



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 238-1040

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

CHARLES HARTLEY

v.

Docket No. 89-DOH-598

W.VA. DEPARTMENT OF HIGHWAYS

D E C I S I O N

On August 1, 1988, Charles Hartley was appointed by respondent Department of Highways (DOH) to serve as District Six's Acting Planning Engineer. On July 21, 1989, he filed a grievance seeking a salary adjustment for what he contended was the appropriate salary for the duties he performed as planning engineer. Decisions were rendered July 26, August 4, and September 28, 1989, and grievant, not satisfied, advanced the complaint to level four in October 1989. A level four hearing was conducted November 2, 1989. The parties agreed to complete submissions of proposed findings of fact and conclusions of law and rebuttals by December 22, 1989.¹

¹By letter dated November 9, 1989, grievant declined to submit proposals but reserved his right to rebut DOH's submission, as agreed. DOH submitted fact-law proposals and argument on December 19, 1989, and grievant responded with a rebuttal statement.

Grievant does not characterize the grievance issue as misclassification but instead pursues a theory of "equal pay for equal work." Throughout this dispute, grievant did not seek reclassification to an advanced job classification. He however contends that he performed the work of a Highway Engineer II (HE II) in his capacity as Acting Planning Engineer and is entitled to comparable wages. On October 31, 1989, Wayne Kaufman, District Engineer for District 6, notified grievant by intra-district memorandum that, "effective November 1, 1989, you will no longer be Acting Planning Engineer."² Accordingly, the sole issue to be decided in this matter is whether grievant is entitled to an award of back wages from August 1988 through October 1989, if he performed the duties of an HE II during that time period even though he was not qualified to hold that job title.³

²Grievant's claim for a permanent salary adjustment is therefore moot. At the level four hearing he stated that, since he had just received the notice, he was not sure what his duties would consist of in the future.

³The West Virginia Supreme Court of Appeals declared in AFSCME v. Civil Serv. Comm'n (AFSCME II), 341 S.E.2d 683, 697 n. 6 (W.Va. 1985) that "relief will not be denied where work of a higher classification is performed, though the individual performing the work lacks the formal qualifications for appointment or promotion to the higher position." Applying the guidance found in AFSCME II, the West Virginia Education and State Employees Grievance Board thus determined that a grievant may prevail on a working-out-of-classification claim for back wages regardless of whether he or she was educationally qualified to hold the position and/or be reclassified. Cart v. W.Va. Dept. of Veterans Affairs and CSS, Docket No. 88-VA-070 (Aug. 3, 1989). Therefore, in the instant matter, if grievant performed the duties of a highway engineer while holding the planning engineer position, he is due back wages.

The parties do not dispute the essential facts of this case. In August 1988, Kenneth Davidson, then Planning Engineer, was transferred from planning engineer to maintenance engineer. He named grievant Acting Planning Engineer and posted the position from August 8-22, 1988. Mr. Davidson interviewed several qualified applicants, i.e., degreed engineers, as well as grievant, who also applied. Mr. Davidson determined that grievant could do a better job than the other candidates although he did not possess the required engineering degree.⁴ Mr. Davidson did not officially fill the posted position, and grievant continued to perform the planning engineer duties.

On September 6, 1989, Mr. Davidson testified at level three, T.3, that,

[Grievant] is now currently working as Acting Planning Engineer in District Six in charge of all design work and buildings and grounds. He assumed my duties when I went from Planning Engineer to Maintenance Engineer at that time.

At level four Mr. Davidson restated his belief that grievant performed the duties of the planning engineer position.

Grievant testified that he knew he did not meet the engineer qualifications and did not expect an engineer's job title. He said he instead sought a salary level equal to the planning engineer's salary. He stated that, had he been upgraded to step

⁴The position required a bachelor's degree in engineering while grievant held only an associate's degree and additional certification as an Engineering Technician conferred by the National Institute for the Certification of Engineering Technicians (NICET).

7 in his present classification, his salary would have been comparable to the engineer's entry-level salary. In that manner, he contended, he would have received the proper wages for the duties he performed.

Mr. Kaufman did not refute Mr. Davidson's statements that grievant performed more than adequately in the planning engineer position but opined that grievant could not do an engineer's work because he did not possess the requisite bachelor's degree.⁵ Mr. Kaufman stated that it was necessary that a qualified, registered engineer hold the position of planning engineer. Grievant responded to Mr. Kaufman's statement by noting that he had been acting planning engineer for over a year, and DOH had made absolutely no effort to fill the position with a qualified engineer.

DOH contends and argues that grievant did not meet his burden of proof in this matter and establish through testimony or other competent evidence that his job duties corresponded to any particular job classification. However, the evidence preponderates that grievant did the work of an HE II and is entitled to be properly compensated in the form of back pay.

DOH conceded that grievant may have worked out of his classification as Acting Planning Engineer but contended that four potential classifications exist in which planning engineer

⁵At level three, Mr. Kaufman stated that "[t]he District and everybody working with [grievant] thinks he is doing an exemplary job [as planning engineer]." T.14.

duties may be performed, Level IV Senior Engineering Technician, Engineer in Training II, HE I and HE II, the maximum assigned class. According to DOH, grievant's career ladder in the technical series, among other things, indicates he performed the work of a Level IV, not a HE II.

DOH's reasoning ignores the fact that it originally posted the planning engineer position as an HE II title. Given that evidence, it must be recognized that the contemplated and actual duties of the posted position were properly based on the nature and scope, assignment/project complexity and supervisory responsibilities of an HE II. Moreover, testimony established that after grievant was named Acting Planning Engineer the amount of work in planning increased, but the staff was reduced by Mr. Davidson's transfer. While Mr. Davidson did assist with one large planning project as DOH pointed out, the evidence indicates that his intervention was necessary because the planning operations did not have sufficient staff to cope with the volume of work required.

In addition to the foregoing determinations, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. In early August 1988, DOH posted a position for a Planning Engineer, Highway Engineer II. From August 1, 1988, through November 1, 1989, grievant was Acting Planning Engineer and performed all of the duties of the former planning engineer. DOH's organizational chart places the position as HE II, pay grade 24.

2. As of October 31, 1989, grievant was classified as an Engineering Technician-Design (ETDES), Level III at pay grade 18, step 2. An advancement to step 7 would have equalized his salary with that of HE II, step 1.

CONCLUSIONS OF LAW

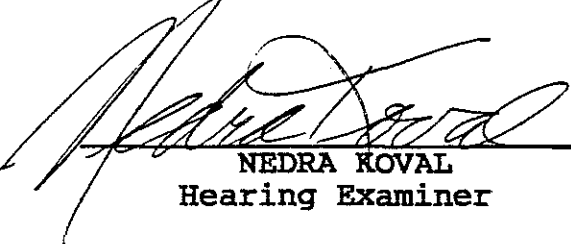
1. A grievant must prove the elements of his case by a preponderance of the evidence. Cusick v. Hancock Co. Bd. of Educ., Docket No. 89-15-179 (Oct. 31, 1989).

2. The evidence preponderates that grievant performed the duties of an HE II classification and is entitled to appropriate back pay. Cart v. W.Va. Dept. of Veterans Affairs and CSS, Docket No. 88-VA-070 (Aug. 3, 1989).

Accordingly, the grievance is GRANTED. Respondent Department of Highways is ORDERED to award grievant back pay for HE II, Step 1, less set off for wages he received, from August 1, 1988, through October 31, 1989.

Either party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: December 29, 1989



NEDRA KOVAL
Hearing Examiner