LARRY W. BILLUPS, JOE H. HENDRICKS, LEWIS E. SMALL

WILLIAM J. INGLES and KERR COLE

v. Docket Nos. 94/DOH/168, 177, 169, 170

and 212

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS

DECISION

The grievants are employed by the West Virginia Division of Highways (DOH) as Engineering Technicians (ETs) in the agency's District 9 headquarters in Ronceverte. They initiated grievances at Level I on or about September 17, 1993, alleging that they had been denied the opportunity to apply for a Senior Engineering Technician position to which another Engineering Technician was promoted in August 1993. The grievant's supervisor was without authority to grant relief and the grievances were denied at Level II. The grievances were again denied at Level III following hearings held March 8, and March 24, 1994. Appeal to Level IV was made May 4, 1994 and a hearing was held July 21, 1994. The parties submitted proposed findings of fact and conclusions of law by August 24, 1994.

I.

There is little if any dispute over the facts of the case. DOH designates various construction and maintenance projects as either major, medium or small. (See footnote 1) A major project is defined as one "which is notable or conspicuous in effect, scope, complexity, staffing, monies committed, which is of sufficient import to rank it as a significant job when compared with other projects within the

Department."

A medium project is one "of a middle condition or intermediate degree which is not of sufficient complexity, scope, staffing or monetary significance to rank it above a TET, ET III level position." DOH defines a small project as one "of little significance or importance; of having little size or slight dimensions when compared to the overall ranking of various projects within the Department. Said parameters being further defined by the small amounts of money involved; reduced staffing complement; shortened length of construction and minimal complexity." Despite that these definitions require consideration of a number of factors, ETs and perhaps some administrators, at least in District 9, tend to classify a project solely on the basis of the amount of funds to be spent. They have come to regard a project on which at least $5,000,000.00 is committed as a major project.

All projects require the appointment of a project supervisor who oversees nearly all aspects of the undertaking. (See footnote 2) DOH has an established practice of appointing only Senior Engineering Technicians (SETs) to supervise major projects. (See footnote 3) In the event that there are no SETs in the district or none are then available, i.e., they are assigned to other projects, a supervisor is selected from the ET ranks. For at least the past eight years, it has been the practice in District 9 to announce or post major project supervisor slots when no SETs are available so that all ETs in the district could make applications. (See footnote 4)

On August 1, 1993, Larry Hanna, an ET, was selected to supervise the District 9 "Jefferson Street" project in Lewisburg, a project to which slightly over $600,000.00 was committed. Oncethe selection was made, DOH requested and received approval from the West Virginia Division of Personnel (Personnel) to "reallocate" Mr. Hanna's ET position to SET and provide him a higher salary. The position was not posted. Rather, DOH determined that Mr. Hannah was qualified for the job and that posting was not necessary under Personnel's regulations.

Mr. Hanna was formerly assigned to District 9, but for the two and one-half years prior to the Jefferson Street appointment, he had been "on loan" to District 5 where he served as supervisor of a $1.9 million dollar bridge construction project. (See footnote 5) The project was not designated "major" and he, thus, retained his ET status during that service. His performance on the project did, however, prompt his superiors in District 5 to make written recommendations to administrators in District 9, that he be considered for promotion upon his return there. There is no dispute that at the time of Mr. Hanna's appointment to supervise the Jefferson Street project, there were no SETs available in

District 9. There also is no dispute that Mr. Hanna and the grievants herein were all minimally qualified for the post.

II.

The grievants claim (See footnote 6) that, pursuant to DOH's past practice, and W.Va. Code §29-6-24, the project supervisor/SET position towhich Mr. Hanna was appointed should have been posted. They acknowledge, however, that the project ended prior to their appeal to Level IV, and, therefore, do not seek that it be posted. Instead, the grievant's urge an innovative approach to relief in the case which focuses on the designation of the project as "major."

They assert that, pursuant to past practice and/or policy, the project was not a major one and that by deviating from policy, DOH has effectively "redefined" the criteria for classifying projects. They seek as relief that DOH "back up" and apply the newly-defined criteria to past, completed projects on which they served as supervisors and which were not then designated "major." They ask to be compensated at the higher SET level of pay for those periods.

The agency maintains that the Jefferson Street project fit the definition of "major" project and that the grievants have not shown that they have been injured as the result of that designation. DOH asserts that the action by which Mr. Hanna was attained SET status was a "reallocation" and that the position was not a "budgetary vacancy." According to DOH, regulations adopted by Personnel did not require posting under those circumstances. DOH points out that in, Hart v. W.Va. Division of Highways, Docket No. 92-DOH-136 (April 30, 1993), a case with a similar fact pattern, the Grievance Board found no violation of statute or policy. (See footnote 7) For reasonshereinafter discussed, the undersigned concludes that DOH was legally bound to post the position and that the grievants are entitled to relief on that finding.

III.

The record reflects that the designation of the Jefferson Street project as a major project was, as the grievants assert, a deviation from DOH's guidelines and practice. (See footnote 8) The grievants, however, have failed to show that they are entitled to the monetary relief they seek as the result of that mischaracterization. This relief is not premised on any damages incurred by the grievants and is simply an attempt to have their prior service as supervisors of small or medium projects

mischaracterized also. They do not seriously argue that during the periods claimed, they were not performing the duties of the ET classification as set forth in Personnel's official description of that classification. (See footnote 9) Thegrievants do not cite and the undersigned is unaware of any authority or legal theory whereby an employer must commit "two wrongs" in order to make a "right."

Finally and more importantly, the guidelines used by DOH to designate projects appear to be just that. They contain no language which would prohibit DOH from deviating from the definitions of major, medium or small projects contained therein. Thus, the grievants have no binding policy on which to rely for their proposition that DOH was required to attach any designation to a particular project. The grievant's request for compensation is, therefore, rejected.

Whether the position in question should have been posted is the more difficult question.

W.Va. Code §29-6-1 provides,

> The general purpose of this article is to attract to the service of this state personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation and welfare of its civil employees, and other incidents of state employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness, except as hereinafter specified. All employment positions not in the classified service, with the exception of the board of regents, are included in a classification plan known as classified-exempt service.

W.Va. Code §29-6-24 provides,

> Whenever a job opening occurs within the classified service, the appointing authority shall, in addition to any other requirement of law or regulation for the posting of job opening notices, at least ten working days before making an appointment to fill the job opening, post a notice within the building or facility where the duties of the job will be performed and throughout theagency, which notice states that a job opening has occurred and describes the duties to be performed by a person employed in that position.

Pursuant to its authority under W.Va. Code §29-6-10, Personnel has promulgated the following policy (See footnote 10), effective August 3, 1993, regarding the posting of vacancies in the state's classified service:

> Posting of Job Openings: Whenever a job opening occurs in the classified service, the appointing authority shall post a notice within the building, facility or work area and throughout the agency that candidates will be considered to fill the job opening. The notice shall be posted for at least ten (10) working days before making an appointment

to fill the job opening. The notice shall state that a job opening has occurred, describe the duties to be performed, and the classification to be used to fill the job opening.

(a)
The term job opening refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer.

(b)
The posting notice shall include a description of the duties to be performed by the person selected, the minimum qualifications for the position, the job classification to be used in filling the job opening, the salary level or range that will be considered, and the job location.

(c)
An established closing date, if any, for the receipt of applications shall allow sufficient time to ensure that the job vacancy circulation has been posted throughout the agency for ten (10) working days. The naming of an individual to fill the position is the appointment and is not altered by the fact that the individual will not assume the duties until a later date. Therefore, the agencyshall not make an appointment to a position prior to the deadline for receipt of applications as listed on the posting.

(d)
The appointing authority shall give due consideration of those employees who apply and are eligible for the posted vacancy.

(e)
If a posted vacancy is not filled within six months of the established closing date, the vacancy must be re-posted prior to an appointment to the vacant position.

(f)
Any employee in the classified service who believes that the posting time and notice requirements of this Section have been violated or who is denied consideration for the job opening has the right to initiate a grievance as provided for in WV Code §29-6A-1 et seq.

(g)

> The vacancy posting requirements apply to all classified position vacancies except demotions with prejudice and/or transfers for cause.

The policy contains the preface, "[T]he purpose of this policy is to establish the procedures and requirements for posting job openings to ensure that merit principles are upheld when filling job openings for classified positions."

In a section denoted "Definitions", Personnel's regulations define "vacancy" as "An unfilled budgetary position in the classified service to be filled by original appointment, promotion, demotion, lateral class change, transfer, or reinstatement." Thus, the policy circuitously defines "job opening" as "an unfilled budgetary position in the classified service to be filled by original appointment, promotion, demotion, lateral class change, transfer, or reinstatement." The term "budgetary position" is not further defined and it is not used elsewhere in the policy.

Personnel has advanced an explanation and/or interpretation of its regulations (See footnote 11) which clarifies that it views the language in Code §29-6-24, "Whenever a job opening occurs in the classified service," as referring to the creation of a vacancy in a classified position which was established and funded via the Legislature's budget appropriations process. According to Personnel, posting is not required unless the position to which an appointment is to be made has been identified in the agency's budget; the budget has been tendered to the Legislature; and the Legislature has included the position in its allotment for that agency's personnel expenditures. Personnel maintains that its regulations on posting which incorporate this interpretation are entirely consistent with the statute.

Personnel also asserts that so long as he or she is not being placed in a "budgeted vacancy," an employee may be promoted without the necessity of posting pursuant to the following regulation:

Whenever substantial changes occur in the duties and responsibilities assigned to a position or to correct a position misclassification, the Director [of Personnel] shall reallocate the position to its proper class. The incumbent or the appointing authority may seek a reconsideration of the allocation action by submitting a written request to the Director within ten (10) calendar days of the effective date of the action.

A resolution of the grievants' claims requires analysis of Personnel's regulations and its opinion.

Regulations promulgated by an agency charged with the execution of a particular statute are to be afforded the effect of law. Thomas v. Bd. of Educ., 261 S.E.2d 453 (W.Va. 1979). The regulations, however, must not be unduly restrictive or contrary to legislative intent. The regulations cannot be "out of harmony" with the statute. Eastern Gas and Fuel Associates v. Hatcher, 107 S.E.2d 618 (W.Va. 1959); Hodge v. Ginsberg, 303 S.E.2d 245 (W.Va. 1983). Moreover, where a statute is clear and unambiguous, the regulation must merely give it that effect and not interpret it. Chico Dairy co. v. W.Va. Human Rights Comm'n, 382 S.E.2d 75 (W.Va. 1989).

Clearly, Personnel is the agency charged with implementing Code §29-6-24, and its regulations on posting should be given effect unless they are inconsistent with the statute. Further, W.Va. Dept. of Health v. Blankenship, 431 S.E.2d 681 (W.Va. 1993) dictates that, "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." After a close review of the parties' arguments andPersonnel's opinion in the case, the undersigned concludes, for the reasons set forth below, that Code §29-6-24 need not be interpreted and that, in any event, Personnel's interpretive regulations on posting are unduly restrictive of Code §29-6-24.

The West Virginia Supreme Court of Appeals has not addressed the import of the job posting requirements of W.Va. Code §29-6-24 or Personnel's regulations on that subject. (See footnote 12) The Court has, however, addressed the requirement in W.Va. Code §18A-4-7a that county boards of education "post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school employees to observe for at least five working days." (See footnote 13) In Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W.Va. 1988), the Court found this language to be clear and unambiguous and rejected the contention that the posting requirements should be "balanced" with a particular school principal's need to maintain flexibility in scheduling classes.

In reaching these conclusions, the Court found it significant that the Legislature had also mandated that county boards "make decisions affecting promotion and filling of any classroom teacher's position occurring on the basis of qualifications." The posting requirement was deemed the "procedural vehicle" by whichthis language was given effect and the "most reasonable way to insure that the most qualified person is found to fill a position." The undersigned finds that the language of Code §29-6-24 is sufficiently similar to that involved in Bonfantino that resort to the Court's analysis and reasoning in the present case is appropriate.

Code §29-6-1 is, in essence, a mandate that state agencies fill positions in the classified service on the basis of qualifications. As the Court pointed out in Thurmond v. Steele, 225 S.E.2d 210 (W.Va. 1976), the general purpose of the statutes establishing a civil service system is to "attract to the service of this state personnel of the highest ability and integrity." The posting requirement of Code §29-6-24 is directly related to that objective.

The language in Code §29-6-24 "whenever a job opening occurs" the agency "shall" post is no less clear than that used in Code 18A-4-7a. There is nothing inherently ambiguous in the Legislature's use of the phrase "job opening." In the context of employer-employee relationships, an opening is merely an "unfilled job or position." A position is a "post of employment." The New American Heritage Dictionary 870, 967 (1985). Whether a position is "open" may depend on the facts of a particular case, but that does not render the statute unclear.

It is further concluded that the Legislature intended the posting requirement of Code §29-6-24 to be an essential "vehicle" for effecting the mandate in Code §29-6-1 that "[a]ll appointmentsand promotions to positions in the classified service shall be made solely on the basis of merit and fitness." An announcement that an agency intends to hire or promote is an efficient if not "scientific" method of achieving the largest pool of qualified applicants. Clearly, the Legislature has determined that job posting in the classified service is a basic if not essential component of an effective merit-based appointment process.

For obvious reasons, Code §29-6-24 also bestows a substantive right upon state employees vying for promotions within their agencies or seeking appointment with others. Either is hard to achieve when opportunities are unannounced. The clarity of the statute and the importance of the role of job announcements require that Personnel's regulations on the subject be reviewed carefully.

The undersigned can find no language whatsoever in Code §29-6-24 upon which it could be reasonably concluded that the Legislature intended to make the posting of a position entirely contingent upon on whether it gave its approval, via its budget appropriations process, to create the position or specifically provided funds to support it. Personnel's rule to that effect is a restrictive one and, for that reason alone, it seems at odds with the legislative intent of Code §§29-6-1 and 29-6-24. Little analysis is needed to conclude that it would exclude a great many personnel actions from the posting requirement.

Posting issues can arise in a variety of contexts. Positions may or may not be created, merged,

and/or abolished during reductions-in-force, agency reorganizations, and transfers ofduties from one employee to another. Promotions, in some circumstances, can involve the creation of positions. Notice is taken that these actions do occur in state government independent of the Legislature's budget approval process.

The Grievance Board has addressed numerous claims made by employees of county boards of education regarding the need to post during the creation, abolishment, realignment and merger of positions. See, e.g., Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 28, 1994) and Hamrick v. Tyler County Bd. of Educ., Docket No. 93-48-185 (Dec. 30, 1993). The decisions in such cases invariably turn on the particular facts established.

Often, in order to determine whether a particular personnel action involved the creation of a position subject to posting requirements, it is necessary to consider changes in salaries, the employer's past practice, the degree with which duties are altered or shifted, and changes in titles. The inquiry includes, but is not limited to, whether the employer has specifically identified a position and set aside funds in its budget for its support.

The cases also recognize, either explicitly or implicitly, that a balance must be struck between the employer's right to manage effectively with the employee's right to be apprised of opportunity. In most cases, the focus is eventually upon what if any evidence is presented to show that the employer was seeking to favor one employee by depriving others of the opportunity to bid on positions. Personnel's rule excludes all but the budgetary consideration.

The present case aptly illustrates that the rule is overly restrictive. The specifications for ET and SET developed by Personnel reflect that the two positions are significantly different. The higher salary assigned the SET classification is in obvious recognition of its supervisory responsibilities and it is those responsibilities which set it apart from the ET classification. The paperwork by which Personnel approved Mr. Hanna's SET status and the higher pay clearly denote the action as a promotion.

As noted, DOH had an established practice of posting project supervisor/SET positions when no employees then classified as SETs were available. The practice is an acknowledgement that the duties and responsibilities to which Mr. Hanna was assigned was an identifiable position within the classified service. The record otherwise reflects that DOH administrators and ETs have always considered SET status to be a significant and perhaps the only avenue of advancement for ETs.

Personnel's regulations permitted DOH's deviation from practice. (See footnote 14) Under the regulations, Mr. Hanna's ET position was merely "reallocated" to SET in order to "correct" the misclassification of his position caused by his assumption of project supervisor duties . Since the process did not involve hisplacement in a "budgeted vacancy," the regulations did not require that DOH notify other ETs, via a job announcement, that there were funds available, from some source, to raise one of them to supervisory status. While the record suggests that at least a cursory review of the qualifications of the grievants was conducted prior to the selection of Mr. Hanna, it will not support that it was the type of review that would have been completed had the grievants, and perhaps others, been given the opportunity to submit their credentials for the post. The undersigned is persuaded that it was the intent of the Legislature, in enacting Code 29-6-24, that they be given that opportunity.

Finally and more importantly, as discussed above, the undersigned finds Code §29-6-24 to be clear and unambiguous and that pursuant to the holdings in Chico Dairy, supra, Personnel's regulations should simply reflect the statute's broad scope and clarity rather than limit its application. Accordingly, the undersigned concludes that Personnel's regulations on posting, to the extent that they limit posting only when the position to be filled is a "budgeted" one, are unnecessary and unduly restrictive of the statute. It is also concluded that Personnel's opinion that "job opening", as that term is used in Code §29-6-24, is equivalent to "budgeted vacancy," is clearly erroneous.

Since Personnel's regulation on reallocation is premised on its definition of job opening, it too is in conflict with the statute. Indeed, the latitude that the rules on reallocation afford employers is at the heart of the case. It is specious tocharacterize the promotion of an employee in one classification to an identifiable, higher-paying, management-oriented classification as a "correction" of a "misclassification" of the employee's original position.

This is not to say that all promotions involve moves to "job openings." An employee's assumption of additional or more complex duties might entitle him to advancement within his classification series but not create an opening within the meaning of Code §29-6-24. Again, determinations regarding the creation of an "opening" should be based on the facts of a particular case and must take into account the plain and unambiguous language of Code §29-6-24 and the legislative intent expressed in Code §29-6-1. (See footnote 15)

The grievants in the present case have shown that the project supervisor/SET position to which

Mr. Hannah was appointed was a job opening in the classified service and that DOH's failure to post it was violative of Code §29-6-24. Because, as previously noted, the Jefferson Street project has ended, they are entitled to only prospective relief.

The holdings herein are, to some extent, in conflict with Hart v. W.Va. Dept. of Highways, Docket No. 92-DOH-136 (April 30, 1993); Junkins v. W.Va. Div. of Labor, Docket No. 91-DOL-460 (May 29,1992); and Watson v. W.Va. Dept. of Health, Docket No. 91-H-120 (Sept. 25, 1991). In Hart, a case which is factually similar to the present one, the Administrative Law Judge expressed concerns that the action in issue therein did involve a job opening in the classified service, but nevertheless found no violation of Code §29-6-24. There was no explanation for the holding. Junkins also found no violation but noted that the grievant therein had not legally challenged Personnel's definition of vacancy.

Finally, although the outcome in Watson was predicated on the timeliness of the complaint, there is a discussion therein which appears to validate Personnel's regulations on posting and reallocation. The ALJ also remarked, however, that there appeared to be "a certain tension" between Personnel's regulations on posting and reallocation and that the facts of the case "raised the specter of an agency avoiding posting requirements and underlying merit principles." The regulations have not been wholeheartedly endorsed. In any event, this is the first extensive examination of those regulations and the pertinent statute(s) and it must take precedence over a less focused analysis. Accordingly, the undersigned finds departure from the doctrine of stare decisis (See footnote 16) appropriate and overrules the above cases to the extent that they conflict with the conclusions herein.

The Grievance Board is authorized under W.Va. Code §18-29-5(b) to "provide such relief as is deemed fair and equitable." After careful consideration of the equities involved and all other matters of record, the undersigned concludes that a direction to DOH to conform to the mandates of W.Va. Code §29-6-24 is the appropriate remedy in the case.

In addition to the findings and conclusions in the foregoing discussion, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) On August 1, 1993, Larry Hanna, an Engineering Technician, was selected to be the supervisor of the "Jefferson Street" project located in Respondent Division of Highways' District 9.

The project was designated "major."

2) The change in Mr. Hanna's duties was substantial. Highways requested and received approval from the West Virginia Division of Personnel to "reallocate" his position from Engineering Technician to Senior Engineering Technician. Mr. Hanna received an increase in pay as the result of the transaction.

3) Although Highways had a practice of posting all "major" project supervisor jobs when persons then holding the Senior Engineering Technician classification were unavailable, it did not do so in this instance. Further, it was not required to do so by Personnel's applicable regulations.

4) The designation of the Jefferson Street project as a major one was also a deviation from Highways' past practice in District 9.

5) The grievants herein, District 9 Engineering Technicians, have supervised various projects in the past which were comparable in size, complexity and expenditure of funds, to the Jefferson Street project. Those projects were not designated major and they did not achieve the Senior Engineering Technician status as a result of the assignments.

CONCLUSIONS OF LAW

1) The grievants have failed to show that Highways has bound itself, per policy, to attach any particular designation to a construction or repair project or that they were injured as the result of the designation given the Jefferson Street project.

2) "Whenever a job opening occurs within the classified service," the appointing authority must post it at the site where the duties are to be performed for at least ten working days. W.Va. Code §29-6-24. This requirement is directly related to the general purpose of W.Va. Code §§29-6-1, et seq., i.e., "to attract to the service of this state personnel of the highest ability and integrity," and grants state employees the right to be apprised of meaningful opportunity for advancement.

3) Personnel is authorized per W.Va. Code §29-6-10 to promulgate regulations implementing the provisions of Code §29-6-24. Its regulations require posting in a given personnel action only when an employee is being appointed to a "budgeted vacancy." 4) Personnel has clarified, in an interpretation of its regulations, that a budgeted vacancy can only occur when the Legislature has approved, via its budget appropriations process, the creation of a new position or when an employee has vacated an existing position which has been identified and funded in the appropriations process.

Personnel's interpretation equates "job opening" as that term is used in Code §29-6-24, with "budgeted vacancy."

5) When a statute is clear and unambiguous, its language should be afforded its everyday meaning and applied. Lavender v. McDowell Co. Bd. of Educ., 327 S.E.2d 691 (W.Va. 1984). Regulations adopted pursuant to an agency's authority to implement a statute should be accorded the effect of law unless they are in conflict with or unduly restrictive of the statute. Eastern Gas and Fuel Associates v. Hatcher, 107 S.E.2d 245 (W.Va. 1959); Hodge v. Ginsberg, 303 S.E.2d 245 (W.Va. 1983).

6) Code §29-6-24 is clear and unambiguous in its pronouncement that all job openings in the classified service are to be posted. See Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W.Va. 1988). Rather than reflect the clarity of the statute, Personnel's regulations on posting unduly restrict its application.

7) The grievants herein have proven that the position to which Mr. Hanna was appointed was a job opening within the meaning of Code §29-6-24, and that Highways' failure to post it was a violation thereof.

Accordingly, the grievance is **GRANTED** to the extent that the West Virginia Division of Highways is hereby **ORDERED** to henceforth post any and all Project Supervisor/SET positions when there are no SETs then currently available, regardless of the geographical location of such positions, in accordance with W.Va. Code §29-6-24 and the holdings herein.

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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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: May 4, 1995

Footnote: 1*The designations are found in a July 2, 1980 memorandum from DOH's central office in Charleston to all district administrators. The parties agree that this memorandum is the only written DOH policy which categorizes and defines construction projects.*

Footnote: 2*The duties may vary with the nature of the construction or maintenance project. Generally, the supervisor must direct the work of ETs who in turn observe, on a day-to-day basis, the actual construction or maintenance work which is performed by private contractors. The supervisor is also responsible for maintaining and submitting records on such matters as the overall progress of the project; money allocated and disbursed; man hours spent; and technical problems encountered.*

As a point of clarification, Project Supervisor is an "in-house" title and not a separate position in the classified service. Persons chosen to fill that role are not reclassified to Project Supervisor.

Footnote: 3*Pursuant to classification specifications promulgated by the West Virginia Division of Personnel, Senior Engineering Technicians must possess "Level IV" certification issued by the National Institute for Certification in Engineering Technologies (NICET). Apparently, NICET will not issue such certifications until the applicant actually achieves placement in a supervisory role.*

Footnote: 4*This finding is based upon the unrebutted Level IV testimony of Roger Patterson, District 9 Construction Engineer. There is other testimony of record which at least suggests that the practice has been in effect for an even longer period.*

Footnote: 5*Apparently, the District 5 project to which Mr. Hanna was assigned did not meet the definition of a major project.*

Footnote: 6*The grievants' legal position, as set forth herein, is a "collective" one. Each grievant submitted proposed findings of fact and conclusions of law which set forth slightly differing versions of the same legal arguments.*

Footnote: 7*The agency's proposed conclusions of law are generally worded and essentially cite Hart as authority for its assertion that the action complained of was proper. In order to gain a clearer understanding of the agency's position, the undersigned hasresorted to that decision, which sets forth a more detailed statement of the agency's legal stance.*

Footnote: 8*Again, Mr. Patterson's testimony on this point is persuasive. It was apparent from his representations at Level IV, that a project with only a $600,000.00 budget had never been designated "major" in District 9.*

Footnote: 9*It is noted that at the Level IV hearing, grievant Hendricks for the first time asserted that his misclassification claim was different from that advanced by the other grievants in that he was asserting that he had been misclassified for some time regardless of DOH's policy on the designation of projects. He failed, however, to prove by a preponderance of the evidence that the duties he was then performing and had been performing more closely fit the job specifications for*

Senior Engineering Technician than those for Engineering Technician. Rather the evidence supports that ET was the better "fit" for his duties. See, Hayes v. Natural Resources/CSS, Docket No. NR-88-038, (March 28, 1989).

Footnote: 10DOH has adopted its own regulations regarding the posting and filling of positions and the grievants allege violations thereof. Those regulations, however, generally conform to those of Personnel. The focus herein is upon Personnel's regulations, since it is Personnel with whom authority to implement W.Va. Code §29-6-24 rests, and DOH concedes that Personnel's regulations take precedence over its own.

Footnote: 11Personnel was not joined as an indispensable party in the case because it appeared that the grievants were complaining only of actions taken by DOH. Pursuant to W.Va. Code §§29-6-4 and 29-6A-7, Personnel was provided notice of the Level IV hearing in the case, but did not appear or request the opportunity to submit legal argument.

Nevertheless, the undersigned, via an April 3, 1995 letter, advised Personnel that its regulation was in issue and asked that it submit an opinion. The undersigned has carefully reviewed Personnel's April 18, 1995 response.

It is also noted that in its response, Personnel questions the authority of the Education and State Employees Grievance Board to declare the regulation void. The undersigned declines to address this issue extensively. It is simply noted that the Grievance Board has concluded, on at least two occasions, that it has such authority. See, Oliverio v. W.Va. Dept. of Human Services, Docket No. 89-DHS-154 (April 26, 1990), and Miller v. W.Va. Div. of Highways, Docket No. 93-DOH-011 (June 30, 1993). By order dated January 16, 1991, Oliverio was affirmed by the Circuit Court of Harrison County.

Footnote: 12The parties do not cite any cases and the undersigned's research has revealed none.

Footnote: 13W.Va. Code §18A-4-8b(a) was the applicable statute at the time. It was superseded in 1990 by W.Va. Code §18A-4-7a. The language of the statute regarding posting remained the same.

Footnote: 14Presumably, Personnel was not aware and would not approve of the mischaracterization of the project to which Mr. Hanna was assigned. It appears to the undersigned that DOH "exaggerated" the nature of the project in the documents it submitted to Personnel and by which approval was given to promote Mr. Hanna.

Footnote: 15It is noted that Personnel sets forth in its April 18, 1995 opinion, a number of personnel actions which would be "disrupted" by a finding that its regulations are invalid, including demotions, reductions-in-force, and agency reorganizations. It should be clear from the holdings herein, that there can be no precise rule for determining the applicability of Code §29-6-24 to a given set of circumstances. Accordingly, the only response which can be made to Personnel's concerns is that the applicability will be determined on a case by case basis.

Footnote: 16Literally, "to stand by things decided." This is the doctrine that when a court has announced a principle of law as applicable to a certain set 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 758, 771 (W.Va. 1994).