DERRICK G. MOORE,

Grievant,

v. **Docket No. 98-DOH-466D**

WEST VIRGINIA DIVISION OF HIGHWAYS,

Respondent.

DECISION ON DEFAULT

Derrick G. Moore (Grievant) filed a "Notice of Default" with the Grievance Board on November 16, 1998, alleging that he should prevail in this grievance, pursuant to the provisions of W. Va. Code § 29-6A-3. In response thereto, on January 22, 1999, the Division of Highways (DOH) filed a "Concession of Default and Motion for Hearing on Remedy." DOH admitted that a default had occurred at level three of the grievance process, and requested a hearing, pursuant to the provisions of W. Va. Code § 29-6A- 3(a)(1), in order to establish that Grievant's requested remedy, reclassification or upgrade, is clearly wrong or contrary to law. Accordingly, a level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on March 22, 1999. Grievant represented himself; DOH was represented by counsel, Timbera Wilcox, and the Division of Personnel failed to appear. Because the parties declined to submit written arguments, this matter became mature for consideration at the conclusion of the level four hearing.

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence presented at level four.

Findings of Fact

1. Grievant is currently classified as a Transportation Worker III--Mechanic, and serves as the shop leader at a county DOH garage.

2. On July 20, 1998, Grievant initiated a grievance alleging he had been subject to pay discrimination and misclassification, because he feels he is not being properly compensated for his supervisory duties.

3. Grievant's duties include the following:

Scheduling work and maintaining time sheets for five employees

Ordering parts and equipment for the county garage

Performing and directing everyday mechanic work on equipment

Completing all necessary paperwork for the county garage

4. The classification specification for Transportation Worker III, promulgated by the Division of Personnel (DOP) and effective September 22, 1997, states as follows:

TRANSPORTATION WORKER III

Nature of Work

Under limited supervision, at the journey level performs skilled work in the construction and maintenance of highways, related buildings and structures, and erecting and operating a drilling rig. **May serve as a working shop leader in a County Garage.** Operates a variety of heavy motorized maintenance equipment such as power graders, bulldozer, backhoe, and 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 full-performance experienced work maintaining and repairing a variety of equipment used in heating, ventilation, cooling and general operation of public buildings. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Examples of Work

Assists Driller in positioning drilling rig by clearing brush and other obstructions and using winch to move rig. Adds rods or augers to drill using wrench. Removes core samples from core barrel and places in core boxes;labels core boxes for depth and location of sample. Assists in the cleaning and maintenance of drilling rig and related tools and equipment. Drives medium to heavy truck to transport drilling rig to drilling site. Cleans drilling site of debris after drilling is complete. Fabricates engine and machinery parts from blueprints and drawings using machinist skills and equipment (lathes, drills, grinders and milling machines). Installs, maintains and repairs equipment such as: air conditioners, heaters, walk-in and reach-in refrigerators, washers, dryers, water chillers and coolers, vent fans, vending machines, food preparation equipment (such as mixers, blenders, slicers, stoves and warmers, steam and hot water distribution lines), stationary boilers, compressors, generators, pumps, water filtration units and heat exchangers. Performs preventive maintenance on heating and cooling equipment such as tightening fan belts and regularly changing oil and filters. Performs routine repairs to equipment such as replacing motors, belts, seals, bearings, and blades. Performs general building maintenance as required by replacing or installing plumbing and sprinkler systems and deliming hot water heaters and water coolers. Designs, lays out and fabricates highway signs. May lead and train lower level workers in performing skilled and 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 damaged steel bridge components. Constructs concrete forms for inlets, manholes, headwalls, and retaining walls; repairs or replaces rubble, masonry, or stone walls. Cleans, sands, tapes, repairs dents and replaces rusted parts of vehicle bodies in preparation for painting.

Paints vehicles and equipment using air compressors and paint sprayers.

Installs windshields and door glass on vehicles and equipment. Repairs highway maintenance vehicles and equipment using gas and electrical welders, torches, shielded metal arcs and other welding equipment. Fabricates a variety of attachments and parts for highway equipment such as snow blades, truck frames and hitches. Operates truck mounted welding equipment to make emergency repairs on vehicles and equipment in the field. Patches portland cement pavement and bridge decks. Installs steel piling, steel reinforcing bars, places and finishes concrete and cleans and paints structural steel. Performs highway coding, spotting, centerline and edge line striping in highway painting operations. Installs and removes sign posts; erects traffic control signs and barricades on construction and maintenance projects. Seals joints and cracks in paved surfaces. Repairs and constructs asphalt paved culverts. Sets and detonates explosive charges for earth removal purposes. Changes and repairs tires or vehicles and heavy equipment using tire cage, hoist, impact wrenches and air compressors. May be required to drive a pickup truck. 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. Mixes small quantities of concrete to fill repaired bridge surfaces. Installs timber deck on steel beam structures using dimensional lumber, hammer and nails. Installs steel piling in pre-drilled holes by placing poles accurately using levels and rulers. Cuts steel piling to correct dimensions with acetylene cutting torches. Places pre-cast prestressed concrete beams on bridge decks using slings and guide ropes, drills holes in abutments using rock drills for anchor bolts to accurately place and secure concrete beams.

Operates hydraulic crane truck for loading, hauling, unloading and placing materials at the job site. Drives trucks to and from job site to transport materials.

May specialize in the operation of a twelve ton hydraulic crane. Cleans and paints structural steel used for repair and construction of new bridges using sand blasting machines, air compressors and airless paint sprayers. Operates one or more pieces of equipment such as: bituminous paver, bulldozer, crane, stone crusher, power grader, hydraulic excavator, centerline paint machine, track endloader, backhoe, rock wagon, pavement shaver, or pavement scraper. Drives tractor-trailer or tandem-axle trucks to transport equipment and materials to and from work sites. Excavates, backfills, grades, or levels soil and aggregates according to plans and specifications. Grades surfaces, rolls or compacts soil and aggregates according to plans and specifications on flat or rolling terrain. 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. May be required to operate other related highway maintenance equipment as employee training permits. Performs a full-range of maintenance, repair, and overhaul on diesel powered engines and components exclusive to diesel equipment operation.

Performs preventive maintenance inspections of heavy equipment. Performs pre-operational check of equipment. Maintains safe and orderly work areas.

Drives equipment after repairs to test operation.

Knowledge, Skills and Abilities Knowledge of safety practices used in structural steel construction.

Knowledge of the procedures, techniques and equipment used in the assigned areas. Knowledge of the occupational hazards and applicable safety standards and

procedures of the assigned area. Knowledge of basic blueprint reading.

Knowledge of general construction and maintenance practices. Knowledge of the methods, materials, tools and equipment used in the maintenance, repair and overhaul of gasoline and diesel powered engines and their components.

Knowledge of the operation of motor driven equipment. Ability to diagnose mechanical problems and determine appropriate procedures for repairs. Ability to safely operate basic hand and power tools. Ability to operate a heavy truck to transport drilling rig in rough terrain. Ability to work safely in assembling drilling apparatus such as rods, augers, water pumps. Ability to read operation manuals, blueprints, and specifi cations in the assigned areas. Ability to 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. Ability to use power and plumbing tools in the repair of building fixtures and facilities. Ability to install, perform preventive maintenance on and repair equipment such as: air conditioners, air compressors, generators, pumps, boilers, washers, dryers and refrigerators. Ability to read gauges and meters to monitor the proper operation of heating, ventilation and cooling systems. Ability to work safely in assembling drilling apparatus such as rods, augers, water pumps. Ability to understand and follow oral and written instructions. Ability to maintain accurate records of daily maintenance activities and of gauges and meters used in heating ventilation and cooling systems. Ability to climb high steel structures. Ability to train and work cooperatively with other skilled and semi-skilled workers.

Minimum Qualifications

Training: No formal education required.

Experience:

Four years of full-time or equivalent part-time paid or non-paid experience automotive body repair, building trades, equipment operation or repair, highway maintenance work or metal work or in building equipment repair including work in heating, ventilation and cooling;

OR

Two years of full-time or equivalent part-time paid employment in bridge or structural steel construction;

OR

Two years of full-time or equivalent part-time paid experience in core drilling, oil or gas drilling or surface mining requiring the operation of drilling equipment or augers;

OR

Two years as a Transportation Worker II - Bridge Maintenance Worker.

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 assignment of Equipment Operation, and may be required in Bridge Maintenance, Equipment Repair, Highway Maintenance, and Core Drilling at the discretion of the appointing authority; (3) some positions in the class may require certification in the assigned area after appointment; (4) specific positions may require certification from a federal EPA approved testing organization as a certified technician required by the Clean Air Act on refrigerant recycling. **AREAS OF ASSIGNMENT:** Automotive Body Repair Bridge Maintenance Building Trades Core Drilling Equipment Operation Equipment Repair Highway Maintenance Metal Work

(Emphasis added.)

5. Grievant has compared his duties to that of a Transportation Crew Chief, which classification specification states as follows:

TRANSPORTATION CREW CHIEF

Nature of Work

Under general supervision, an employee in this class leads and participates in a crew or crews performing maintenance and repair on highways, upkeep and management of buildings or engaged in core drilling activities. May be exposed to hazardous working conditions and inclement weather. Core drilling requires frequent travel. Performs related work as required.

Distinguishing Characteristics The supervisory responsibility is limited to two crews or less.

Examples of Work

Reviews work schedule, determines equipment and materials needed, and assigns crew members to various tasks and leads the crew in completion of the project. Oversees and participates in a crew performing maintenance and repair work on roads such as: concrete and asphalt patching, bridge deck repair, cleaning culverts, mowing and brush cutting, snow removal, guardrail repair, or removal and repair of landslides. Oversees the progress and checks the quality of work performed by the crew. Keeps records of materials and equipment used on the project. Keeps time and attendance records of the crew. Completes a daily report of the project and submits to supervisor. Trains crew members on individual tasks on maintenance and repairprojects. 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. Classifies the rock or soil found in the sample by type and hardness of strata. Labels core boxes for depth and location of sample. Drives medium to heavy truck to transport drilling rig to drilling site. Prepares reports of drilling activity, materials and equipment used. Repairs drilling rig and related equipment of minor mechanical and structural problems. Organizes and directs the work of crews cleaning buildings, repairing and maintaining mechanical and electrical equipment, plumbing systems, and building structure. Ensures compliance with fire, electrical, OSHA, and other applicable laws, rules, and regulations. Develops, interprets, and revises blueprints for specific maintenance projects. Inspects building facilities continuously to ensure proper maintenance.

Knowledge, Skills and Abilities

Knowledge of highway maintenance techniques.

Knowledge of the standard safety procedures of the Division of Highways.

Knowledge of the maintenance standards of the Division of Highways.

Knowledge of the capabilities of construction and maintenance equipment.

Knowledge of the standard methods, practices, tools, and equipment used in building maintenance.

Knowledge of employee policies, procedures and supervisory techniques.

Knowledge of local, state, and federal building safety codes.

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

Knowledge of safety practices for core drilling work.

Ability to plan work and schedule crews and train and lead a crew in the various tasks of highway maintenance.

Ability to understand and follow oral and written instructions.

Ability to operate equipment used in highway maintenance and repair.

Ability to maintain routine records.

Ability to maintain effective working relationships with others.

Ability to perform basic arithmetic calculations to determine amounts of materials needed.

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 assemble drilling rig and related equipment.

Ability to classify types of rock, aggregate and soils from core drilling.

Ability to perform minor maintenance on drilling rig and related equipment.

Minimum Qualifications

Training:

No formal education required.

Experience:

Two years of full-time or equivalent part-time experience in highway construction or highway maintenance; or building and trades; core drilling; oil or gas drilling; or surface mining requiring the operation of drilling equipment or augers.

Special Requirement:

A valid West Virginia Motor Vehicle Operator's License or a Commercial Driver's License may be required after employment.

6. The Transportation Worker III classification is in Pay Grade 12.

7. The Transportation Crew Chief classification is in Pay Grade 13.

8. After denials at levels one and two, Grievant appealed to level three, where a hearing was held on August 14, 1998. At the conclusion of the level three hearing, Grievant agreed to allow the level three evaluator until October 1, 1998, to render a decision.

9. The level three evaluator did not issue a decision by October 1, 1998. 10. Despite notification of the level three and level four proceedings in this grievance, DOP declined to appear or participate.

Discussion

Effective July 1, 1998, the West Virginia Legislature amended the grievance procedure for state employees to add a default provision. (See footnote 1) This default provision is contained in W. Va. Code § 29-6A-3(a)(2), which provides, in pertinent part:

> The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in

> this article, unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

Although Respondent concedes that a default occurred, it contends that Grievant's requested remedy is clearly wrong and contrary to law, because his current job duties fall squarely within his classification of Transportation Worker III. In a default matter, Respondent has the burden of establishing its defense by a preponderance of the evidence. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowersv. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Obviously, if Grievant is misclassified, reclassification to the correct job title and pay grade is a remedy which logically "flows from" this grievance. See Gruen v. W. Va. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

Grievant contends that, whether he is reclassified or upgraded to a higher pay grade, one of these remedies is necessary in order to compensate him for the supervisory duties he performs at the county garage. He argues that he performs all of the same duties as a Transportation Crew Chief, except that the Crew Chief's duties are performed on road projects, and his duties are performed in a county garage. Grievant believes that, because a Transportation Crew Chief is compensated at a higher pay grade for his supervisory duties, he should also be so compensated.

In misclassification grievances which did not involve the default provision, in order for the Grievant to be reclassified, the Grievance Board has required proof that an employee's duties more closely match another DOP classification specification than that under which he is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). In these cases, classification 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 generally its most critical section. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dept. of Employment Sec., Docket No.89-ES-101 (Nov. 3, 1989). The key to the

analysis is to ascertain whether Grievant's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dept. of Health & Human Resources, 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).

Under the standards set forth in the cases cited above, DOH has proven by a preponderance of the evidence that Grievant is properly classified as a Transportation Worker III. The Nature of Work section of that specification states that such an employee “[m]ay serve as a working shop leader in a County Garage,” which is precisely what Grievant does. Moreover, the Transportation Crew Chief classification clearly contemplates an employee who leads and directs a highway or field crew, which does not include a supervising mechanic in a county garage. It would be clearly wrong to reclassify Grievant.

Grievant has made an alternative argument that DOP should have created a separate classification for county shop supervisors and placed it in Pay Grade 13. However, Grievant did not present any request of this type to DOP. DOP has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code §29-6-10(2). The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Moore v.W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghan v. W. Va. Civil Service Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hospital v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985).

However, in the instant case, because Grievant is entitled to a presumption that he has won the merits of this grievance, the burden of proof is upon Respondent to demonstrate that it would not be an abuse of discretion for DOP not to establish a new classification for Grievant. When an employee claims he is entitled to a new classification, it must be determined whether Grievant's current position description fits his job duties. See Ferrell v. Bureau of Employment Programs, Docket No. 93-BEP-449 (July 29, 1994). As discussed above, DOH has already established that Grievant's current job duties fit well within his current classification title. An examination of the Transportation Crew Chief

classification specification reveals that, not only is such an individual responsible for paperwork and time sheets, but he or she is required to possess extensive knowledge and skills in highway construction and related areas. Such individuals are also expected to have knowledge of various regulations, prepare daily reports, and be able to plan and direct work specific to highway maintenance and construction. As a county shop supervisor and mechanic, Grievant's supervisory duties encompass a much smaller scale of responsibility, although some paperwork and supervision are required of him. However, as a mechanic, his required knowledge is limited to that specific area of expertise, and the evidence presented indicates that his supervisory duties are limited to keeping time sheets,scheduling work, and ordering parts for equipment. All of these duties are incidental to operation of the mechanic work in the county garage. Grievant's current job description clearly encompasses all of his responsibilities.

Grievant's frustration is understandable, because other workers with no supervisory responsibilities hold the same classification and are compensated at the same pay grade as he is. However, the scant evidence in this case only demonstrates that Grievant's duties are encompassed by his current job description and that no other classification specification, current or otherwise, is a better fit for his duties.

Respondent has established that the remedy requested by Grievant would be clearly wrong. His job duties fit well within the classification he currently holds. Creation of a new classification and pay grade is a decision within the substantial discretion of DOP, and DOH has demonstrated there has been no abuse of that discretion here, where Grievant's duties fit within his current classification.

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. A grievant who has prevailed by default at one of the lower levels of the grievance procedure for state employees is entitled to receive the remedy requested, unless the employer timely requests a Level IV hearing, and demonstrates that, notwithstanding the presumption that the grievant prevailed on the merits of his or her grievance, awarding such remedy would be contrary to law or clearly wrong. W. Va. Code § 29-6A-3(a)(2). 2. When the employer asserts that the remedy received is contrary to law or clearly wrong, the employer must establish such a defense by a

preponderance of the evidence. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

3. Where a Grievant's job duties fit squarely within his current classification, reclassification of the employee would be “clearly wrong” within the meaning of W. Va. Code § 29-6A-3(a)(2).

4. Where it is proven that an employee's job duties are accurately described by his current job specification, it would be “clearly wrong” within the meaning of W. Va. Code § 29-6A-3(a)(2) to create a new classification and pay grade for the grievant.

5. Respondent has established that it would be clearly wrong to grant Grievant's requested relief of reclassification or a new classification and pay grade.

Accordingly, **Respondent's** request for a determination under W. Va. Code § 29- 6A-3(a)(2), that the remedy sought, reclassification or a new classification/pay grade, is clearly wrong, is **GRANTED**. Because it has been presumed, in accordance with W. Va. Code § 29-6A-3(a)(2), that Grievant prevailed on the merits of his grievance, but he is not entitled to the remedy sought as a matter of law, **this grievance is hereby 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, and 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.

Date: April 14, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment

Programs, Docket No. 98-BEP-285 (Sept. 24, 1998).