REBECCA HALEY

v. **Docket No. 93-DOH-148**

DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS

D E C I S I O N

Ms. Rebecca Haley, Grievant, is employed as an Equal Employment Opportunity Representative (hereinafter EEOR or Representative). She filed this grievance on October 2, 1992 alleging she had been misclassified since January 19, 1989 and should be classified as an Equal Employment Opportunity Specialist (hereinafter EEOS or Specialist). (See footnote 1)

Background

The majority of the facts in the case are not in dispute. The Grievant has worked for the Division of Highways (hereinafter DOH) for 26 years and became an EEOR in 1973. There are only three people in the Contract Compliance Section - Grievant, an EEOR, Mr.Stone, the supervisor and an EEOS, and Mr. Danny Byers, another EEOR.

The Grievant's division works with contractors to assure their compliance with equal opportunity rules and regulations. This work includes overseeing training schedules, especially for minorities and women, reviewing paperwork, conducting on-site visits, investigating complaints of discrimination and sexual harassment, and completing various reports to appropriate agencies.

The Grievant testified at some length about the type of work she performs. Her statements were supported by supervisors, co-workers, and independent contractors. The Grievant works independently, with little supervision. Grievant and Mr. Stone, the supervisor, work as a team conducting on-site and paper compliance reviews to ensure contractors are obeying equal opportunity laws. She testified she and Mr. Stone performed the same work, except for some of his administrative tasks.

She also discussed how, over time, she and Mr. Stone have divided the Division's duties based on preference and abilities. Mr. Stone compiles the quarterly itinerary to the Federal Highway

Administration and monitors more of the training programs. Grievant handles most of the discrimination and sexual harassment cases and compiles the weekly schedule. (See footnote 2) (Trans. Vol. II at 12, 14, and 38.) Both have input into the other's areas. Sheconcluded the "Nature of Work" section under Specialist was the "best fit" for her.

Next, Grievant stated that although she does some of the "Examples of Work Performed" listed under the EEOR job specification, only 25 percent of her time is involved with these duties. (Trans. Vol. II at 50.) She then reviewed the Specialist "Examples of Work Performed" and discussed how she performed these duties on a daily basis. The Grievant described the Specialist job as decision-making and the Representative position as being information-gathering and reporting. A review of the "Examples of Work Performed" for each position supports this assessment. She stated she makes decisions constantly, especially in terms of whether or not a contractor is in compliance or noncompliance with the equal opportunity rules and regulations. (Trans. Vol. II at 36.) She also interacts with multiple external groups such as labor unions, corporate level contract representatives, and referral agencies. (Trans. Vol. II at 36.)

Additionally, a January 18, 1989 memo designated Grievant as Assistant Section Chief in charge in Mr. Stone's absence. That memo also directed Grievant to "monitor employment practice of contractors", "conduct compliance reviews", and "perform administrative functions for section." (G. Exh. 5.) These assigned duties relate directly to the Specialist job description, not the Representative's. Further, in approximately March, 1992, the Grievant assumed the supervision of Mr. Byers at Mr. Stone's request because he had been unsuccessful in monitoring him. (Trans. Vol. II at 12.) Grievant has done some retraining and monitoring of Mr. Byers' work, and it has improved. (Trans. Vol. II at 42.)

Mr. Stone's testimony corroborated Grievant's. He stated she worked under "very limited" supervision and they functioned as a team. (Trans. Vol. II at 10.) He gave an example of this team approach. Usually they would schedule two compliance reviews at one time. He would conduct one while she conducted the other, and on the way back they would compare notes. (Trans. Vol. II at 12 and 25.)

Mr. Stone testified that although Grievant did part of the work described under the EEOR's "Nature of Work" section, the "Nature of Work" description which best described her duties was for the EEOS. He reviewed each phrase under the "Examples of Work Performed" and confirmed she

routinely performed each of these tasks. Mr. Stone stated the only difference between her duties and his was that he performed "some administrative functions" which took approximately 5% of his time. (Trans. Vol. II at 15.) He confirmed he had requested Grievant to supervise Mr. Byers, and estimated this took 5% of her time.

Grievant also presented the testimony of three contractors. Mr. Paul Turman, a contractor and EEO and training officer with the Barboursville Bridge Company, stated he had worked with the Grievant and Mr. Stone for many years and never saw any difference in their positions or duties. When they came to a constructionsite for a review they had equal responsibility, equal interactions, and performed the same tasks.

Ms. Alice Dement, a former project supervisor at DOH and current manager of a contracting firm, stated she thought their positions were the same because she saw no difference in their work in the field. In reviewing the job specifications, she said Grievant functioned as a Specialist. (See footnote 3)

Mr. Mike Williams, employed by the Department of Transportation as a Project Supervisor, stated he had worked with both Grievant and Mr. Stone. He did see a difference between the two individuals because Grievant did most of the work and took charge at the site. He thought Grievant was Mr. Stone's boss.

Mr. Haynes, the EEO Division Director, stated he previously recommended Grievant's promotion to a Specialist. (See footnote 4) (Trans. Vol. I at 11.) He stated the Specialist job description best describes the duties Ms. Haley actually performs in her daily work activities. (Trans. Vol. I at 13-14.) He denied this grievance at Level II because Mr. Basford, Assistant Director, Division of Personnel, (hereinafter DOP) in charge of Classification and Compensation, had told him there could only be one EEOS because it was a supervisory position.

Mr. Basford represented DOP at the Level III hearing and also appeared as a witness. He testified that Mr. Stone, as the Section Chief, had the more responsible position, and since Grievant was subordinate to him he must be the Specialist and she the Representative. (Trans. Vol. I at 20.) He stated supervision was the distinguishing characteristic between the two job specifications even though the word supervision was not mentioned anywhere in the document. (Trans. Vol. I at 23.) He agreed he was inserting a qualifying description not on the face of the job specification, but testified that supervisory duties were required before one could be classified as a Specialist. (Trans. Vol. II at 66, Vol. I at 23.) He also stated that not having the distinguishing characteristic on the job description

was not significant because the regulations do not require it, and specifications do not have to be so detailed as to cover every possibility "out there in the world of work." (Trans. Vol. II at 66.)

Issues or Contentions

Grievant contends she should be classified as a Specialist because that position is the "best fit" for her duties and responsibilities. Grievant's supervisor and second level supervisor concur. The DOP argument in this grievance is two-fold. At the Level III hearing Mr. Basford argued the grievance was untimely because it was not filed within the AFSCME IV guidelines. In briefs at Level IV, DOP argued the grievance was untimely, butif the grievance were timely filed Ms. Haley was only entitled to back pay for ten days prior to the day of filing.

DOP's second argument is that the Grievant is correctly classified. The major thrust of this argument is that since Grievant does not perform supervisory duties she cannot be a Specialist. Additionally, DOP argued Grievant's section can only have one EEOS, and that must be Grievant's supervisor because he has supervisory and administrative responsibilities she does not have. DOP also argued a supervisory position requires monetary rewards and Mr. Stone received these by being an EEOS.

Classification Specifications at Issue

EQUAL EMPLOYMENT OPPORTUNITY REPRESENTATIVE

Nature of Work: Under general supervision, an employee in this class provides on-site services to the local employment offices and businesses in an assigned area with respect to employment practices required by equal employment opportunity laws and regulations.

Examples of Work Performed:

Identifies problem areas in employment services, employer compliance and recommends action to strengthen service to minority groups in general and individual applicants.

Investigates causes of discriminatory employment practices, files reports, and recommends action to the Equal Employment Opportunity Officer.

Consults with business and industry, local civil rights organizations, governmental and other civic organizations working in the field of job placement and Equal Employment Opportunity through addressing assembled groups to promote a better understanding of the Employment Service functions required by Civil Rights legislation.

Informs employers of the principles of equal opportunity and merit based systems and provides guidance and assistance to aid them in meeting requirements of Titles VI and VII of the 1964 Civil Rights Act and other equal employment legislation.

Recruits applicants, in cooperation with local employment offices and agencies, in response to court orders and consent decrees by visiting employers to develop jobs for various protected group applicants.

Informs Equal Employment Opportunity Officer on status of programs.

Informs employees of complaint procedures and rights to appeal discriminatory practices.

Performs related work as required.

Required Knowledge, Skills and Abilities:

Knowledge and understanding of minority groups and their socio-economic problems.

Knowledge of Federal and State laws, regulations, and policies governing discriminatory employment practices and equal opportunities and knowledge of related agency policies, procedures, and regulations concerning services to various protected groups.

Knowledge of available community and industrial training resources and programs.

Knowledge of private and governmental organizations and programs concerned with Equal Employment Opportunities.

Knowledge of complaint procedures and appeal rights.

Ability to present ideas clearly and effectively, both orally and in writing.

Ability to secure effective cooperation from colleagues and representatives of labor, industry, educational, and religious groups in areas which may be emotional and controversial.

Ability to appraise situations and personalities and to formulate and recommend solutions to problems in the fields of intergroup relationships.

Minimum Training and Experience Requirements:

TRAINING: Graduation from an accredited four-year college or university.

SUBSTITUTION: Experience as described below may be substituted on a year-for-year basis.

EXPERIENCE: One year of professional or technical experience in Employment Service, counseling or vocational guidance, or labor, industrial, personnel administration or community relations work involving problems or protected group members.

SUBSTITUTION: Graduate study in sociology, psychology, industrial relations, public administration, counseling and guidance, social work or rehabilitation counseling may be substituted for the required experience on a year-for-year basis.

EQUAL EMPLOYMENT OPPORTUNITY SPECIALIST

Nature of Work: Under limited supervision, an employee in this class performs personnel work in equal opportunity, such as, compliance reviews; recruiting; investigating EEO complaints; and counseling employees and supervisors, to ensure compliance with equal employment opportunity laws.

Examples of Work Performed:

Coordinates equal employment opportunity programs, projects, and seminars.

Monitors activities of divisions and districts of a state agency or subcontractors to assure that affirmative action program requirements are met such as dissemination of agencies or subcontract's equal employment opportunity policy, recruitment, training and promotions, records and reports.

Investigates complaints concerning alleged discrimination.

Informs employees of complaint procedures and their right to complain about unfair and/or inequitable employment practices.

Assists in recruiting employees for state agencies or subcontractors.

Writes reports and makes recommendations to the Equal Employment Opportunity Officer.

Performs related work as required.

Required Knowledge, Skills and Abilities:

Knowledge of federal, state, and agency EEO laws, rules, regulations, and policies.

Knowledge and understanding of various protected groups and their socioeconomic problems.

Knowledge of the processes involved in filing a equal employment opportunity complaint.

Ability to conduct EEO investigations.

Ability to write clear and concise reports of finding.

Ability to establish and maintain effective working relationships with business, industry and personnel within the Department of Highways and to deal with various ethnic groups.

Ability to recruit individuals and recommend them for employment in proper job categories.

Ability to work with various protected class groups such as ethnic, racial, sex, age and handicap.

Minimum Training and Experience Requirements:

TRAINING: Graduation from an accredited four-year college or university.

SUBSTITUTION: Experience as described below may be substituted on a year-for-year basis.

EXPERIENCE: Two years of professional or technical experience in Employment Service, counseling or vocational guidance, or labor, industrial, personnel administration or community relations work involving problems of protected group

members.

SUBSTITUTION: Graduate study in sociology, psychology, industrial relations, public administration, counseling and guidance, social work or rehabilitation counseling may be substituted for the required experience on a year-for-year basis.

DISCUSSION

A. Timeliness

The Grievance Board has repeatedly ruled misclassification is an ongoing practice and as such may be alleged at any time. Hatfield v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-052, 169 (Sept. 27, 1991). Depending on the circumstances, W. Va. Code §29-6A-4 may limit the amount of damages. "As a general rule, where a state employee is aware of the facts constituting a grievable matter and delays filing[,] relief is limited to the ten-day period preceding the filing of the grievance." Hatfield at 5.

Here, the Grievant could have filed a grievance much earlier but did not do so. It is obvious the Grievant thought she was misclassified because she discussed the situation with Mr. Haynes several times. Her rationale for not filing earlier was that Mr. Haynes was going "to do something about it" and she wanted to give him time to resolve the issue.

The evidence does not demonstrate that Mr. Haynes "intended to mislead or lull the Grievant into believing that filing a grievance would not be necessary." Gaskins v. W. Va. Dept. of Health and Div. of Personnel, Docket No. 90-8-032 (Apr. 12, 1990). Rather, these statements appear to reflect his agreement that she was misclassified and he would discuss the issue with DOP. The statements by Mr. Haynes are insufficient to support a finding of equitable estoppel. Thus Grievant's damages, if any, are limited to a ten-day period prior to the filing of this grievance. Back pay for any earlier period of time is barred by the ten-day time limit on filing a grievance.

B. Classification

In order for the Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely matched another cited Personnel classification specification than the one to which she is currently assigned. See

generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. 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. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991); See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether the Grievant's current classification constitutes the "best fit" for her required duties. Propst v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 93-HHR-371 (Dec. 3, 1993); Simmons v. W. Va. Dept. of HHR/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 Services, Docket No. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearlyerroneous. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

The Grievant's evidence clearly demonstrates the EEOS specification more closely matches the duties she performs than the specification to which she is currently assigned. It is clear the Grievant, under limited supervision and on a daily basis, performs the higher level activities described under the EEOS "Nature of Work." She conducts and completes compliance reviews and investigates EEO complaints. She does not just provide on-site services with respect to employment practices.

Additionally, the unrebutted testimony supports the finding Grievant does the higher level "Examples of Work Performed" of the EEOS. The Grievant does more than identify problem areas and recommend action, she coordinates the EEO programs, projects, and seminars. She not only investigates "causes of discriminatory employment practices", and files reports and recommendations, she investigates the entire complaint. She does not just inform employers of the principles of equal opportunity, she monitors this activity and decides whether employers are in compliance or noncompliance.

The Grievant's description of the EEOR as an information-gatherer and the Specialist as a decision-maker is valid and obviously the Grievant does not just inform and identify, she monitors, coordinates, and decides. Thus, the Grievant routinely performs the activities required of an EEOS,

meets thespecifications required to be an EEOS, and has the required knowledge, skills, and abilities.

Division of Personnel offered only minimal argument and testimony that the Grievant did not meet the identified job specifications of an EEOS. Rather, Mr. Basford's focus was Grievant could not be a Specialist because she had no supervisory duties. This argument was tied to a secondary, reversed argument that the Grievant's division could have only one Specialist, Mr. Stone, because he was the supervisor. Again, it must be noted that the word supervision does not appear anywhere in the EEOS job specification. Mr. Basford cites to Division of Personnel Rules 5.04(a) and (b) (See footnote 5) to support his contentions.

5.04. Class Specifications - The class specification shall be considered in allocating positions and shall be interpreted as follows:

(a) Class specifications are descriptive only and not restrictive. The use of particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.

(b) In determining the class to which any position shall be allocated the specifications for each class shall be considered as a whole. Considerations shall be given to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as purporting together a picture of the positions that the class intended to include.

Mr. Basford stated since there are only two categories in this class they must be compared and contrasted with each other. Thus, since Mr. Stone is the supervisor and Grievant is a subordinate,supervising is a distinguishing characteristic and Mr. Stone must be the Specialist and Grievant the Representative.

DOP further argues that Mr. Stone has additional duties and responsibilities as the supervisor (See footnote 6) , and placing Grievant in the same classification with him violates the equal pay for equal work requirement in Code §29-6-10. It must be noted this provision does not require all employees in the same classification be paid identical salaries. (See footnote 7)

W. Va. Dept. of Highways v. Blankenship, 431 S.E.2d 681 (W. Va. 1993), requires this Board to give "great weight" to DOP explanations and interpretations of classification specifications. This deference is not required when DOP is "clearly erroneous." Id. at 687. Here, DOP is not explaining or interpreting a specification, but is injecting restrictive language not found in the job description. There

was no evidence that Personnel has an established practice of reading these class specifications to require a Specialist to also be a supervisor.

Further, even if one accepts this as a case in which DOP's explanation and interpretations are entitled to great weight, this grievance must still be granted because DOP is "clearly wrong." Unrebutted testimony proves Grievant routinely performs the dutiesof an EEOS. Additionally, the Grievant does perform some supervisory duties, as Assistant Section Chief and Mr. Byers' supervisor. The key to analysis in a classification case is to find the "best fit", and the predominant duties of the position are class controlling. Propst, supra; Simmons, supra; Broaddus, supra. Thus, given Grievant's predominant duties, her "best fit" is as an EEOS, and DOP's explanations and interpretations are clearly wrong.

In conclusion, upon a thorough and detailed review of the record, and after comparing and contrasting the classification specifications for EEOR and EEOS, Grievant has proven by a preponderance of the evidence that she routinely performs all of the duties of an EEOS. Grievant's duties conform with the "Nature of Work" section and the "Examples of Work Performed" section of the EEOS job description. Additionally, she possesses the "Required Knowledge, Skills, and Abilities." Further, although not required, the Grievant does engage in supervisory duties. The overwhelming evidence of record supports the conclusion that the EEOS position is the best fit for this Grievant.

The foregoing discussion of facts and the facts of the case and the applicable law is supplemented by the following conclusions of law.

Conclusions of Law

1. Grievant has proven by a preponderance of the evidence that she performs duties of an EEOS based upon the principle that the predominant duties of the position are class controlling. Broaddus, supra.

2. The DOP's rationale for classifying the Grievant as an EEOR based on an unwritten, distinguishing requirement is either not entitled to deference or clearly wrong in light of the probative evidence of record. Blankenship, supra; Propst, supra.

Accordingly, this grievance is **GRANTED** and the Division of Highways is **ORDERED** to reclassify Ms. Haley as an EEOS retroactive to ten days prior to the date of filing this grievance and to pay

appropriate damages, if any, in the form of the difference between the salary she would have received had she been properly classified and the salary she received as an EEOR, less any appropriate set-off for the period in question.

Any party or the West Virginia Division of Personnel may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 29, 1994

Footnote: 1*This grievance was denied at all lower levels and appealed to Level IV on April 30, 1993. At Level IV multiple continuances were granted. The parties eventually agreed to submit the case on the record. This grievance became mature for decision on November 19, 1993. Two days of hearing were conducted at Level III. The hearing of January 26, 1993 will be referred to as Trans. Vol. I ___ and the hearing of March 24, 1993 will be referred to as Trans. Vol. II ___.*

Footnote: 2*Grievant had the major responsibility of the weekly schedule, but in March, 1992 it became her total responsibility.*

Footnote: 3*Although Ms. Dement was not a expert in job classification she had served as a grievance officer at DOH and was familiar with the old classification rules and regulations.*

Footnote: 4*Grievant's position description was submitted as an exhibit. Attached to this form is the immediate supervisor's section filled out by Mr. Haynes. He refers to Grievant throughout as a Specialist.*

Footnote: 5*W. Va. Admin. Rules, W. Va. Div. of Personnel, Series I (amended) 5.04(a) and (b). This case was filed under the former DOP rules and regulations.*

Footnote: 6*DOP did not recognize that Grievant had any supervisory duties even though she is the Assistant Section Chief and supervises Mr. Byers. Of course her supervisory duties are not as extensive as Mr. Stone's.*

Footnote: 7Accordingly, Mr. Stone's salary could be placed above Grievant's to compensate him for his additional duties and responsibilities.