BRIAN CARSON,

Grievant,

v.

DOCKET NO. 03-DOH-030

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Brian Carson, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways") and the Division of Personnel ("DOP") on September 27, 2002:

> I ran the flail mowers for several years, [m]oved up to operator of the boom mower for approximately the last 6 months on a daily basis. There is special training required to operate this mower. The closest piece of equipment (operation wise) is a backhoe which requires an operator 3. This mower is more dangerous (operation wise) than a backhoe. Cabell County is a very populated area. Operation of this mower is/can be very dangerous to the public and me as the operator. It is for all of these reasons I feel I should be reclassified as an operator 3.
>
> Relief sought: I feel the operation of a boom mower should require a classification of operator 3. As the operator of the boom mower in Cabell County, I feel I should be reclassified as an operator 3.

The grievance was denied at the lower levels of the grievance procedure, and Grievant appealed to level four on January 30, 2003. (See footnote 1) A level four hearing was held on April 28, 2003, and this matter became mature for decision on May 28, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by James P. McHugh,

Esq., Barrett Chafin Lowry Amos & McHugh, Highways was represented by Barbara L. Baxter, Esq., and DOP was represented by Lowell D. Basford.

SUMMARY OF EVIDENCE

Level Three Grievant's Exhibits

Ex. 1 -

October 11, 2002 memorandum from J. Wilson Braley to Jeff Black.

Ex. 2 -

October 24, 2002 memorandum from Jeff Black to J. Wilson Braley.

Ex. 3 - June 9, 1995 Weekly Vacancy Report.

Ex. 4 -

Highways Transaction Form, August 16, 1995.

Ex. 5 -

December 9, 2002 email from Charlene Pullen to Brenda Craig Ellis; December 10, 2002 email from Sue Knighton to Charlene Pullen.

Ex. 6 -

Photographs of boom mower.

Level Three Highways' Exhibits

Ex. 1 -

Grievance Board decision of Self v. W. Va. Dept. of Transp., Docket No. 94- DOH-410 (Jan. 31, 1995).

Ex. 2 -

Classification Specification for Transportation Worker 2.

Ex. 3 -

Classification Specification for Transportation Worker 3.

Level Four Grievant's Exhibits

Ex. 7 - Highways Classification and Paygrade Schedule.

Ex. 8 -

Boom Mower training and certifications. (SEALED)

Testimony

Grievant testified in his own behalf, and presented the testimony of Lowell Basford, Timothy Pullen, Clifford Martin, Ronnie Breedlove, Jeff Black, and Roger Cantley. Respondents presented no additional testimony.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been employed by Highways since March 15, 1995, and is currently classified as an Equipment Operator II.

2. Grievant operates a piece of machinery known as the tiger mower, which is classified by Highways as a Level II piece of equipment.

3, All tiger mower operators are required to complete safety training and maintain annual certification because the tiger mower is a hazardous piece of equipment.

4. A piece of machinery known as the backhoe is classified as a Level III piece of equipment.

5. The certification required by Highways for Level III equipment such as the backhoe is obtained when an operator meets the certification requirements established for that equipment by the International Union of Operating Engineers (IUOE).

6. There is not an IUOE “certification” process for training on the tiger mower. Highways provides the training on operation and safe use of the tiger mower, and provides a document to operators who complete this training, stating they have successfully completed the tiger mower training.

7. Clifford Martin is employed by Highways, and is classified as an Equipment Operator 3. His primary job duty is operating the tiger mower. 8. Grievant's supervisor stated in his level one response to this grievance that, “I agree that anyone who operates a boom mower should be in the classification of TW3EQOP, but it is not within my authority to make this decision.” Level One Decision.

9. The level two grievance evaluator concurred with the level one decision, and further noted: “this specification (TW2EQOP) had not been updated or revised since 09/22/97, and that the newer equipment was far more complicated to operate and considered to be far more safety sensitive than in the past.” Moreover, the level two grievance evaluator found it appropriate that the District Engineer request that the operation of the boom mower be reevaluated “with our recommendation that it be included in the examples of Transportation Worker 3.” Level Two Decision.

10. Soon thereafter, on October 11, 2002, Wilson Braley, District Engineer, requested of Jeff Black, Director, Human Resources Division, “that the operation of the boom mower be reevaluated, and consideration be given to making this a Transportation Worker 3 piece of equipment.” LIII G. Ex. 1.

11. Mr. Black replied to Mr. Braley on October 24, 2002, informing him that the issue of changing the boom mower had already been addressed in a previous grievance, resulting in a committee review of the tiger mower classification, and that it was 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.” See Self v. W. Va. Dept. of Transp., Docket No. 94-DOH-410 (Jan. 31, 1995).

12. Based upon the Self decision, Mr. Black denied Mr. Braley's request to reevaluate the tiger mower again.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant contends Highways acted arbitrarily and capriciously and in contradiction of the clear weight of the evidence

when it decided to classify a tiger mower operator as an Equipment Operator 2, and when it refused the recent request of the level two grievance evaluator and a District Engineer for the equipment to be reevaluated.

Grievant also maintains he is not receiving equal pay for equal work, because another tiger mower operator, Clifford Martin, performs the same work but is classified as an Equipment Operator 3.

Highways relies on this Grievance Board's decision in Self v. W. Va. Dept. of Transp., Docket No. 94-DOH-410 (Jan. 31, 1995), for its decision not to reclassify the tiger mower, asserting there has been no significant change of circumstances since that decision which would warrant revisiting the issue. Highways acknowledges that Clifford Martin is an Equipment Operator 3 operating a tiger mower, but maintains it is Mr. Martin who is misclassified, not Grievant, and the appropriate relief is not to wrongly reclassify Grievant to an Equipment Operator 3 position, but to correct Mr. Martin's situation. This Grievance Board adheres to the doctrine of stare decisis (See footnote 2) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). See also Belcher v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.

The Self decision involved a factually identical case in which the grievant alleged the tiger mower should be a Level 3 piece of equipment, and he should be reclassified to a Transportation Worker 3. Highways appointed a committee to review the tiger mower classification which concluded it was properly classified as a Level 2 piece of equipment. The Transportation Worker II and III classification specifications set forth the type of machinery to be operated by someone in the respective classifications, however, the tiger mower was not specifically mentioned in either specification. The Administrative LawJudge concluded it was not arbitrary or capricious for Highways to designate the

tiger mower as a Level 2 piece of equipment, and consequently, the grievant was correctly classified as a Transportation Worker II.

Highways contends there is no reason to revisit the tiger mower classification issue because the Self decision holds it is correctly classified as a Level 2 piece of equipment. Highways is correct that a Finding of Fact in Self concurs with Highways' determination that the tiger mower belongs in the Level 2 classification. However, a factual finding is not precedent in the sense Highways uses it. It is the law applied to the facts that becomes the precedent, and the law in Self merely held that Highways' designation of the tiger mower was not arbitrary or capricious, and that Grievant failed to prove he was misclassified. Therefore, the doctrine of stare decisis only applies to the Self conclusions of law applicable to the issue of misclassification.

Grievant contends that circumstances have changed since the Self decision, and the tiger mower should now be reclassified to a Level 3 piece of equipment. Grievant points to the level one and two decisions in this grievance, and Mr. Braley's request to Mr. Black, which all recommend the tiger mower be reclassified. Grievant also points out that a Transportation Worker 3 is currently operating a tiger mower.

The Transportation Worker II classification specification which was applicable when the Self decision was rendered stated in the “Nature of Work” section that the worker holding that classification “[o]perates motorized highway maintenance equipment such as backhoe, mudjack, front-end loader, tandem-axle truck and snow plow.” The Transportation Worker III classification specification which was applicable stated that theworker holding that classification “[o]perates a variety of heavy motorized maintenance equipment such as power graders, bulldozer, semi-trailer.” See Self, supra.

Roger Cantley, a Transportation Worker III who was on the committee appointed during the Self grievance to review the tiger mower classification, testified in the instant hearing that one factor the committee considered was that the backhoe had been classified as a Level 2 piece of equipment. Mr. Cantley testified the backhoe and the tiger mower are “basically the same machine”, but one has a bucket and one has a mower. LIV Test., Cantley.

Sometime after the Self decision, DOP amended the Transportation Worker 2 and 3 classification specifications. (See footnote 3) The Transportation Worker 2 now “[o]perates motorized highway maintenance equipment such as *boom mower,* mudjack, front-end loader, tandem-axle truck and

snow plow." LIII Highways Ex. 1 (emphasis added). The Transportation Worker 3 now "[o]perates a variety of heavy motorized maintenance equipment such as power graders, bulldozer, *backhoe*, and semi-trailer." LIII Highways Ex. 2 (emphasis added). Neither Mr. Cantley nor Jeff Black, Director of Human Resources, could recall when the classification specifications were amended to designate the backhoe as a Level 3 piece of equipment.

At levels one and two of this grievance, the grievance evaluators recommended the tiger mower be upgraded to a Level 3 piece of equipment. Wilson Braley, the District Engineer, agreed, and asked Jeff Black to review the classification and upgrade the equipment. As noted before, Mr. Black saw no reason to revisit the issue, relying on theSelf decision. LIII G. Exs. 1, 2. Grievant points to all of these factors as evidence that Highways' decision not to reclassify the tiger mower, and hence himself, as arbitrary and capricious, and clearly wrong.

It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). However, that determination cannot be arbitrary and capricious.

An agency which has acted in an arbitrary and capricious manner has abused its discretion. "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely

related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996).

The undersigned is faced with a difficult decision. Grievant has presented persuasive evidence that the tiger mower and the backhoe are “basically the same machine,” yet one is classified as Level 2 and one at Level 3. Highways simply relies on the Self decision in refusing the revisit the issue. DOP, through its representative, Lowell D. Basford, Classification and Compensation Section, maintains the backhoe is a much more complex and dangerous piece of equipment which is normally used as part of a larger construction operation. The tiger mower, on the other hand, can be operated independently of any ongoing construction project. That is the sum total of the evidence against reclassifying the tiger mower.

Nevertheless, the experts in the field of motorized heavy equipment have determined it is properly classified as a Level 2 piece of equipment. The undersigned has neither the knowledge nor the expertise to conclude that determination is clearly wrong. Moreover, while Grievant's evidence is persuasive, it is not enough to override the agency's discretion regarding matters within its expertise. Therefore, the undersigned must conclude that it is not arbitrary and capricious, nor clearly wrong, for Highways and Personnel to designate the tiger mower as a Level 2 piece of machinery.

Consequent to the finding that the tiger mower is a Level 2 piece of equipment, Grievant cannot succeed in proving he is improperly classified as a Transportation Worker 2. In order for a grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely matchthose of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. 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 the Work" section of a classification specification is its most critical section. 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 the employee's current classification constitutes the "best fit" for his required duties. Simmons v. W. Va. Dep't of Health and 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). Importantly, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 398, 431 S.E.2d 681, 687 (1993). The holding of the Supreme Court of Appeals of West Virginia in Blankenship presents a state employee contesting her classification with a substantial obstacle to overcome in attempting to establish that he is misclassified. The most pertinent portions of the classification specifications at issue have already been discussed more fully above. Highways and Personnel saw fit to include the tiger mower in the Transportation Worker 2 classification specification, and Grievant's duties fall squarely within that description.

Grievant has also raised the issue of equal pay for equal work, and proven that another who operates the tiger mower is classified as a Transportation Worker 3. The concept of “equal pay for equal work” is embraced by W. Va. Code § 29-6-10. See AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94-DOH- 555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR- 453 (Apr. 13, 1993); Acord v. W. Va. .Dept. of Health & Human Resources, Docket No. 91- H-177 (May 29, 1992).

Mr. Black testified that he was unaware that Clifford Martin, a Transportation Worker 3 had been operating the tiger mower a significant portion of his time, and stated it was a mistake. Unfortunately for Grievant, the solution is not to also wrongly classify Grievant, but to correct the situation with Mr. Martin by either reclassifying him to a Transportation Worker 2, or taking away his tiger mower duties. See Akers v. W. Va. Dept. of Tax and Rev., 194 W. Va. 456, 460 S.E.2d 702 (1995).

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166 W. Va. 775, 277 S.E.2d 613 (1981). However, that determination cannot be arbitrary and capricious.

3. An agency which has acted in an arbitrary and capricious manner has abused its discretion. "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in amanner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996).

5. Grievant has failed to prove by a preponderance of the evidence that Highways' and DOP's determination that the tiger mower be classified as a Level 2 piece of equipment was arbitrary and capricious or clearly wrong.

6. In order for a grievant to prevail upon a claim of misclassification, he must prove by a preponderance of the evidence that his duties for the relevant period more closely match those of

another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

7. Grievant has failed to prove by a preponderance of the evidence that the Transportation Worker 2 classification is not the best fit for his job duties and responsibilities, and that he should be classified as a Transportation Worker 3.

8. The concept of “equal pay for equal work” is embraced by W. Va. Code § 29- 6-10. See AFSCME v. Civil Service Comm'n, 181 W. Va. 8, 380 S.E.2d 43 (1989). Previous decisions interpreting that provision have established that employees performing similar work need not receive identical pay, so long as they are paid in accordance with the pay scale for their proper employment classification. Largent v. W. Va. Div. of Health, 192W. Va. 239, 452 S.E.2d 42 (1994); Salmons v. W. Va. Dept. of Transp., Docket No. 94- DOH-555 (Mar. 20, 1995); Hickman v. W. Va. Dept. of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995); Tennant v. W. Va. Dept. of Health & Human Resources, Docket No. 92- HHR-453 (Apr. 13, 1993); Acord v. W. Va. Dept. of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

9. Grievant has proven by a preponderance of the evidence that an employee whose predominant duties involve operation of the tiger mower is classified as and being paid as a Transportation Worker 3.

10. However, the solution is not to wrongly reclassify Grievant, but to correct the situation with the other employee working out of classification. Akers v. W. Va. Dept. of Tax and Rev., 194 W. Va. 456, 460 S.E.2d 702 (1995).

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: June 19, 2003

Footnote: 1

The grievance was denied at level one on October 7, 2002, and at level two on October 16, 2002. A level three hearing was held on December 13, 2002, and the grievance denied by decision dated January 24, 2003. The level three transcript and exhibits have been incorporated into the record at level four.

Footnote: 2

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. V. W. Va. Dept. of Health & Human Resources, 451 S.E.2d 768, 771 (W. Va. 1994).

Footnote: 3

The titles have been changed from Transportation Worker I and II to Transportation Worker 2 and 3.