MICHAEL SHREMSHOCK, .

.

Grievant, .

.

v. . Docket No. 94-DOH-095

.

WEST VIRGINIA DEPARTMENT OF .

TRANSPORTATION, DIVISION OF .

HIGHWAYS, .

.

Respondent. .

D E C I S I O N

This is a grievance by Michael Shremshock (Grievant) against the West Virginia Department of Transportation, Division of High-ways (DOH), alleging: "Qualified level 2 bridge inspectors are regularly asked to assume the duties and responsibilities of crew leaders (level 3) without compensation." As relief, Grievant requested: "Elevate those with the necessary training and experience to level 3, or increase the hourly rate to that of a level 3 on those particular days, or stop asking on a state wide basis." After his grievance was denied at Levels I and II for lack of authority to grant relief, a hearing was held at Level III on July 22, 1993. On October 8, 1993, Fred VanKirk, Commissioner of the Division of Highways, adopted the findings of the Level III grievance evaluators which included a recommendation that "a temporary upgrade policy be initiated for salaried employeessimilar to hourly employees." After concluding that no such policy would be forthcoming, Grievant appealed to Level IV on March 21, 1994 and a hearing was conducted in this Board's Charleston office on May 4, 1994. At that hearing, Respondent waived any issue of timeliness in regard to this grievance not being elevated within 5 days of the Level III decision. At the conclusion of the hearing, the parties waived written post-hearing submissions and this matter became mature for decision at that time.

BACKGROUND

The facts in this case are essentially undisputed. Bridge Inspectors employed by DOH are divided into four classes: Level 1 is the entry level; Level 2 have at least two years of experience; Level 3 involves crew leader responsibility; and, Level 4 which involves coordinators for the inspection program. The position classification specifications for the classes at issue are reprinted as follow:

BRIDGE MAINTENANCE INSPECTOR II

Nature of Work: Under general supervision, an employee in this class performs skilled inspection work on a highway bridge maintenance inspection team. The findings are documented so as to be used in an evaluation program to determine the structural integrity and safety of state highway bridges. The work of this class requires strenuous labor, climbing on the superstructure and substructure of bridges, and working in severe weather.

Examples of Work Performed:

Rigs scaffolds and ladders to provide access to bridge structure.

Chips dirt and scale from bridge members to allow inspection and measurement.

Obtains data on the dimensions and other details of the bridge.

Determines the condition and amount of reduction of bridge members.

Takes soundings to determine scour and other riverbed conditions.

Takes field notes and makes sketches of bridge conditions.

Takes photographs of bridge deterioration.

Completes standard bridge inventory documents.

Makes recommendations for the repair of damage to the bridge.

May write the narrative section of the inspection report.

Performs related work as required.

BRIDGE MAINTENANCE INSPECTOR III

Nature of Work: Under limited supervision, an employee in this class performs supervisory inspection work as a team leader on a highway bridge maintenance inspection team. The findings are documented so as to be used in an evaluation program to determine the structural integrity and safety of state highway bridges. The work of this class requires strenuous labor, climbing on the superstructure and substructure of bridges, and working in severe weather.

Examples of Work Performed:

Supervises the work of members of the bridge inspection team.

Rigs scaffolds and ladders to provide access to bridge structure.

Chips dirt and scale from bridge members to allow inspection and measurement.

Obtains data on the dimensions and other details of the bridge.

Determines the condition and amount of reduction of bridge members.

Takes soundings to determine scour and other riverbed conditions.

Takes field notes and makes sketches of bridge conditions.

Takes photographs of bridge deterioration.

Makes recommendations for the repair of damage to the bridge.

Compiles and writes the inspection report.

Performs related work as required.

(G Ex 1 at L III.)

During the year prior to the Level III hearing on July 22, 1993, Grievant served as a crew leader for approximately fourweeks. (T at 6-7.) As crew leader, Grievant was responsible for assigning tasks to the other team members, recording their time and was primarily responsible for preparing the bridge inspection report. Since Grievant has over five years' experience as a Bridge Inspector and has completed the required training through the Federal Highway Administration, he is authorized to sign bridge inspection reports in the same manner as a Bridge Inspector III. Crew leader duties are normally performed by Bridge Inspector III's. Given the context of the normal crew leader's absence, it does not appear that Grievant had any meaningful choice in accepting or rejecting this additional responsibility nor does it appear that he sought out or volunteered for these duties. See Thornton v.

W. Va. Workers' Compensation Fund, Docket No. 90-WCF-077 (Dec. 26, 1990).

Counsel for the Respondent indicated at the Level IV hearing that DOH had submitted a memo dated January 10, 1994 requesting the Division of Personnel to develop a temporary upgrade policy for salaried employees governing periods of less than 30 days. It was further represented that Personnel responded by asking DOH to draft a proposed policy without interjecting any legal restriction that would prohibit enactment of such a policy. The current Division of Personnel Pilot Policy on Temporary Classification Upgrades, dated July 15, 1993, does not apply to Grievant's situation since he has not continuously performed the duties of a higher-graded position for 30 days or more.

DISCUSSION

In the first of a series of cases commonly referred to as the AFSCME cases, (See footnote 1) American Federation of State, County & Municipal Employees v. Civil Service Commission, 324 S.E.2d 363 (W. Va. 1984) (AFSCME I), the West Virginia Supreme Court of Appeals found that the doctrine of equal pay for equal work, as embraced by W. Va. Code § 29-6-10(2) (1992), requires that state employees employed in a particular employment classification but performing work in another classification that is compensated at a higher pay grade, be paid consistent with the higher classification. In conformance with AFSCME I, this Board has held that, "[e]xcept for infrequent short-term assignments, an employer may not impose upon an employee in the classified service duties which are outside the specifications established by Personnel for his or her position." Toney v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994). Toney further provided that "in the event an employee establishes that he has been assigned such duties, he is entitled, as relief, . . . back wages in the difference between his salary and that of the higher classification." Id. at 12. In Toney, the prevailing grievant established that she was performing duties in a higher classification on an average of 25% of her work time.

Similarly, in Steele v. West Virginia Division of Corrections, Docket No. 92-CORR-048 (Jan. 29, 1993), this Board found thatemployees classified as Correctional Officer I's were entitled to additional compensation when they were required to perform duties of Correctional Officer II's while serving as acting Assistant Officers in Charge during a full shift. Likewise, in Hartley v. West Virginia Department of Highways, Docket No. 89-DOH-598 (Dec. 29, 1989), additional compensation was ordered for a Department of Highways employee performing the higher-graded duties of a Highway Engineer II

while designated as "Acting Planning Engineer."

The foregoing line of cases make it abundantly clear that when an employee demonstrates that he is performing the duties of a higher classification at the direction and approval of higher management, the employee is entitled to additional compensation based upon the difference between his regular rate of pay and the rate he would receive if classified at the higher level. See Steele, supra. The Respondent has not demonstrated, and the undersigned is not aware of, any legal distinction between hourly and salaried employees which would warrant exempting salaried employees from the equal pay for equal work requirements of AFSCME I. Moreover, where an employee, such as Grievant, is required to fill in as a crew leader performing the essential duties of a higher classification for approximately four weeks per year, such work is not considered de minimis so as to warrant disregard of the dictates of AFSCME I.

Finally, a lack of specific policy guidance from the Division of Personnel does not excuse failure to comply with an established court ruling that has been the law in West Virginia for nearly adecade. If current policy does not permit short-term, ad hoc assignments of salaried employees to higher-graded classifications, then the employer must simply refrain from making assignments to such duties until an approved policy permitting such assignments is in place.

The remainder of this decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed by the Department of Highways (DOH) as a Bridge Inspector II assigned to a three-person crew in District Three.

2. The crew leader for Grievant's crew is a Bridge Inspector III.

3. For approximately four weeks during the year prior to July 1993, Grievant was required to serve as acting crew leader, in the absence of the regular crew leader due to training, annual leave or illness.

4. While serving as acting crew leader, Grievant was responsible for directing the work of his crew, maintaining records normally maintained by the crew leader and writing the inspection report for bridges inspected by the crew.

CONCLUSIONS OF LAW

1. In order to prevail, Grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-

441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. When a Grievant in the classified service establishes that he has been required by his employer to perform duties in a higher-graded classification on a regular basis, such employee is entitled to back wages in the form of the difference between his salary and that of the higher classification for each day on which such higher-graded duties are performed. See Toney v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994); Steele v. W. Va. Div. of Corrections, Docket No. 92-CORR-048 (Jan. 29, 1993).

3. Grievant has demonstrated that on those days when he was required to serve as a crew leader for his bridge inspection crew, he performed the essential duties of the higher-graded position of Bridge Inspector III. Accordingly, Grievant is entitled to the daily difference between his salary as a Bridge Inspector II and that of a Bridge Inspector III for each day that he performed crew leader duties. AFSCME v. Civil Service Comm'n, 324 S.E.2d 363 (W. Va. 1984); Steele, supra.

Accordingly, this grievance is **GRANTED**. The Respondent Division of Highways is **ORDERED** to pay back wages to Grievant consistent with the holdings herein and to similarly compensate Grievant in the future if he is required to perform crew leader duties normally performed by a Bridge Inspector III.

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.

LEWIS G. BREWER

Administrative Law Judge

Dated: August 31, 1994

Footnote: 1324 S.E.2d 363 (W. Va. 1984) (AFSCME I); 341 S.E.2d 693 (W. Va. 1985) (AFSCME II); No. 17929 (unpublished, May 20, 1988) (AFSCME III); and 380 S.E.2d 43 (W. Va. 1989) (AFSCME IV).