MICHAEL E. WILDS,

Grievant,

v. Docket No. 94-DOH-290

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was initiated November 19, 1993, by Michael E. Wilds ("Grievant") against the West Virginia Department of Transportation, Division of Highways ("DOH"), alleging: "I have been working out of my classification since May 1993." As relief, Grievant requested: "To be properly classified as a transportation crew supervisor with back pay, benefits and to be made whole." After his grievance was denied at Levels I and II, (See footnote 1) a hearing was held at Level III on March 29, 1994. On July 13, 1994, Fred VanKirk, Commissioner of the Division of Highways, adopted the findings of the Level III grievance evaluators, and granted Grievant back pay in the amount of the difference between his salary as a Certified Welder and the higher salary of a Crew Leader (See footnote 2) for the period September 10 through November 3, 1993, except for nine days during that period for which Grievant had already been compensated at the Crew Leader pay level. Grievant's claim that he was entitled to the position of Crew Leader because of an alleged violation by DOH of the Division of Personnel ("Personnel") temporary upgrade policy was denied at Level III without a determination as to whether the policy had in fact been violated. Grievant appealed to Level IV on July 15, 1994, and the parties agreed to submit this case for decision on the record, supplemented by proposed findings of fact and conclusions of law. This case became mature for decision on September 2, 1994.

Based upon the findings of fact and conclusions of law set forth below, the undersigned finds that the Grievant has proven that DOH violated the Pilot Policy on Temporary Classification Upgrades developed by Personnel, and applicable to DOH effective July 15, 1993; and that Grievant should be awarded back pay in the amount of the difference between his compensation as a Certified Welder, and the higher compensation of a Crew Leader for the time periods set forth fully below. As to the remaining claims, Grievant has not met his burden of proof in this case.

The relevant facts of this case, as set forth in the following Findings of Fact, are sparse, and difficult to ascertain from the record at Level III.

FINDINGS OF FACT

1. Grievant is employed by the Division of Highways. Grievant was classified as a Transportation Worker IV - Welder on November 16, 1993, pursuant to the Statewide Reclassification Project by Personnel. His previous classification was Certified Welder. T. 4; Agency Exhibit No. 1. (See footnote 3)

2. The Crew Leader of the crew to which Grievant was assigned was injured in late 1992, and had not returned to work through the date of the hearing (March 29, 1993). T. 3-4, 19, 31.

3. Grievant was placed on temporary upgrade status as Crew Leader, performed the duties of Crew Leader on the Cabwaylingo Park bridge project in place of the injured Crew Leader, and was compensated at the higher pay grade of a Crew Leader during various periods beginning November 4, 1992, through September 9, 1993. From November 4, 1992, through May 24, 1993, Grievant was upgraded to Crew Leader on only 30 days; while, beginning May 25, 1993, and continuing through September 9, 1993, Grievant performed the duties of Crew Leader, and was compensated as such, every day except August 10, 1993. T. 3-8, 22; Agency Exhibit No. 4. (See footnote 4)

4. DOH paid Grievant as a Crew Leader over a period of 26 calendar days from July 15, 1993, but on the next day (August 10, 1993) DOH compensated Grievant as a Certified Welder. From August 11 through September 9, 1993, Grievant was compensated as a Crew Leader. Agency Exhibit No. 4.

5. September 9, 1993, was the ninetieth (90th) work day Grievant had been upgraded to Crew Leader during the twelve month period beginning November 4, 1992. On September 10, 1993, Grievant was removed from the temporary upgrade status of Crew Leader, because the policy on temporary upgrades which was being used by DOH allowed an employee to be assigned to a

temporary position for no more than ninety (90) work days in any twelve month period. T. 4, 7. (See footnote 5)

6. From September 10 through November 3, 1993, Grievant (after being made aware that he would not be paid as a Crew Leader during this period because the Temporary Upgrade Policy being applied by DOH did not allow him to be paid at the higher pay grade for more than ninety work days during a twelve month period) voluntarily "chose to perform the job (of Crew Leader) without upgrade pay" for the higher classification, and did in fact performthe duties of Crew Leader. Grievant stated that he chose to do so, "for two reasons. One, to better myself, give myself more experience which I thought would help me. Two, we were in the middle of a major project and I did it to help the organization to keep things rolling, keep things moving." T. 5, 21, 45. However, Grievant was in fact compensated for the difference in pay between a Crew Leader classification and a Certified Welder classification on nine (9) days during this time period. T. 21-23; Agency Exhibit No. 4.

7. During the period from November 4 through November 15, 1993, Grievant performed the duties of Crew Leader, and was compensated at the Crew Leader pay grade, except on November 5, 1993, when he was compensated at the Certified Welder pay grade. T. 3; Agency Exhibit No. 4. From November 16, 1993, when Grievant was reclassified as a Transportation Worker IV - Welder, through November 19, 1993, when this grievance was filed, Grievant was paid at the Transportation Worker IV - Welder pay grade, while performing the duties of the higher pay grade classification of Transportation Crew Supervisor (previously identified as a Crew Leader before the reclassification by Personnel). T. 4.

DISCUSSION

Grievant has the burden to demonstrate by a preponderance of the evidence that he should prevail on his claims. Grievant's claims for relief can be divided into claims for back pay for four periods, and a claim for permanent assignment to the position ofCrew Leader. The four periods to be addressed to determine whether back pay should be awarded are: (1) August 10, 1993; (2) September 10 through November 3, 1993; (3) November 4 through November 15, 1993; and (4) November 16 through November 19, 1993. Each period will be addressed separately.

In this case Grievant has asserted a violation by DOH of its Temporary Upgrade Policy. Grievant has demonstrated that DOH violated the Personnel Pilot Policy on Temporary Classification Upgrades ("Pilot Policy"), which became effective July 15, 1993. Grievant's Exhibit No. 2. DOH

applied the DOH Temporary Upgrade Policies dated August 25, 1983, and May 9, 1990, to Grievant's case, apparently because DOH was not aware of the Pilot Policy until late December 1993. (See footnote 6) Had these older Temporary Upgrade Policies been in effect after July 15, 1993, DOH would have also been in violation of them during the period from September 10 through November 3, 1993.

The Pilot Policy provides in part II, A through E:

A. This pilot policy applies to both classified and classified-exempt employees who are assigned or perform in the following capacities:

1. Employees assigned by proper authority to an acting capacity as a result of the separation or extended leave of absence of another employee.

2. A trial work period to determine the suitability of the employee for promotion to the higher classification.

3. Short term projects, assignments, or emergency work assignments deemed appropriate by proper authority.

B. Acting capacity assignments shall be not less than 30 calendar days, nor more than 6 months.

C. Trial period assignments shall not exceed 6 months.

D. Short term projects or emergency assignments shall not be less than 30 calendar days and may continue until the completion of the project or emergency situation, but no longer than 6 months without the express authorization of the Director, Division of Personnel. Extensions shall be granted in incremental periods of no more than 3 months each

until completion of the project or resolution of the emergency situation.

E: An employee may not be assigned to successive temporary upgrade assignments.

Grievant's temporary upgrade could be considered either an acting capacity assignment or a short term project. Both temporary upgrades are subject to the requirement of the Pilot Policy that the temporary assignment cannot be for a period of less than 30 days.

(1) August 10, 1993.

Beginning on the date the Pilot Policy became effective (July 15, 1993), DOH paid Grievant as a Crew Leader over a period of 26 calendar days, but on the next day (August 10, 1993), DOH paid Grievant at his assigned position of Certified Welder. From August11 through September 9, 1993, Grievant was compensated at the Crew Leader pay level. Agency Exhibit No. 4. On August 10, 1993, DOH violated the provision of the Pilot Policy which precludes an acting capacity assignment, a short term project or emergency assignment for a period of less than thirty (30) calendar days. Grievant should have been assigned to the temporary position of Crew Leader, and compensated accordingly for a minimum thirty (30) day period, beginning July 15, 1993. Grievant should therefore receive back pay in the amount of the difference between the compensation of a Crew Leader and that of a Certified Welder for August 10, 1993.

(2) September 10 through November 3, 1993.

Grievant has asserted that he should also be paid back pay for the period September 10 through November 3, 1993, because he performed the job of Crew Leader during that period, but was paid at the lower rate of pay applicable to his assigned position of Certified Welder. The Supreme Court of Appeals of West Virginia held in American Federation of State, County & Municipal Employees v. Civil Service Commission, 324 S.E.2d 363 (W. Va. 1984) (AFSCME I), 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." Shremshock v. W. Va. Dept. of Transportation, Division of Highways, Docket No. 94-DOH-095 (August 31, 1994).

In this case, Grievant admitted that he knew he would not receive the higher Crew Leader pay

during the period from September 10 through November 3, 1993, but, nonetheless, "chose" to perform the duties of a Crew Leader to gain experience in the position and to move the project along. T. 5, 45. This Board has consistently held that "(E)mployees who, with full understanding that they have no guarantee of higher compensation voluntarily fill in at a higher classification level cannot later claim that they should have been reclassified for that period. Freeman v. W.Va. Dept. of Health and Human Resources, Docket No. 90-H-237 (Dec. 26, 1990)." Spencer v. W. Va. Dept. of Health and Human Resources/Welch Emergency Hospital, Docket No. 93-HHR-523 (Oct. 28, 1994). Consequently, absent other factors, Grievant would not be entitled to Crew Leader pay for the period from September 10, 1993, through November 3, 1993.

However, it was determined at Level III that during the period from September 10 through November 3, 1993, Grievant was compensated at the higher pay rate of a Crew Leader on nine (9) days. This finding is supported by the evidence. See Agency Exhibit No. 4; T. 21-23. No explanation for this occurrence was placed into evidence, and this occurrence is inconsistent with the testimony offered by the parties that Grievant had performed the duties of Crew Leader without the higher pay, and inconsistent with the Temporary Upgrade Policy DOH was apparently following at this time which would not allow Grievant to be paid as a Crew Leader during this time.

DOH was in error when it told Grievant he could not be compensated as a Crew Leader during the period September 10 through November 3, 1993, because DOH was applying the wrong temporary upgrade policy. This is not to fault DOH. Apparently DOH did not know about the Pilot Policy. When Grievant volunteered to continue to perform the job of Crew Leader without additional pay, he was under the false impression that he could not receive Crew Leader pay during that period. It is clear that Grievant would not have chosen to perform the Crew Leader duties without additional compensation had he been aware that he could be paid as a Crew Leader under the Pilot Policy. This distinguishes Grievant's situation from this Board's previous holdings in Freeman and Spencer, supra. Also, the fact that Grievant received Crew Leader pay for nine days during the period September 10 through November 3, 1993, indicates that DOH was choosing, arbitrarily or otherwise, to follow the old temporary upgrade policy some days and not follow it on others. Again, even under the old temporary policy, Grievant volunteered to perform the job under a false impression that he could not receive additional pay. Grievant should receive back pay in the amount of the difference between the compensation of a Crew Leader and that of a Certified Welder for the period from

September 10 through November 3, 1993, except for the nine days he has already been compensated at a Crew Leader pay grade.

(3) November 5, 1993.

During the period from November 4 through November 15, 1993, Grievant performed the duties of Crew Leader, and was compensatedas a Crew Leader, except on one day (November 5). No explanation was provided for the failure to properly compensate Grievant on this date. Consistent with the holding of AFSCME I and the Personnel Pilot Policy, Grievant should be awarded back pay in the amount of the difference between the compensation of a Crew Leader and that of a Certified Welder for November 5, 1993.

(4) November 16 through November 19, 1993.

After his reclassification on November 16, 1993, to Transportation Worker - IV, Grievant continued to perform the duties of Crew Leader, but was not paid as a Crew Leader. Again, no explanation for this was given. Under AFSCME I, Grievant must be compensated for the job performed. Grievant should be awarded back pay in the amount of the difference between the compensation of a Crew Leader and that of Transportation Worker - IV for the period from November 16, 1993, through the date of the grievance, November 19, 1993.

Claim for Permanent Assignment to Crew Leader Position.

Grievant is not entitled to a promotion to Crew Leader simply because he has performed the duties of Crew Leader temporarily, nor as a remedy for a violation of a Temporary Upgrade Classification Policy. This Board has made it clear that "(E)xcept for infrequent short-term assignments, an employer may not impose duties upon a classified state employee which are outside the specifications established by the Division of Personnel for his or her position." Toney v. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-460 (June 17, 1994), at 8. However, this Board has also heldthat the remedy for a violation of this principle is "that the duties be discontinued and back wages in the form of the difference between his salary and that of the higher classification." Id. at 12. In this case, over a period of approximately twelve and one half (12 1/2) months, Grievant apparently performed the duties of Crew Leader on one hundred twenty-six (126) work days, (See footnote 7) with no pretense that he would be permanently upgraded to the position. In several cases the Grievance Board has made it clear that employees who perform the duties of a higher paid classification on a temporary assignment cannot claim misclassification for such periods, nor can they

claim entitlement to the higher paid classification. Thornton v. W. Va. Workers' Compensation Fund and West Virginia Div. of Personnel, Docket No. 90-WCF-077 (Dec. 26, 1990). See, also, Wolfe v. W. Va. Tax Dept., Docket No. T-88-011 (July 28, 1989); and Freeman v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-237 (Dec. 26, 1990). The Grievant's claim that he should be upgraded permanently to the position of Crew Leader is accordingly **DENIED**.

It should be made clear that the events upon which both this grievance and the decision herein are based occurred prior to or on November 19, 1993, when the grievance was filed. Events occurring after the date of the grievance which were placed into the recordare not relevant to this grievance and were not considered in rendering this decision.

CONCLUSIONS OF LAW

1. In order to prevail, a 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. "The West Virginia Division of Personnel (Personnel) is authorized by W. Va. Code §29-6-10 to establish and maintain a position classification plan for all positions in the classified service. State agencies utilizing such positions must adhere to that plan in making assignments to their employees." Toney v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994), at 12.

3. The W. Va. Division of Personnel Pilot Policy on Temporary Classification Upgrades was effective July 15, 1993, and should have been used by DOH from that date forward. DOH violated the Pilot Policy when it failed to temporarily upgrade Grievant for a period of at least thirty days, and when it failed to compensate Grievant at the higher pay grade when he was temporarily upgraded.

4. The doctrine of equal pay for equal work (W. Va. Code §29-6-10(2) (1992)), requires that state employees employed in a particular employment classification, but performing work in another classification compensated at a higher pay grade, be paidconsistent with the higher classification. American Federation of State, County & Municipal Employees v. Civil Service Commission, 324 S.E.2d 363 (W. Va. 1984).

5. Grievant has failed to establish that he was entitled to be classified as a Crew Leader based upon his temporary upgrade to that position.

Accordingly, this grievance is **GRANTED** in part and **DENIED** in part. The Respondent Division of Highways is **ORDERED** to pay back wages to Grievant consistent with the holdings herein that on August 10, 1993, from September 10 through November 3, 1993, on November 5, 1993, and from November 16 through November 19, 1993, DOH violated the Pilot Policy on Temporary Classification Upgrades developed by Personnel, and applicable to DOH effective July 15, 1993; and that Grievant should be awarded additional pay for August 10, 1993, for all but nine work days (for which he was already properly compensated) during the period from September 10 through November 3, 1993, for November 5, 1993, and for the period November 16 through November 19, 1993, in the amount of the difference between his compensation as a Certified Welder, and the higher compensation of a Crew Leader. The claim of Grievant to the classification of Crew Leader is **DENIED**. 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 30, 1994

Footnote: 1 The grievance was denied at Level I on November 23, 1993, and at Level II on December 16, 1993.

Footnote: 2 In a November 16, 1993, reclassification, the Division of Personnel changed the title of Crew Leader to Transportation Crew Supervisor.

Footnote: 3 All references to the transcript of the Level III hearing held on March 29, 1994, will be made as follows, with the page number of the transcript appearing in the blank: "T. ."

Footnote: 4 There is some testimony in the record from Grievant about beginning the temporary upgrade in May of 1993, and the grievance itself states that Grievant had been working out of his classification since May of 1993. The record from Level III is unclear as to when Grievant was temporarily upgraded. It appears, and will be found that the Crew Leader was injured in November 1992, and Grievant then assumed the Crew Leader duties for some short period of time on a

temporary basis. However, Grievant did not performthe Crew Leader duties on a consistent basis until May 1993. Agency Exhibit No. 4 shows that from May 18, 1993, through September 9, 1993, Grievant worked 61 days as Crew Leader, out of a total of 90 days worked as Crew Leader from November 4, 1992, through September 9, 1993.

Footnote: 5 Grievant had also been injured and off work for some period of time between November 4, 1992, and September 9, 1993. The parties apparently are in agreement that this resulted in the ninety (90) day time period ending September 9, 1993.

Footnote: 6 DOH argued that the Pilot Policy did not apply to this grievance because Mr. Sam Beverage, who represented DOH at the Level III hearing, did not receive the Pilot Policy until December 27, 1993, and because DOH had been told in a memo, which was not made a part of the record, that the Pilot Policy did not apply to employees in Grievant's classification. Joe Smith, Assistant Division Director of Personnel, testified that the Pilot Policy was effective July 15, 1993, and applied to DOH from that date, and that it applied to Grievant's upgrade after that date. T. 47-51. No evidence was presented that the Pilot Policy was not properly adopted. An otherwise properly adopted policy will not be held inapplicable to DOH in this case simply because Mr. Beverage did not receive it on or before the effective date.

Footnote: 7 This number is calculated by adding the 90 days as Crew Leader through September 9, 1993, to the number of days from September 10, 1993, shown on Agency Exhibit Number 4 which are marked with either a pay grade of 131 (Certified Welder) or 143 (Crew Leader). See T. 22.