CHARLES ADKINS,

Grievant,

v. **Docket No. 95-DOH-328**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Charles Adkins, alleges discrimination because West Virginia Division of Highways ("DOH") is "[r]efusing to promote me to my job classification of Level IV (4) while others in the state are working Survey Party Chiefs as Level IV (4)." As relief, Grievant sought "[p]romotion to my job classification to Level IV which I am doing at my present Level III (3)." At the Level IV hearing Grievant repeatedly stated he was asking for "equal pay for equal work." This grievance was denied at Levels I, II and III.

A Level IV hearing was held on September 1, 1995. When Grievant appealed to Level IV he submitted the following "Statement of Grievance" and "Relief Sought":

STATEMENT OF GRIEVANCE:

I am being discrimated [sic] against because I have being [sic] working out of my job classification ET 3 Survey since 1992. The job classification I work is SET 4. The State DOT organization chart discriminatesagainst Party Chiefs and also breaks the law of "The doctrine of equal pay for equal work" W. Va. Code §29-6-10(2). I proved with-out [sic] a shadow of doubt that they are Survey Party Chiefs Level-4.

RELIEF SOUGHT: Be instated as SET Level IV Grade at a conformable salarly [sic] reflecting raises. I seek back-pay plus interest for 10 years. $50,000.00 for anguish and suffuring [sic].

Because DOH's counsel refused to agree to these changes, and pursuant to the ruling in Syl. Pt.

4, W. Va. Dept. of Health and Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993), the original Statement of Grievance will be the issue considered. In terms of relief sought, the undersigned explained to Grievant that DOH objected, damages were not awarded by this administrative body, and timeliness would ban much of the relief sought. This case became mature for decision on September 20, 1995, the deadline for the submission of DOH's proposed findings of fact and conclusions of law.

The pertinent sections of the class specifications at issue are set out below.

ENGINEERING TECHNICIAN

(Construction, Design, Maintenance, Materials,

Survey, Traffic Operations)

Nature of Work: Under limited supervision, independently performs tests, inspections and technical work of a considerable degree of complexity within one of the technical highway career fields: construction, design, maintenance, materials, survey, or traffic operations. This employee supervise other lower level technicians, and will perform work as described in the various work elements for level three as established by the National Institute for the Certification of Engineering Technologies (NICET).

Distinguishing Characteristics: The distinguishing characteristics between level two and three is that level two is a technician requiring general supervision in the performance of level two work elements as established by NICET, while level three is a supervisor, and/or performing NICET level three work elements.

Examples of Work

(Following are examples of the kind and level of work typically assigned to positions in this class. The NICET certification requires verification of general and special work elements in the specialty area).

Performs and supervises materials testing in the field and in district and central laboratories, including but not limited to sample and core selection; collection and

preparation for shipment; adequacy of coverage; recording of determinations and certificates.

Performs, supervises and coordinates construction surveys including Chief of Party duties; layout and staking of drainage, grade, line, earthwork, curbs and gutters; and preparation of as-built reports and quantity surveys.

Reads and utilizes complex plans and specifications; reviews consultants plans, specifications and bid proposals.

Assures compliance with OSHA and other safety requirements; assures availability of first aid and emergency services on job.

Coordinates traffic controls and detours on job.

Inspects and verifies compliance with federal, state and local requirements for special programs.

Coordinates activities with utilities, local governments and citizen interest.

Assures basic erosion controls during construction.

Computes, checks and verifies quantities and costs of line items.

Inspects and records steel and concrete structures including staking and layout; forming, curing, stripping, finishing and treating concrete structures in all weather; placement of reinforcing steel on concrete structures; erection and removal of falsework on steel structures; fastening and seating on steel structures.

Communicates with the public and prepares written correspondence and reports.

Maintains property records and safeguards instruments, supplies and equipment.

Coordinates complete bid proposal for a standard project including adequate provisions for compliance with all Federal, State, Local andAASHTO requirements, cost estimates, time estimates and bidding procedures.

Conducts initial review of bids and formulation of recommendations for award of a contract.

Coordinates drafting, computing and reproduction processes for a complex project.

Conducts plans-in-hand inspection of projects.

Develops ownership agreement and work sheet for relocation of utilities or railroads.

Reviews and processes permit application for utilities or land developers.

Reviews shop and erection drawings for a steel structure; reviews adequacy of soil boring data for design of highway section.

Compilation and application of materials specifications to design of standard projects.

Organizes work crews with appropriate equipment and materials for performance of maintenance or repair projects; schedules routes for recurring maintenance and inspection work.

Supervises truck drivers and heavy equipment operators to assure safe and efficient use of equipment; supervises the bituminous or portland cement concrete patching operations.

Selects appropriate items of heavy equipment, trucks, and hand tools for accomplishment of maintenance and repairs.

Provides effective and safe traffic controls at job sites.

Inspects and records maintenance work performed on highways, safety structures, drains, ditches, bridges and shoulders.

Prepares and reviews field books and sketches for drainage structures, earthwork, grades and curbs and gutters.

Performs title searches to determine, plot and locate cadastral information.

Reviews, evaluates and prepares recommendations for revision of speed limit zones.

Designs and review plans for upgrading standard traffic signal systems.

SENIOR ENGINEERING TECHNICIAN

(Construction, Design, Maintenance, Materials,

Survey, Traffic Operations)

Nature of Work: Under limited supervision, performs para-professional engineering work within one of the highway construction career fields: construction, design, maintenance, materials, survey, or traffic operations. Assists a professional engineer and may be delegatedauthority by the

professional engineer in matters where engineering precedent has been established. Is certified as a NICET Senior Engineering Technician and must be willing to relocate as the Department needs dictate. Quota limitations will be set by management concerning the staffing level of classified positions per organization. Positions in this class typically include the following functional roles: Utilities Supervisor, Reconstruction/Resurfacing Supervisor, Survey Coordinator, Maintenance/Equipment Management Analyst, Project Engineer/Supervisor, Maintenance Assistant at district level, Section Leader or Staff Assistant at division level. Performs advanced level technician duties established in work elements by NICET.

Examples of Work

(Following are examples of the kind and level of work typically assigned to positions in this class. The NICET certification requires verification of general and special work elements in the specialty area).

Prepares complete bid proposal for a complex project including adequate provisions for compliance with all Federal, State, Local and AASHTO requirements, cost estimates, time estimates and bidding procedures.

Maintains project/design cost records, evaluate performance of subordinates, safeguards and assures good condition of materials and equipment and operates within requirements of agency, state, local and FHWA Technical and Administrative Programs.

Establishes effective working relations within unit and with units employed on similar work, as well as with consultants, suppliers, government agencies and municipalities.

Assures quality of all work performed or supervised.

Prepares comprehensive engineering and environmental reports.

Prepares reports, summaries and accident reports and compiles data required to permit effective management.

Prepares schedules of priorities for recurring maintenance operations and monitors compliance with established schedules.

Utilizes equipment and personnel effectively and assure the quality of all work supervised.

Performs initial review of major construction plans to insure that the latest principles of highway safety are being utilized.

Supervises and coordinates inventory and analysis of traffic control devices on all highways within area of responsibility.

The material facts of this grievance are not in dispute and are set out below.

Findings of Fact

1. Grievant has been employed by DOH for thirty-two years and currently works in District II. He is classified as an Engineering Technician III ("ET III"), and his working title is Survey Party Chief ("SPC"). He wishes to be reclassified to a Senior Engineer Technician ("SET IV"). (See footnote 1)

2. Grievant obtained his National Institute for Certification in Engineering Technologies ("NICET") SET certification in Transportation Engineering Technology, Highway Survey Level IV in

March 1994, after Division of Personnel's ("DOP") reclassification project. Thus, he is qualified to be a SET IV.

3. On July 1, 1992, DOH revised its District organization chart and established the position of a District SPC was to be filled by an ET III.

4. None of the District SPC's are classified as SET IV's. All District SPC's are classified the same as Grievant, ET III's.

5. DOH does employee SET IV's as SPC's in its Roadway Design Division Statewide Survey Section.

6. The SPC's in the Roadway Design Division work on a statewide level and travel frequently. The work performed by theseindividuals is similar in nature to an ET III's but is typically more complex, more complicated, and requires greater accuracy.

7. District design projects are less complex and involve resurfacing, minor safety repairs, small bridge replacement, and minor drainage issues.

8. Roadway Design Division's projects involve large bridges, work other survey teams refuse to do because they think it is too dangerous, and measurement of critical sites, such as retaining walls requiring numerous technical measurements.

9. Roadway Design Division's SPC's are frequently called in by the District's Chief Engineer or may be required to review projects by the Federal government, when the work needs to be carefully assessed and measured. Roadway Design Division's SPC's have been called into Grievant's District to perform this type of work, and Grievant's crew was assigned to another job site.

10. About 8% of the time, Grievant fills in for his supervisor.

11. Infrequently, approximately 5% of the time, Grievant works outside his District.

Discussion

In order for 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 another cited DOP classification specification than the one under which he is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). DOP'sspecifications 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 his required duties. Simmons v. W. Va. Dept. 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 Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993). The West Virginia Supreme Court of Appeals' holding in Blankenship presents employees contesting their current classification with a substantial obstacle to overcome in attempting to establish they are currently misclassified.

Additionally, Grievant adds the charge of discrimination to his misclassification claim. He argues that since he performs thesame work as the SET IV's in the Roadway Design Division, he should be classified and paid the same as they are.

To prove a case of discrimination, a grievant must first establish a prima facie case by demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant's third argument is that DOH violated W. Va. Code §29-6-10(2) when it failed to give him

equal pay for equal work.

All three of Grievant's contentions are refuted by the same finding. He does not perform the work of a SET IV and does perform the work of his present classification, ET III. Although Grievant stated the job of SPC was not listed in the ET III job description, the second listed item in the "Examples of Work" section states:

Performs, supervises and coordinates construction surveys including Chief of Party duties . . . ."

Clearly, this section, as well as a comparison of the other elements of the class specification with Grievant's job duties, indicate he is properly classified as an ET III. Testimony also revealed Grievant is not similarly situated to the SET IV SPC's in Roadway Design Division. The work they perform is more complex andinvolves extensive statewide travel, thus he has not established a prima facie case of discrimination. Grievant's equal pay for equal work argument must also fail - he is not performing work equal to the SET IV in Roadway Design Division. Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994). His work is similar, but not the same, and is not as critical or as difficult.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994).

2. Grievant failed to establish a prima facie case of discrimination and prove he was similarly situated to the SET IV's who serve as SPC's in Roadway Design Division. See Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant did not demonstrate DOH violated the equal pay for equal work provision of W. Va. Code §29-6-10(2).

4. Grievant did not meet his burden and prove by a preponderance of the evidence that he was misclassified as an ET III or that the classification of SET IV is the "best fit" for his normal duties.

Accordingly, this grievance is **DENIED**.

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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: October 31, 1995

Footnote: 1Although the Roman Numerals do not appear on the class specifications, DOH and its employees identify these positions in this manner, and for clarity of the parties the undersigned will do so in the Decision.