RUSSELL J. DAY,

Grievant,

v. **DOCKET NO. 94-DOH-288**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

This grievance was initiated December 20, 1993, by Russell J. Day ("Grievant") against the West Virginia Department of Transportation, Division of Highways ("DOH"), alleging that he should be classified as an Operator [Transportation Worker] III. (See footnote 1) Grievant asserted that he was entitled to this classification because, first, Grievant had been operating Operator III equipment; and, second, in 1989, Grievant withdrew a nonselection grievance when he was told by DOH personnel that he would be recommended for the next vacant Operator III position in Morgan County. Grievantalso asserted retaliation by his supervisor, (See footnote 2) and that he was being paid less than other employees in the same classification as he. After the grievance was denied at Levels I and II, (See footnote 3) Grievant appealed to Level III, and a Level III hearing was held on May 16, 1994. On June 16, 1994, Fred VanKirk, DOH Commissioner, adopted the findings of the Level III grievance evaluators, and denied the grievance. Grievant appealed to Level IV on July 15, 1994. The parties agreed to submit this case for decision on the record. This case became mature for decision on November 7, 1994, with only Respondent submitting proposed findings of fact and conclusions of law.

Based upon the findings of fact, which are essentially undisputed, and conclusions of law set forth below, the undersigned finds that Grievant has not met his burden of proof and that the grievance must be denied.

FINDINGS OF FACT

1. Grievant is employed by DOH as a Transportation Worker II ("TWII") in Morgan County, and has been a DOH employee for about fifteen years. T. 3-4. (See footnote 4)

2. Grievant's primary job duty is to operate a dump truck, which Grievant admits is within the duties of a TWII rather than those of a Transportation Worker III ("TWIII"). He occasionally operates a backhoe and a front-endloader, also within the duties of a TWII. T. 18.

3. Grievant operates a grader on a rotation with another employee, when one of the two TWIII's in Morgan County is on leave. T. 14-15. A grader operator is classified as a TWIII. During 1993, Grievant operated a grader a total of forty-two (42) hours over six (6) days. Grievant was placed on temporary upgrade status as a TWIII, and compensated accordingly at the higher pay grade of a TWIII, when operating a grader. (See footnote 5) T. 9, 19, 23; Agency Exhibit Number 1.

4. Grievant was told in 1989 by Nicholas Bromhal, District Five Engineer, DOH, that he would be considered for advancement to a TWIII position in Morgan County, when such a position became available. Grievant did not pursue a grievance he had pending at that time because of this representation. T. 10-11.

5. Grievant completed a grader operation training program in 1991, and passed the test administered as a part of the program. T. 8.

6. There are two graders assigned to Morgan County, and there are two TWIII positions in Morgan County. One of those positions has been filled by the same employee for fourteen tofifteen years, and the other has been filled by Wayne Spring for five to six years. No TWIII positions have become vacant in Morgan County since Mr. Spring began working as a TWIII. T. 9-10, 19.

DISCUSSION

Grievant has the burden to demonstrate by a preponderance of the evidence that he should prevail on his claims. Grievant has made several claims in this case, none of which were supported by the evidence.

The primary claim of Grievant is that he should be classified as a TWIII. Grievant's claim is based upon the fact that he has temporarily operated a grader, and upon a promise made to him by DOH personnel in 1989 which he believes has not been fulfilled. Grievant was told in 1989 that he would be recommended for the next TWIII vacancy in Morgan County. Grievant chose not to pursue a 1989 grievance regarding the choice of Wayne Spring for the position of TWIII instead of him, believing that another TWIII position would soon be posted for Morgan County because DOH expected one

TWIII employee to resign, and that he would be recommended for that position.

Although the grievance statement reads on its face as a misclassification claim, Grievant presented no evidence that he is misclassified, and indeed, Grievant could not prevail on a claim of misclassification. (See footnote 6) Grievant's primary job is to operate a dumptruck; but on occasion he operates backhoes, front-endloaders, and graders. Grievant acknowledges that the operation of a dump truck, backhoe and front-endloader, is within the job duties of a TWII. The job specifications for TWII and TWIII confirm this, and the relevant portions of these job specifications are as follows:

TRANSPORTATION WORKER II

Nature of Work: Under general supervision, at the full-performance level, performs skilled work in the construction and maintenance of highways and related buildings and structures. Operates motorized highway maintenance equipment such as backhoe, mudjack, front-end loader, tandem-axle truck and snow plow. Makes major repairs to highways, culverts, bridge structures; welds, and erects steel girders and supports; builds forms and finishes concrete; performs overhaul of gasoline-powered engines and/or diesel powered equipment; performs major body repairs for automotive and maintenance equipment. Performs finish carpentry, electrical, plumbing and other building maintenance duties. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Examples of Work (See footnote 7)

...

> **Operates one or more pieces of equipment such as: asphalt distributor, rubber tire endloader, roller, trench machine, culvert cleaner, or mudjack.**

> **Drives dump, flat-bed, or tandem-axle trucks to transport equipment and materials to and from work sites....**

May be required to operate other highway maintenance equipment as employee training permits....

Drives equipment after repairs to test operation.

TRANSPORTATION WORKER III

Nature of Work: Under limited supervision, at the journey level performs skilled work in the construction and maintenance of highways, related buildings and structures, and erecting and operating a drilling rig. May serve as a working shop leader in a County Garage. Operates a variety of heavy motorized maintenance equipment such as power graders, bulldozer, semi-trailer. Transports equipment across state to construction or maintenance sites; makes major repairs to roads and bridges. Performs major overhaul of gasoline and diesel powered automotive and highway maintenance equipment. Performs skilled work in carpentry, plumbing, electrical and other building maintenance in construction areas. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Examples of Work

...

Operates one or more pieces of equipment such as: bituminous paver, bulldozer, crane, stone crusher, power grader, hydraulic excavator, centerline paint machine, track endloader, backhoe, rock wagon, pavement shaver, or pavement scraper....

Excavates, backfills, grades, or levels soil and aggregates according to plans and specifications.

Grades surfaces, rolls or compacts soil and aggregates according to plans and specifications on flat or rolling terrain....

May be required to operate other related highway maintenance equipment as employee training permits....

Drives equipment after repairs to test operation.

Grievant is not entitled to a promotion to TWIII simply because he has been temporarily upgraded to TWIII. Wilds v. W. Va. Dept. of Transportation/Division of Highways, Docket No. 94-DOH-290 (December 30, 1994). This Board has made it clear that "[e]xcept for infrequent short-term assignments, an employer may not impose duties upon a classified state employee which are outside the specifications established by the Division of Personnel for his or her position." Toney v. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-460 (June 17, 1994), at 8. However, the remedy for a violation of this principle is "that the duties be discontinued and back wages [be awarded] in the form of the difference between his salary and that of the higher classification." Id. at 12. In this case, over a period of twelve (12) months, Grievant performed the duties of a TWIII only forty-two (42) hours over a period of six (6) work days, and was upgraded and paid at the higher pay grade for his service. In several cases the Grievance Board has made it clear that when an employee voluntarily performs the duties of a higher paid classification on a truly temporary basis, he cannot claim misclassification for such periods, nor can he claim entitlement to the higher paid classification. Thornton v. W. Va. Workers' Compensation Fund and W. Va. Div. of Personnel, Docket No. 90-WCF-077 (Dec. 26, 1990). See, also, Wolfe v. W. Va. Tax Dept., Docket No. T-88-011 (July 28, 1989); and Freeman v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-237 (Dec. 26, 1990).

Grievant's frustration is understandable. Grievant withdrew a 1989 nonselection grievance after he was told by DOH personnel that he would be considered for the next vacant TWIII position in Morgan County. Grievant expected a TWIII vacancy to occur within a short period, because one employee classified as a TWIII was expected to resign his position. Also, at that time there were several TWIII positions in Morgan County. Shortly thereafter, however, the number of graders and the number of TWIII positions in Morgan County was reduced to two, and both of those positions havebeen filled for at least five years. Again, in February of 1992, in a Level II decision on a different grievance filed by Grievant (and apparently not appealed to Level III), DOH told Grievant, "[a]s experience is gained operating the grader, Management will submit Mr. Day for a promotion to Equipment Operator III."

The undersigned cannot find that Grievant was misled by DOH personnel in 1989. There is no evidence that DOH personnel knew Morgan County would lose all but two TWIII positions when they represented to Grievant that another TWIII position would be open. Further, there is no evidence of an intent by DOH to mislead Grievant to get him to drop his earlier grievance. That being the case, DOH has not breached its agreement with Grievant. DOH personnel agreed to consider Grievant for the next TWIII grader operator vacancy in Morgan County. The simple fact is that there have been no TWIII grader operator vacancies in Morgan County since about 1989, and Morgan County does not need a third full-time grader operator.

Finally, Grievant claims that he is paid less than other DOH employees who are classified as TWII's, and who have less seniority than he. Grievant's sole evidence on this subject was that he believes two other DOH employees with less seniority than he, and also classified as TWII's, make $8.05 per hour, while he makes $7.92 per hour. On cross-examination, however, Grievant stated that he did not know whether he had received salary advancements in 1989 and 1991. This casts doubt on Grievant's claim of pay differentials. T. 22. Further, Grievant presented no evidence tosupport a conclusion that he should have received a pay raise instead of, or in addition to, some other employee, or that he has otherwise been discriminated against in some way. There is nothing inherently unlawful in persons who hold the same job classification being paid differing amounts. Largent v. W. Va. Div. of Health, Appeal No. 21864, S.E.2d (W.Va. 1994); Acord v. W. Va. Dept of Health & Human Resources, Docket No. 91-H-177 (May 29, 1992).

CONCLUSIONS OF LAW

1. In order to prevail, a Grievant must prove the allegations in his complaint by a preponderance of the evidence. Wargo v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-441/445/446 (Mar. 23, 1994); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has failed to establish that he was entitled to be classified as a TWIII based upon his temporary upgrade to that position for only 42 hours over a twelve month period. Thornton v. W. Va. Workers' Compensation Fund and W. Va. Div. of Personnel, Docket No. 90-WCF-077 (Dec. 26, 1990). See, also, Wolfe v. W. Va. Tax Dept., Docket No. T-88-011 (July 28, 1989); and Freeman v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-237 (Dec. 26, 1990).

Accordingly, this grievance is DENIED.

Any party 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: February 16, 1995

Footnote: 1 ***The terms "Transportation Worker", "Equipment Operator" and "Operator" refer to the same position throughout this decision. The terminology used in classifications has changed over the last few years with the statewide reclassification project by the West Virginia Division of Personnel.***

Footnote: 2 ***As Grievant presented no evidence to substantiate even a prima facie case of retaliation, this issue is considered to be without merit and is summarily dismissed.***

Footnote: 3 ***The grievance was denied at Level I on or about December 27, 1993, and at Level II on January 18,***

1994.

Footnote: 4 ***All references to the transcript of the Level III hearing held on May 16, 1994, will be made as follows, with the page number of the transcript appearing in the blank: "T. __."***

Footnote: 5 ***Grievant has not alleged a violation of the temporary upgrade policy.***

Footnote: 6 ***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 those of another cited classification specification than the classification to whichhe is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).***

Footnote: 7 ***The examples of work for both TWII and TWIII are very lengthy, and contain a multitude of possible duties which were not discussed by the parties in the presentation of the limited evidence; therefore, where ellipses appear (...), portions of the examples of work have been omitted.***