PHILLIP LINK, et al.

v. Docket No. 94-BOD-251

WEST VIRGINIA BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY

DECISION

___Grievants, seventeen WVU-ACE members employed by West Virginia University (WVU) at the Physical Plant, filed a level one grievance dated April 3, 1994, in which they protested: The grievants feel they were not properly compensated for all emergency days and holidays worked since 1/1/94 to present. Policy Bulletin 62 clearly states its application of compensation in this area. It is the Grievants [sic] belief that this section of Policy Bulletin 62 is applied and computed differently throughout the university, which also makes this grievance a discrimination issue. To satisfy grievants, compensation shall be computed as stated in P.B. 62. We also request that other divisions in the university apply and compute this policy fairly throughout.

After denials at levels one and two, appeal was made to level four on June 21, 1994. An evidentiary hearing was held on September 13 and the grievance became mature for decision with the filing of proposed findings of fact and conclusions of law on October 21, 1994.

The limited facts of this matter are undisputed. Due to inclement weather in January 1994, WVU was closed on January 4, 5, and 18-21, as "declared emergency days." January 17, 1994, was a holiday. Grievants worked on one or all of those days and were compensated, in addition to their regular salary, at one and one-half times their regular hourly salary. A second option available to Grievants was compensatory time off (CTO) at the rate of one and one-half times their actual hours worked. Guidelines for overtime, holiday, and emergency work are

set forth in Board of Trustees Policy Bulletin No. 62 (P.B. 62).

Grievants argue that while revised P.B. 62 contains some word changes from the 1987 version, the meaning and intent of the holiday compensation section remains the same. Based on that premise, Grievants cite Walden v. West Virginia University, Docket No. 89-BOR-89 (Aug. 31, 1989), as support for their position that they were entitled to receive their regular pay, plus pay at their regular rate for the number of hours worked, plus CTO at a rate of one and one-half times the number of hours worked.

Grievants reason that their interpretation is only fair because employees who did not work during the emergency received their regular pay plus a day off work with no loss of leave time which was "worth just as much as the pay;" therefore, those individuals who did not work during the emergency were essentially twice compensated, while employeeswho did work were, in effect, compensated only half their regular salary more than those who did not work. Thus, Grievants opine that adequate compensation for work during emergencies would be three and one-half times their regular salary.

WVU argues that P.B. 62 was revised effective January 1, 1994, making the prior version under which Walden was reviewed inapplicable to the facts herein. (See footnote 1) **Contrary to Grievants' characterization, WVU argues that the provisions of P.B. 62 have changed significantly. Citing Section 5, WVU asserts that employees who are required to work on any designated Board or institution holiday shall receive regular pay plus substitute time off or additional pay at the rate of one and one-half times the number of hours actually worked, for a total of two and one-half times regular pay.**

Although P.B. 62 (1994) initially omitted reference to work on emergency days, the oversight was addressed by a January 28, 1994, memorandum from Drayton Justus, Assistant Vice President for Human Resources. Mr. Justus advised via the memorandum that the policy stated in P.B. 62, Section 8.2 (1987) would be carried over until the 1994 policy could be amended. Consistent with this ruling, employees who worked during the declared emergency in January received their regular wages and were additionally compensated at one andone-half times their regular salary or given CTO in the amount of one and one-half times the actual number of hours worked. WVU argues that Grievants were correctly compensated under these provisions.

WVU denies that Grievants were the victims of discrimination due to the compensation policy having been inconsistently applied throughout the institution. (See footnote 2) WVU notes that while there may be different time sheets in the various departments, the calculations regarding regular time, overtime, holiday time, and emergency time, are applied consistently to all employees. Because Grievants have cashed their checks for the period of time in question and/or utilized the CTO accrued, WVU argues that they now have no entitlement to any monies or CTO due them.

Although Grievants' argument regarding the value of a day off work with pay and without loss of leave time is not without some logic, the procedure applied by WVU in this matter was not contrary to P.B. 62. Section 5.2 of P.B. 62 (1994) provides:

When a full-time or part-time classified non-exempt employee is required to work on any designated board or institution holiday, that employee at his/her option shall receive regular pay for thatholiday plus substitute time off or additional pay at the rate of one and one-half (1 1/2) times the number of hours actually worked. The time off must be used within a six-month period following the holiday.

In the absence of a policy reference to emergency time worked, Mr. Justus' memorandum restating the provisions in the 1987 version of P.B. 62 is controlling. In that document, Mr. Justus advised that "employees required to work during the emergency period are entitled to [regular, straight-rate pay] and additional compensation at the rate of one-and-one-half for actual hours worked." WVU's compensation of Grievants at a rate of two and one-half times their regular salary is consistent with this provision.

Grievants' assertion that the P.B. 62 provisions regarding holiday pay had remained unchanged in the 1994 version is inaccurate. The policy made a part of the record in the Walden matter stated:

When a classified employee is required to work on any designated Board or institution holiday, that employee shall receive regular pay for the number of hours worked on that holiday plus substitute time off at the rate of one and one-half (1 1/2) times the number of hours actually worked on the holiday.

Contrary to Grievants' interpretation, the wording in this version of P.B. 62 is not identical

to that in the 1994 version. Because the prior version provided for compensation at the regular rate for the number of hours worked on aholiday, the wording inferred that the compensation for the number of hours worked would be in addition to the employee's regular pay for the day. To read the provision otherwise could actually result in the employee receiving less than his regular daily salary. For instance, if an employee worked only two hours on a holiday he might receive his regular compensation for two hours plus three hours of CTO. This would have resulted in the employee actually earning less than his regular salary for that day. Since such an outcome was unreasonable, the policy had to be interpreted to mean the employee would receive his regular salary, additional pay for the number of hours worked, and CTO for the hours worked on a holiday. The 1994 version of P.B. 62 does not retain the ambiguous wording upon which the Walden decision was based.

In support of the discrimination allegation, Grievants submitted what appears to be a work sheet used to calculate the hours an individual worked during the week of January 16-22, 1994. At the level two hearing it was identified by Grievants' representative as a worksheet used by the Personal Rapid Transit (PRT) division. Grievants offered no testimony from any individual at the PRT division responsible for completion of the worksheet, but only expressed concern that they did not understand the calculations which led them to believe that an inconsistency existed. Grievants offered no further evidence regarding this issue at the level four hearing and did not address the matter in their proposedfindings of fact and conclusions of law.

It was never confirmed that the document admitted into the Level II record as Grievants' Exhibit No. 3 was an official form which was in fact utilized by any division or department at WVU. (See footnote 3) **Neither did Grievants produce any evidence to show that the calculations on the form were indeed inconsistent with the methodology used to calculate their compensation. Because it cannot be determined on the face of the document that the calculations were inconsistent, it must be concluded that Grievants have failed to prove that WVU has treated them in a discriminatory manner in reference to this issue.**

In addition to the foregoing statements of fact and discussion, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. The evidence of record establishes that Grievants were appropriately compensated for work completed on a holiday and during a declared emergency in compliance with Board of Trustees Policy Bulletin No. 62 (1994) and institution policy and practice.

2. Grievants have failed to prove that calculations forholiday and emergency work varied within the divisions of WVU or that there was otherwise any disparity in compensation which might constitute discrimination as defined by W.Va. Code §18-29-2(m).

Accordingly, the grievance is DENIED.

DATED: January 31, 1995 Sue Keller, Senior Admn. Law Judge

ARCHIE SELF

v. Docket No. 94-DOH-410

WEST VIRGINIA DIVISION OF HIGHWAYS

DECISION

Grievant, Archie Self, employed by the Division of Highways (DOH) as a Transportation Worker II (TWII), filed a grievance at level one on December 20, 1993, in which he alleged that his assignment operating a Tiger Mower (See footnote 4) **warranted classification as a Transportation Worker III (TWIII).** (See footnote 5) **Mineral County Supervisor John Lusk advised Grievant that he had no authority to grant the requested relief at level one and the grievance was denied by District Engineer Nicholas Bromhal at level two. At level three, the evaluators determined that the Tiger Mower should be reviewed by a panel or committee to determine the proper classification for the position held by the operators of that equipment. When the results of that review confirmed the correct classification to be TWII, Grievant advanced his complaint to level four on August 12, 1994. An evidentiary hearing was**

conducted on October 26. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, andthe matter became mature for decision on November 7, 1994, when DOH submitted a video tape depicting the Tiger Mower in use.

Testifying on his own behalf, Grievant stated that he has been employed by DOH for 29 years and that he has operated a Tiger Mower since they were first introduced in 1985. At level two Grievant estimated that approximately 75% of his time was allocated to operating the Tiger Mower; however, at level four that estimate was revised to 80% of his time. Grievant asserts that he is entitled to the higher classification due to the complex operation of, and the potential danger created by, the equipment. Mr. Self states that he works under constant stress caused by the numerous security measures which must be completed throughout the day to ensure the Mower is functioning safely. Grievant also described the difficultly in operating the Mower which requires the manipulation of numerous pedals and levers. Safety is a major concern expressed by Grievant, who stated that the operator's vision and hearing are somewhat impaired by the machine, requiring close attention to avoid throwing debris onto the highway, possibly injuring another individual. Grievant notes that the Tiger Mower is the only equipment which requires annual certification of its operators due to the aforementioned considerations. To illustrate his position, Grievant submitted a videotape of the Tiger Mower in use. Additionally, Grievant elicited testimony from severalco-workers and county supervisors who substantiated his claims regarding the equipment's complexity and opined that the operator should be classified as a TWIII. Finally, Grievant submitted the classification description utilized by the state of Maryland for Highway Technician III. One of the duties listed on this form is the operation of tractor mounted telescopic/articulating boom mowers, such as the Tiger Mower. Grievant argues that this document is supportive of his position because the classification descriptions for Highway Technician I, II, and III mirror West Virginia's Transportation Worker I, II and III classifications.

DOH explains that the classification of TWI, II, or III is dependent on the type of equipment the employee is assigned to operate. While the operation of mowers is generally included in the TWI classification, those employees assigned to Tiger Mowers are classified as TWIIs as determined by the findings and recommendations of the review committee convened pursuant to the level three decision. DOH asserts that the classification descriptions from Maryland are

irrelevant in this matter because the equipment used may be different than the Tiger Mower.

Jeff Black, Director of DOH's Human Resources Division, testified that based upon the committee review, it has been determined that those employees assigned as TWI's will operate light equipment, TWII's will operate the Tiger Mower and endloaders, and TWIII's will be responsible for graders,dozers, tractor-trailers, and other heavy equipment. Mr. Black opined that while the classification system used in Maryland is similar to West Virginia's, differences do exist. For example, while mowers with a boom are assigned to Class III in Maryland, so are tandem axle trucks, which are considered Class II equipment in West Virginia.

While acknowledging that the Tiger Mower is a hazardous piece of equipment, Mr. Black notes that all operators are required to complete safety training and maintain annual certification. He also points out that the purpose of the equipment is destructive, cutting grass, brush, etc., rather than constructive. It is not used to build or finish roadwork. Therefore, the nature of the work completed with the Tiger Mower is not as crucial as that completed with other equipment. Because the work product is to remove excessive vegetation along the roadways, Mr. Black suggests that the purpose of the Tiger Mower is similar to the sickle bar which is Class I equipment. However, given the more advanced skills required of Tiger Mower operators, he opines that the correct classification for Grievant would be TWII.

In order to prevail upon a claim of misclassification, a grievant must prove by a preponderance of the evidence that his duties are those of a classification higher than the one assigned, as described by the specifications for that classification promulgated by the West Virginia Division of Personnel. Bannister v. W. Va. Dept. of Human Services,Docket No. 89-DHS-251 (Nov. 3, 1989). The analysis is focused upon whether the grievant's current classification constitutes the "best fit" for his required duties. Simmons v. W.Va. Dept. of HHR/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The class specifications at issue in this matter are:

TRANSPORTATION WORKER III

Nature of Work

At the journey level performs skilled work in the construction and maintenance of highways and related buildings and structures. Operates a variety of heavy motorized maintenance equipment such a power graders, bulldozer, semi-trailer. Transports equipment across state to construction or maintenance sites; makes major repairs to roads and bridges. Performs major overhaul of gasoline and diesel powered automotive and highway maintenance equipment. Performs skilled work in carpentry, plumbing, electrical and other building maintenance in construction areas. Performs related work as required.

Examples of Work

-Positions drilling rig on drilling site using a winch and steel cables.

-Assembles drilling rig and related equipment on location using wrenches, hammers and other tools.

-Interprets boring layout to determine location of drilling site and equipment needed.

-Operates drilling rig to collect core samples.

-Drives medium to heavy truck to transport drilling rig to drilling site.

-Prepares reports of drilling activity, materials and equipment used.

-Fabricates engine and machinery parts from blueprints and drawings using machinist skills and equipment lathes, drills, grinders and milling machines).

-Performs carpentry, masonry, painting, plumbing, electrical, air conditioning and heating work on buildings, building equipment and property.

-Estimates materials and costs and sketches plans for building construction and maintenance projects.

-Designs, lays out and fabricates highway signs.

-May lead and train lower level workers in performing skilledand semi-skilled work.

-Constructs concrete forms from plans and specifications with plywood and dimensional lumber using hand and power tools such as hammers, electric saws, drills, levels and rulers.

-Installs and ties reinforcing steel bars in concrete forms using wire, pliers and rulers to comply with the required specifications of bridge foundations.

-Pours, vibrates and finishes concrete using power vibrators and trowels.

-Climbs high steel structures to repair damage steel bridge components.

-Fabricates and installs structural steel by cutting steel to exact specification with acetylene

torches, placing and bolting steel in correct position to repair existing or construct new bridges.

Knowledge, Skills and Abilities

-Knowledge of the type of rock, aggregate and soil found in core drilling.

-Knowledge of safety practices for core drilling work.

-Knowledge of safety practices used in structural steel construction.

-Knowledge of the procedures, techniques and equipment in the assigned areas.

-Knowledge of applicable safety standards.

-Knowledge of basic blueprint reading.

-Ability to operate a drilling rig, water pump, air compressor and related equipment to drill for core samples.

-Ability to operate a heavy truck to transport drilling rig and related equipment.

-Ability to read operation manuals, blueprints, and specifications in the assigned areas.

-Ability to use hand tools and operate motorized equipment in the assigned areas.

-Ability to perform skilled trades work in bridge construction and maintenance.

-Ability to operate and maintain highway equipment and attachments.

Minimum Qualifications

-Training: No formal education required.

-Experience: Three years of full-time or equivalent part-time paid or non-paid experience in one or more of the assigned areas.

-Special Requirements: (1) A valid West Virginia Motor Vehicle Operator's License or a Commercial Driver's License may be required after employment. (2) Some positions in the class may require certification in the assigned area after appointment.

TRANSPORTATION WORKER II

Nature of Work

Under general supervision, at the full-performance level, performs skilled work in the

construction and maintenance of highways and related buildings and structures. Operates motorized highway maintenance equipment such as backhoe, mudjack, front-end loader, tandem-axle truck and snow plow. Makes major repairs to highways, culverts, bridge structures; welds, and erects steel girders and supports; builds forms and finishes concrete; performs overhaul of gasoline-powered engines and/or diesel powered equipment; performs major body repairs for automotive and maintenance equipment. Performs finish carpentry, electrical, plumbing and other building maintenance duties. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Examples of Work

-Constructs concrete forms out of plywood and dimensional lumber using hand tools, such as hammers, electric saws, levels and rules.

-Installs and ties reinforcing steel bars in concrete forms using wire, pliers and rulers.

-Pours, vibrates and finishes concrete using electric vibrators and trowels.

-Performs carpentry, masonry, painting, plumbing, electrical, air conditioning or heating equipment work to repair buildings, building equipment and property.

-Constructs concrete forms for inlets, manholes, headwalls, and retaining walls; repairs or replaces rubble, masonry, or stone walls.

-Paints vehicles and equipment using air compressors and paint sprayers.

-Repairs and forges hand tools and minor machinery parts using blacksmithing techniques and tools.

-Operates one or more pieces of equipment such as: asphalt distributor, rubber tire endloader, roller, trench machine, culvert cleaner, or mudjack.

-Drives dump, flat-bed, or tandem-axle trucks to transport equipment and materials to and from work sites.

-Checks equipment to determine operational readiness and makes minor corrections as required.

-Makes minor mechanical repairs in the field such as changing tires, blades, or filters.

-Performs maintenance, repair and minor overhaul on gasoline powered equipment and may work with components on diesel powered equipment.

-Repairs hydraulic brake system, (i.e. rebuild wheel cylinders, install brake shoes, rebuild disc

brake calipers, install disc brake pads, replace master cylinders, etc.).

-Cleans, sands, tapes, repairs dents and replaces rusted parts of vehicle bodies in preparation for painting.

-Installs windshields and door glass on vehicles and equipment.

-Repairs highway maintenance vehicles and equipment using gas welders and other welding equipment.

-Changes and repairs tires on vehicles and heavy equipment using tire cage, hoists, impact wrenches and air compressors.

-May set and detonate explosive charges for earth removal purposes.

-May be required to operate other highway maintenance equipment as employee training permits.

-Patches portland cement pavement and bridge decks.

-Installs and removes sign posts; erects traffic control signs and barricades on construction and maintenance projects.

-Seals joints and cracks in paved surfaces.

-May be required to drive a pickup truck.

-Repairs and constructs asphalt paved culverts.

-Fabricates road signs by cutting and punching aluminum and placing reflective sheeting and ribbing on blanks using rivet guns, electric drills, roller applicator, power punch presses and metal sheers.

-Service drive line components, (i.e., universal joints, axle seals, and auto transmission, etc.).

-Remove and replace alternators, starters, generators and batteries.

-May inspect vehicles for compliance with state regulations.

-Service components of chassis assembly to include such repairs as replacing ball joints, tie rod ends, control arms, idler arms, wheel bearings, etc.

-Performs minor engine tune-ups.

-Assists higher level mechanics in heavy equipment repairs.

-Maintains safe, orderly work area.

-Drives equipment after repairs to test operation.

Knowledge, Skills and Abilities

-Knowledge of the procedures, techniques and equipment in the assigned area.

-Knowledge of the methods, materials, tools, and equipment used in the maintenance and repairs of vehicles and other motor driven equipment.

-Knowledge of applicable safety standards.

-Ability to read operating manuals and specifications in the assigned area.

-Ability to use basic hand and power tools.

-Ability to climb high steel structures.

-Ability to operate and maintain highway equipment and attachments.

-Ability to diagnose less complex mechanical problems and follow appropriate procedures for repair.

-Ability to maintain routine records (time cards, work repair orders).

-Ability to use hand tools and operate motorized equipment in the assigned area.

-Ability to understand and follow oral and written instructions.

-Ability to train and work cooperatively with other skilled and semi-skilled workers.

Minimum Qualifications

-Training: No formal education required.

-Experience: Two years of full-time or equivalent part-time paid or non-paid experience in automotive body repair, building trades, equipment operation or repair, highway maintenance or metal work. No experience required for Bridge Maintenance position.

-Substitution: Successful completion of an approved vocational school program in automotive mechanics of at least 1,080 clock hours may be substituted for one year of the required experience.

-Special Requirements: (1) A valid West Virginia Motor Vehicle Operator's license; (2) a valid class A or B Commercial Driver's License is required in the area of Equipment Operation; (3) some positions in the class may require certification in the assigned areas after appointment.

These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W.Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for

these purposes, the "Nature of Work" section of a classification specification is its most critical section. Atchison v. W.Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). The key to the analysis is to ascertain the predominant duties of the position in question insofar as they are class-controlling. Broaddus v. W.Va. Div. of Human Serv., Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990).

In the present matter Grievant states that the predominant duty he performs, consuming 75-80% of his worktime, is the operation of the Tiger Mower. A comparison of the TWIII and TWII class specifications reveals that the primary difference in these positions is that the TWIII is required to operate heavy equipment and perform more complex work. A TWII is required to perform skilled work, including the operation of many types of motorized equipment, and may be exposed to hazardous working conditions.

Although the Tiger Mower requires all the operator's attention to manipulate the numerous levers and pedals, and the safety factors expressed by Grievant are not disputed by DOH, it does not appear that it falls within the category of heavy equipment as contemplated by TWIII. On the contrary, the mower appears to be comparable to other equipment operated by a TWII. Exposure to hazardous working conditions is specifically stated in the class specifications of TWII. The record reflects that a significant amount of debate has occurred within DOH regarding the Tiger Mower and the classification of those who operate that equipment. Grievant has shown that numerous DOH employees consider the appropriate classification for this assignment to be TWIII; however, unless and until Personnel's class specifications are amended, the appropriate classification for employees who operate the Tiger Mower remains TWII.

In addition to the foregoing narration, it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed by the Division of Highways and is presently classified as a Transportation Worker II.

2. Grievant is assigned to operate a tractor mounted telescopic articulating boom mower,

referred to herein as a Tiger Mower, 75-80% of his work time.

3. Operation of the Tiger Mower requires the manipulation of numerous levers and pedals, involves some visual impairment, and necessitates great attention to detail regarding safety factors.

4. A committee selected to review the Tiger Mower and recommend the proper classification for the operator supported the classification of TWII.

CONCLUSIONS OF LAW

1. Grievant has not proven by a preponderance of the evidence that the classification of Transportation Worker III is the "best fit" for the duties he performs. See Simmons v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-433 (Mar. 28, 1991).

2. Interpretation of the classification specifications by DOH for the positions of TWII and TWIII, as they apply to the duties performed by Grievant, are not clearly erroneous.

3. Grievant's job duties best fit within the classification for Transportation Worker II.

Accordingly, the grievance is DENIED.

January 31, 1995 Sue Keller, Senior Admn. Law Judge

Footnote: 1Respondent advises that although Walden was reviewed under the 1985 version of P.B. 62, that policy had been revised in 1987 and then again in 1994.

Footnote: 2It is noted that in the level two decision Mr. Justus found that departmental timesheets were not standardized throughout the University and that the examples provided were confusing and needed clarification. To that end his recommended action was that standardized departmental time sheets featuring explicit pay calculation procedures be developed and implemented by July 1, 1994.

Footnote: 3This concern is based upon a second "form" submitted as part of Grievants' Exhibit No. 3. This form, from the Physical Plant, is of a different format than that allegedly from the PRT; however, Paul Walden, Assistant Director of the Physical Plant, stated at the level two hearing that the Physical Plant form was not officially used. (Level II T. p.44).

Footnote: 4"Tiger Mower" is the brand name for the tractor mounted telescopic articulating boom mower.

Footnote: 5The West Virginia Division of Personnel (Personnel) did not participate at any of the lower levels of

the grievance process. Personnel was given Notice of the level four hearing but did not appear or request that it be made a party. Neither DOH nor Grievant requested that Personnel be made a party.