DAVE CUNNINGHAM, et al.,

Grievants,

v.

DOCKET NO. 98-DEP-454

DIVISION OF ENVIRONMENTAL PROTECTION/

OFFICE OF WASTE MANAGEMENT and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievants filed the following grievance against their employer, the West Virginia Division of Environmental Protection ("DEP") and the West Virginia Division of Personnel ("DOP"), on August 11, 1998: (See footnote 1)

> The undersigned WV Division of Environmental Protection inspectors (RCRA Hazardous Waste Inspectors) are improperly classified as Environmental Inspectors. Our job duties are more accurately reflected in the Environmental Inspector Specialist job description. Since August 4, 1996, we have attempted to correct this misclassification through the WV DEP's Office of Waste Management and the WV Division of Personnel. All attempts to date have proven ineffective and we are still working under the incorrect job classification.

RELIEF SOUGHT

> The relief sought in this case is for the WVDEP and WVDOP to correctly change our job titles to the "Environmental Inspector Specialist" title. We request that our salaries be adjusted to 5% above the currently highest paid WVDEP Environmental Inspector Specialist, to be morecommensurate with the higher level of training, range of responsibility, degree of difficulty and inherent risks associated with our duties as compared to others holding the Environmental Inspector Specialist job title. We also request back pay at this higher rate for the years that we have performed these duties and have been deprived of the benefits thereof. We also request any and all pre and post judgement interest, any lost benefits associated with the higher salary, and to be made whole in every way.

The grievance evaluators at levels one and two were without authority to grant the relief requested, and a level three hearing was conducted on August 27, 1998. The level three grievance evaluator, Jack C. McClung, recommended the grievance be denied by decision dated October 19, 1998, to which Michael P. Miano, Director, concurred on November 2, 1998. Grievants appealed to level four on November 20, 1998, and following several continuances for good cause, a level four hearing was conducted on March 9, 1999. Grievants were represented by Paul M. Stroebel, Esq., Stroebel & Johnson, DEP was represented by Donald Darling, Esq., and Rex Burford, Esq., Office of the Attorney General, and DOP was represented by Lowell D. Basford, Assistant Director of Personnel, Classification and Compensation Section.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

Position Description Form for Environmental Inspector.

Ex. 2 -

Job Specification for Environmental Inspector and Environmental Inspector Specialist.

Ex. 3 -

November 12, 1997 memorandum from B. F. Smith, P.E., Chief, Office of Waste Management, WVDEP, to Tim Basford, WVDOP, with attachment.

Ex. 4 -

June 29, 1998 memorandum from Lowell D. Basford to Sandra Kee, Administrator, with attachments.

Ex. 5 -

November 19, 1990 press release.

LIII DOP Exhibits

Ex. 1 -

Organization Chart for OWM Compliance Monitoring & Hazardous Enforcement Section.

Ex. 2 -

May 26, 1998 memorandum from H. Michael Dorsey, Assistant Chief, to Sandy Kee.

LIV Grievants' Exhibits

Ex. 1 -

October 4, 1996 memorandum from H. Michael Dorsey to Stan Moskal and Tom Fisher.

LIV Respondents' Exhibits

Ex. 1 -

Definitions of various categories of employees within a job classification.

Testimony

At Level III and/or Level IV, Grievants Dale L. Gable, Dave Cunningham, Joyce Moore, John Fredericks, Jim Gatson, Penny Harris, Mike Blumish, and Henry Haas testified in their own behalf, and presented the testimony of Tom Fisher, and Lowell Basford. Respondents presented the testimony of Sandra Kee, Lowell Basford, Michael Zeto, Randy Huffman, and Franklin J. Parker.

FINDINGS OF FACT

1. Grievants are currently classified as Environmental Inspectors and are employed in the Waste Management section of DEP.

2. In May 1998, Grievants completed Position Description Forms for the purpose of requesting a change in the classification of their positions from Environmental Inspectors to Environmental Inspector Specialists.

3. In June 1998, DOP made a determination that Grievants should remain classified as Environmental Inspectors. DOP concluded that because Grievants do not perform lead worker duties, they should not hold the Environmental Inspector Specialist classification. 4. In August 1998, Grievants filed this grievance, asserting they are improperly classified as Environmental Inspectors and should be classified as Environmental Inspector Specialists.

5. The “Nature of Work” section of the Environmental Inspector classification states as follows:

> Under limited supervision, at the full-performance level performs technical and field inspection work in environmental protection programs to determine compliance with applicable laws, regulations, permits, best management practices and/or contracts within an assigned region of the state. Authority is given to follow-up violations with initiation of civil or administrative proceedings or criminal prosecution, including swearing out warrants, or taking other action provided by law to effect prosecution, in compliance with established procedures. Work requires travel and outside work in varying weather conditions and over difficult terrain. Subject to emergency response, being on-call and temporary assignment to a different geographical area of the state as necessitated by environmental conditions and agency needs. May be assigned to an area of specialization as detailed above. Performs related work as required.

6. The “Distinguishing Characteristics” section of the Environmental Inspector classification states as follows:

> This class is distinguished by its full-performance journey-level nature. Employees at this level perform a full range of inspector duties. May be required to provide instruction to trainees engaged in field work, but typically do not supervise or lead Inspectors-in-Training or perform the duties of a training officer.

7. The “Nature of Work” section of the Environmental Inspector Specialist classification states as follows:

> Under administrative direction, at the advanced level, serves as a lead worker or training officer and performs technical and field inspection work in environmental protection programs to determine compliance with applicable laws, regulations, permits, best management practices and/or contracts on a statewide basis. Has the authority to follow-up violations with initiation ofcriminal prosecutions but is generally directing and assisting other less trained and experienced inspectors in appropriate enforcement procedures. Work requires travel and outside work in varying weather conditions and over difficult terrain. Subject to emergency response. May be assigned to an area of specialization as detailed above. Performs related work as required.

8. The “Distinguishing Characteristics” section of the Environmental Inspector Specialist classification states as follows:

> This classification is distinguished from the Inspector by the elements of training others and lead work; may serve as an area-specific specialist. It is further distinguished from the Inspector Supervisor in that this classification, acts as liaison between the supervisor and field personnel. Typically, incumbents in this classification do not act as full-performance supervisors over other inspectors.

9. The Environmental Inspector classification is a generic classification used to cover a number of inspector employees in different departments of DEP. Waste Management is only one of DEP's departments which employs Environmental Inspectors.

10. The predominant difference between the Environmental Inspector classification and Environmental Inspector Specialist classification is the lead worker component contained in the Environmental Inspector Specialist classification. The duties of the Environmental Inspector classification do not include lead worker responsibilities.

11. Grievants do not perform lead worker duties.

DISCUSSION

In order for Grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties for the relevant period more closely match another cited Personnel classification specification than that under which they are currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, DocketNo. NR-88-038 (Mar. 28, 1989). Personnel 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. Dep't of Health, Docket No. 90-H-444 (Apr. 22, 1991); see generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether Grievants' current classification constitutes the “best fit” for their required duties. Simmons v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Admin. Rule, § 4.04(a); Coates v. W.

Va. Dep't of Health and Human Res., Docket No. 94-HHR- 041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. W. Va. Admin. Rule, § 4.04(d). Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. See, W. Va. Dep't of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

The personnel classifications at issue are reproduced as follows:

ENVIRONMENTAL INSPECTOR

Nature of Work

Under limited supervision, at the full-performance level performs technical and field inspection work in environmental protection programs to determine compliance with applicable laws, regulations, permits, best management practices and/or contracts within an assigned region of the state. Authority is given to follow-up violations with initiation of civil or administrative proceedings or criminal prosecution, including swearing out warrants, or taking other action provided by law to effect prosecution, in compliance with established procedures. Work requires travel and outside work in varying weather conditions and over difficult terrain. Subject to emergency response, being on-call and temporary assignment to a different geographical area of the state as necessitated by environmental conditions and agency needs. May be assigned to an area of specialization as detailed above. Performs related work as required.

Distinguishing Characteristics

This class is distinguished by its full-performance journey-level nature. Employees at this level perform a full range of inspector duties. May be required to provide instruction to trainees engaged in field work, but typically do not supervise or lead Inspectors-in- Training or perform the duties of a training officer.

Examples of Work

Collects samples from state waters, soil and discharges for field and laboratory analyses to determine environmental quality and compliance; documents findings.

Makes regular inspections of sites to ascertain types of wastes produced, sources and volume of wastes, efficiency of treatment, disposal methods, compliance with laws, regulations, issued permit

conditions, reclamation contracts, best management practices or to determine the condition of state waters, or to evaluate surface mining and reclamation practices.

Discusses with public officials, private business representatives and the general public, their efforts to protect the environment and to outline pertinent statutory and regulatory obligations.

Investigates complaints pertaining to suspected environmental harm from point sources, nonpoint sources, or regulated facilities.

Conducts field reviews of permit applications, contract proposals or sediment control plans.

Determines the intervals and appropriate sites for sampling, records pertinent data concerning relevant factors and interprets data collected. Inspects sites under construction and/or during operation for compliance with contracts, permits or best management practices.

Responds, in accordance with approved emergency response procedures, to spills or releases of pollutants, some of which may be hazardous substances.

Consults with supervisor on observations, variances cited in complying with regulations, and problems noted during inspections in order to determine courses of action which will accomplish the regulatory objectives.

Initiates criminal, administrative or civil enforcement or prosecution actions against suspected violators of environmental protection laws; testifies in court or administrative proceedings as required.

Orders immediate cessation of any operation or portion thereof when provided for by law where the public welfare or safety calls for such or when necessary due to noncompliance with law, regulations, permit conditions, and/or agency orders.

Makes decisions on change orders on reclamation contracts, adequacy of construction materials and methods, and verifies appropriateness of payment requests.

Coordinates enforcement activities with technical staff.

Writes technical and activity reports.

ENVIRONMENTAL INSPECTOR SPECIALIST

Nature of Work

Under administrative direction, at the advanced level, serves as a lead worker or training officer and performs technical and field inspection work in environmental protection programs to determine

compliance with applicable laws, regulations, permits, best management practices and/or contracts on a statewide basis. Has the authority to follow- up violations with initiation of criminal prosecution but is generally directing and assisting other less trained and experienced inspectors in appropriate enforcement procedures. Work requires travel and outside work in varying weather conditions and over difficult terrain. Subject to emergency response. May be assigned to an area of specialization as detailed above. Performs related work as required.

Distinguishing Characteristics

This classification is distinguished from the Inspector by the elements of training others and lead work; may serve as an area-specific specialist. It is further distinguished from the Inspector Supervisor in that this classification acts as liaison between the supervisor and field personnel. Typically, incumbents in this classification do not act as full-performance supervisors over other inspectors.

Examples of Work

Trains inspectors-in-training and inspectors.

Coordinates and monitors work of inspectors-in-training and inspectors engaged in complex technical or inspection duties. Follows-up and evaluates performance to determine need for additional or more intensive training.

Interprets laws, rules, regulations, contracts, engineering drawings, plans and specifications and explains such to others, and enforces the provisions thereof.

Conducts training seminars for inspectors and other technical and professional personnel.

Completes reports on activities for review by supervisor; assists legal counsel in the preparation of materials for hearings in courts of law or administrative proceedings; testifies as necessary.

Consults and advises supervisor concerning proposed or needed changes in policy and work procedures.

Makes inspections at sites to verify the accuracy or completeness of inspection reports submitted by inspectors-in-training or inspectors.

Responds in accord with approved emergency response procedures to spills or releases of pollutants, some of which may be hazardous substances.

Discusses with public officials, private business representatives and the general public their efforts to protect the environment and to outline pertinent statutory and regulatory obligations.

> Investigates complaints pertaining to previously reported suspected environmental harm from point sources, nonpoint sources, or regulated facilities to determine if prior inspections were conducted and appropriate action taken.

Grievants contend their classification more closely fits that of Environmental Inspector Specialist because they act as lead workers at hazardous waste clean-up sites, and perform training functions. DEP and DOP contend that Grievants have confused the term “lead worker” with the duties of a lead inspector at a clean-up site, and that Grievants do not perform “lead worker” duties a predominant portion of their time.

Grievants monitor facilities that generate, treat, store, or dispose of hazardous waste in the State of West Virginia. They perform compliance evaluation inspections under both federal and state regulations. Grievants train personnel within DEP engaged in remediation activities on sites, as well as environmental contractors, environmental consultants, and others. Grievants have emergency response duties where they functionas lead inspectors on sites such as truck spills and train derailments involving hazardous chemicals.

As lead inspectors, Grievants direct other inspectors during particular activities within their area of responsibility. Grievants cover facilities in different counties within the State, depending upon their area of assignment, as well as engage in state-wide activities. When an accident occurs in a specific facility, the Grievant assigned to that facility will act as the lead inspector. He or she schedules other workers' activities during that clean-up, assigns them duties, is completely responsible for the health and safety of all individuals on the work site, and prepares all paperwork associated with that project. Depending upon the size of the site, some or all of Grievants may be required to assist. When that occurs, one of the Grievants will be assigned by their supervisor as lead inspector.

Grievants contend that when this occurs, they are acting as lead workers over the other Environmental Inspectors. DOP and DEP argue that it is not possible, nor within the intent and framework of the classification scheme, to have every single position within a unit be classified as a lead worker. Rather, they argue, Grievants have misapplied or misinterpreted the term “lead worker” with their function as lead inspector. Further, DOP did not intend for the lead work responsibility to apply to occasional, ad hoc tasks. Lead work is described as an on-going responsibility for scheduling and/or reviewing the work of other co-workers. It is intended to be a regular and recurring

element in the position. DOP Ex. 1. Lead workers are intended to be “quasi-supervisors” and to perform the more routine elements of supervision such as assigning and reviewing work and training subordinate employees. Grievants are assigned lead inspector duties on a particular site out of necessity, in order to insure a recognized chain-of-command at the work site, and to avoid “too many cooks in the kitchen.” Each Grievant is assigned these duties from time to time, depending on the location of the site. Their work assignments are primarily self_made. Grievants do not supervise each other on a day-to-day basis, or routinely assign and review each others' work.

In summary, Grievants do not serve as lead workers, and their duties and responsibilities fall squarely within the Environmental Inspector classification.

CONCLUSIONS OF LAW

1. In order for Grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties more closely match another cited Personnel classification than that under which they are currently assigned. Hayes v. W. Va. Dep't of Natural Resources, Docket NO. NR-88-038 (Mar. 28, 1989).

2. The key to the analysis is to ascertain whether the Grievants' current classification constitutes the “best fit” for their required duties. Simmons v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991).

3. Class specifications are descriptive only and are not meant to be restrictive. Coates v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-041 (Aug. 29, 1994).

4. For position classification purposes, the “Nature of Work” section of the class specification is its most critical section. Atchison v. W. Va. Div. of Health, Docket No. 90-H- 444 (Apr. 22, 1991). 5. The Division of Personnel's interpretation and explanation of classification specifications, if such language is determined not to be ambiguous, should be given great weight unless clearly erroneous. W. Va. Dep't of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993).

6. The Division of Personnel's interpretation of the classification specifications at issue is not clearly erroneous as applied to the evidence adduced in this matter.

Pursuant to the foregoing Findings of Fact, Grievants did not prove by a preponderance of the evidence that they are misclassified as Environmental Inspectors. Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 25, 1999

Footnote: 1

The named Grievants are Dave Cunningham, Henry Haas, Dale L. Gable, Kevin Campbell, Joyce Moore, Mike Blumish, Jim Gaston, Penny Brown, and John Fredericks.