No. 27757 - The Estate of Berthold Stollings, deceased, v. Division of Environmental Protection and Division of Personnel

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OF WEST VIRGINIA

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Davis, J., dissenting:

This case presented two very simple and straightforward issues for resolution. First, was Mr. Stollings entitled to receive a retroactive increase in pay? Second, was Mr. Stollings entitled to an award of attorney's fees? Both issues should have been quickly resolved by this Court under existing principles of law. Instead, the majority opinion has created several confusing principles of law. Additionally, the majority has remanded this case for further disposition under those principles. Because I firmly believe that the principles of law created by Syllabus points 5, 6, and 7 of the majority opinion are unnecessary and legally unsound, I dissent.

A. The Back Wages Claim

Mr. Stollings[1] was hired by the Division of Environmental Protection (hereinafter referred to as the "DEP") for the position of Engineer I. Shortly thereafter, the DEP informed Mr. Stollings that he had been hired in the wrong classification, and therefore, he would be reclassified as a Technical Analyst. The DEP later concluded that it had erroneously reclassified Mr. Stollings as a Technical Analyst. Thus, his job title changed back to Engineer I.

[1]Mr. Stollings died shortly after this case was submitted to this Court.

Subsequently, Mr. Stollings learned that, based upon his qualifications, he actually should have been hired as an Engineer II. Mr. Stollings further discovered that, under the DEP'S own hiring rules, he should have been promoted to Engineer III upon his successful completion of a six-month probationary period as an Engineer II. Consequently, Mr. Stollings filed a grievance asserting that he should have been hired as an Engineer II. He further grieved that, because he successfully completed his six month probationary period, he was entitled to be promoted to the position of Engineer III. The West Virginia Education and State Employees' Grievance Board (hereinafter referred to as the "Board") agreed with Mr. Stollings. The Board ordered the DEP to classify Mr. Stollings as an Engineer III. However, the Board concluded that Mr. Stollings was not entitled to back wages because he was actually receiving the salary of an Engineer III. Thus, the Board denied attorney's fees.

In the decision of this case, the majority of this Court correctly determined that Mr. Stollings' title of Engineer III was not a reclassification as that term is ordinary construed. However, the majority opinion also concluded that this occurrence was not a promotion. I disagree.

The applicable state regulation, 143 C.S.R. 1-3(75), provides that a promotion is "[a] change in the status of an employee from a position in one class to a vacant position in another class of higher rank as measured by salary range and increased level of duties and/or responsibilities." In the instant case, the Board found that Mr. Stollings should have been hired as an Engineer II and "re-designated" as an Engineer III, after a six-month probationary period. Simply put, this "re-designation" was, in fact, a promotion. Whether or not an Engineer III position was vacant is irrelevant as the Engineer III position

was ultimately awarded to Mr. Stollings. The logical conclusion then is that this "re-designation" was an actual promotion obtained through the grievance process.

Nevertheless, the majority opinion, without any meaningful discussion or analysis, has improperly determined that no promotion occurred because the "re-designation" resulted from the grievance proceeding. Syllabus point 5 of the majority opinion states: "When a re-designation of job title arises from the successful prosecution of a grievance by an employee, the re-designation is neither a 'reclassification' pursuant to 143 C.S.R. 1-3(78) nor a 'promotion' under 143 C.S.R. 1-3(75)." Under this broad syllabus point, no state employee can ever be "promoted" as a result of winning a wrongfully denied "promotion" in a grievance proceeding. With that proposition, I cannot agree.

Syllabus point 6 is likewise wrong. This syllabus point states, in relevant part, "[w]hen an employee's re-designation arises from an employees grievance and does not fit neatly into either the regulatory definition of reclassification or promotion, the employee should not be left without a remedy if the employee is, in fairness, entitled to one. . . ." The wording of this syllabus point creates unnecessary confusion. How are the lower tribunals, or even this Court, to determine what is meant by "does not fit neatly?" This phrase has no legal basis for any meaningful analysis.

Finally, Syllabus point 7 of the majority opinion is inconsistent with syllabus points 5 and 6. Moreover, Syllabus point 7 is inconsistent with the outcome of this case. Syllabus point 7 states, in

pertinent part:

> In determining what is required to make an employee whole by reason of a wrongful classification corrected by a grievance procedure, it is appropriate for the Board to consider what benefits would have inured to the employee had the agency or the Department of Personnel timely rectified the wrongful classification on its own initiative or the employee had been timely promoted to the correct classification. . . .

Through this syllabus point, the majority has acknowledged that this case did, in fact, present a simple "promotion" issue. Syllabus point 7 states in unequivocal language that the make-whole remedy occurs when an employee is not "timely *promoted* to the correct classification." (Emphasis added). Should one follow the logic of the majority opinion, Mr. Stollings would have no remedy on remand because the remedy occurs when an employee is wrongly denied a "promotion." Yet, in this case, the majority opinion has stated the appellant's re-designation was not a promotion.

In conclusion, I believe Mr. Stollings was entitled to the relief sought from this Court under existing law. As this Court observed in *Largent v. West Virginia Division of Health*, 192 W. Va. 239, 243, 452 S.E.2d 42, 46 (1994), "if someone is promoted to a higher classification, he or she should not be required to take a pay cut or remain at the same salary, but get a raise--this only makes sense." The majority opinion has refused to grant such relief. Instead, the majority opinion has taken the unnecessary step of creating principles of law that are unworkable and will only add confusion to an otherwise straightforward area of the law. I therefore respectfully dissent.[2]

[2]In view of my position, attorney's fees should have been awarded to Mr. Stollings.