203 (W. Va. 1990) (*per curiam*) (finding substantial compliance with termination procedure); *Duruttya v. Board of Education of Mingo County*, 382 S.E.2d 40 (W. Va. 1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Service Commission of West Virginia*, 275 S.E.2d 640 (W. Va. 1981) (holding that violation of grievance procedure was merely technical and that there was substantial compliance with same).

The clear import of Administrative Directive 6000.40 is that employees in the chain of command between the transferee and the Commissioner be informed about and have an opportunity

to offer input upon the transfer of a subordinate employee. That spirit was observed in this case and substantial compliance was achieved.

**B. INsofar AS THE BUREAU WAS REQUIRED AND FAILED TO POST THE POSITION OF SYSTEMS COORDINATOR INTO WHICH VANCE WAS PLACED, SUCH FAILURE WAS HARMLESS AND DID NOT PREJUDICE VANCE.**

Vance argues that because the position of Systems Coordinator was not posted in accordance with the Bureau's written policies, Administrative Directives 6000.11 and 6500.40, the change in her job duties should be overturned and she should be returned to the position of Office Manager.

Administrative Directive 6000.11 states in pertinent part:

Whenever a job opening occurs in the classified service, the hiring agency must post a notice throughout the agency that candidates will be considered to fill the job openings. . . .

Job posting notices must be posted for at least ten working days before making an appointment. This posting requirement includes any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer . . . Intra-and inter-agency transfer is often used as an efficient means to fill needed positions.

Administrative Directive 6500.40 states in pertinent part as follows:

It shall be the policy of the [Bureau] to advertise vacancies in order that qualified full-time employees with permanent status may have an opportunity to be considered. . . .

Selection will be made by the unit supervisor, subject to the approval of the normal chain of command and the division director. The commissioner has final authority in the appointment of all employees . . . Vacancies will be advertised via a Job Opportunities announcement . . . [t]his is the official posting for Bureau jobs. . . .

Posted vacancies may be filled by promotion, demotion, lateral class change, reinstatement, transfer, or by selection from an appropriate Division of Personnel (DOP) Register. . . .

The Grievance Board found that while the Bureau's failure to post the Systems Coordinator position was in conflict with the Bureau's written policies, such failure was harmless error. (04/30/02 Decision at 7.) Obviously, the written policies permit the Bureau to fill positions by "transfer." Of course, that is exactly what happened in this case. As the Grievance Board noted, "posting this position would have been a formality when a transfer was already planned." Because the error did not prejudice Vance, it was harmless and does not warrant reversal of the Bureau's decision. *See* Syl. Pt. 4, *Burns v. Goff*, 262 S.E.2d 772 (W. Va. 1980).

Indeed, it appears that Vance is attempting to raise the prejudice that may have been suffered by others who may not have had the opportunity to view the posting for Systems Coordinator and to request that they be considered for the position. Indeed, the underlying rationale for Administrative Directive 6500.40 is to provide an opportunity to interested parties to apply for posted positions.

However, Vance does not have standing to assert the rights or interests of others to obtain relief for herself. *See Kessel v. Leavitt*, 511 S.E.2d 720, 743 & n.23 (W. Va. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 509 (1975); *United States Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990)). If anyone may have been prejudiced by the lack of posting, it was other parties who did not have the opportunity to seek the Systems Coordinator position, it was not Vance. Vance cannot assert the harm that may have befallen others in order to boot-strap herself into having a claim. Vance simply was not harmed by the Bureau's misstep in failing to observe the posting formality.

IV.

CONCLUSION


Based upon the foregoing, the Bureau respectfully requests that this Court affirm the April 30, 2002 Decision of the Grievance Board which was upheld by the Circuit Court of Kanawha County on March 30, 2004.

Respectfully submitted,

WEST VIRGINIA BUREAU OF  
EMPLOYMENT PROGRAMS/ELKINS JOB  
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CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Brief of Appellee was served by depositing the same postage prepaid in the United States Mail, this 2<sup>nd</sup> day of February, 2005, addressed as follows:

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Kelli D. Talbott