

JAMES M. BEER, II

v. Docket No. 95-DOH-161

DIVISION OF HIGHWAYS

DECISION

Grievant, James M. Beer, II, employed by the Division of Highways (DOH or Respondent) and classified as an Engineer in Training II, filed a level one grievance on or about March 10, 1994, in which he complained that he was not compensated for the time he was assigned as Acting Maintenance Engineer. Grievant's immediate supervisor responded that he supported the claim but that he lacked authority to grant the requested relief. The level two decision concluded that the "administrator cannot grant the relief sought; and the grievance must be denied at this level." The grievance was denied at level three and advanced to level four on April 19, 1995. The matter became mature for decision on September 21, 1995, when the parties presented final oral arguments.

The facts of this matter are undisputed.

1. Grievant is employed by DOH, District Four, as a Maintenance Assistant.

2. Grievant's classification is Engineer in Training II.

3. Grievant performed the duties of the District Four Maintenance Engineer Ron Smith, while Mr. Smith was on medical leave from November 20, 1993, through January 9, 1994, and April 14, 1994, through July 3, 1994. Mr. Smith holds the classification of Highway Engineer IV, which requires licensure as a professional engineer in West Virginia.

4. Division of Personnel Pilot Policy, effective July 15, 1993, "Temporary Classification Upgrades" requires that "[e]mployees assigned under this policy shall meet or be within 3 months of meeting the minimum requirements of training and experience for the position to which temporarily assigned. Any licensure requirements must be met at the time of the assignment."

5. By memorandum dated December 22, 1993, Jeff Black, Director of DOH's Human Resources Division, advised:

[r]equest for temporary classification upgrade must be submitted to this Division in advance of the duties of the new position being assigned. . . Once the temporary upgrade has been approved, this

Division will issue a letter to the employee stating the terms of the appointment and asking them to sign the letter to indicate their agreement. Only after these steps have been completed may the employee begin performing the duties of the position.

6. By Memorandum dated January 27, 1994, Mr. Smith advised Harry Carr, Jr., District Engineer that Grievant had performed Mr. Smith's duties from November 1993 through January 1994, and was eligible for a temporary upgrade consistent with Mr. Black's memorandum of December 22, 1993. Mr. Smith stated that it had been impossible to obtain prior approval for the temporary upgrade because he had not received Mr. Black's memorandum until January 12, 1994.

7. On or about January 27, 1994, the request for temporary upgrade was denied because it had not been submitted in advance and because Grievant lacked a professional engineering license, a minimum requirement for the position.

Grievant challenges the upgrade policy claiming that: 1) the DOH is the only state agency that requires professional registration for its lower engineer classification; 2) there are not enough professional engineers at DOH to fill all of the positions that require the registration; and 3) there is no practical reason for the requirement as evidenced by the fact that during the four and one-half months he served as the acting Maintenance Engineer he was never required to use a professional sign off. Grievant notes that he was the most qualified employee to hold the acting position based on his experience, and claims that at least two other employees who do not hold professional registrations are assigned as either Maintenance Engineers or Construction Engineers at the District level. Grievant cites Hartley v. W.Va. Dept. of Highways, Docket No. 89-DOH-598 (Dec. 29, 1989), as precedent supportive of his position regarding this issue.

Grievant requests temporary upgrades for the time periods identified, and a policy change which would allow experience to substitute for registrations and licensures. If the policy is not amended, he requests that employees not be asked to perform work above their classification level and that "personnel statewide that do not meet professional registration requirements be replaced with people who do."

DOH argues that it must abide by the policy of the Division of Personnel in this matter; therefore, it has no discretion in the licensure requirement. Addressing Grievant's concerns that other employees who lacked the license held engineering positions, Harry Carr, District Four Engineer, stated at the level three hearing that while unlicensed employees may perform the higher-level duties, their

classifications were not upgraded. Mr. Carr also indicated that Grievant would no longer be worked outside his classification. DOH recognized the Hartley decision and claims that it now compensates employees acting in an engineer capacity at least the minimum salary for the classification of Highway Engineer IV.

Except 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. See generally: Hagar v. Dept. Of Health and Human Resources and Div. of Personnel, Docket No. 95-HHR-214 (Sept. 29, 1995); Toney v. W.Va. Dept. of Health and Human Resources, Docket No. 93-HHR-460 (June 17, 1994). Also see: Williams v. W.Va. Dept. of Human Services, Docket No. 90-DHS-476 (Feb. 28, 1991); and A.F.S.C.M.E. v. Civil Serv. Comm'n of W.Va. (A.F.S.C.M.E. I), 324 S.E.2d 363 (W.Va. 1984). If an employer should assign an employee "out-of-class" duties on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification. Grievant herein is entitled to such relief. Shremshock v. W.Va. Dept. of Transportation, Div. Of Highways, Docket No. 94-DOH-095 (Aug. 31, 1994).

Although the evidence of record establishes that DOH adopted a pilot policy, effective July 15, 1993, which requires that employees requesting temporary classification upgrades must hold any licensure requirements at the time of the assignment, DOH officials did not comply with that policy regarding Grievant. An employer may not improperly benefit by disregarding its own policy and then refuse to compensate an employee for work performed in a higher paying classification. Similarly, DOH may not refuse to grant the temporary upgrade because the request was not timely filed when the notice stating the timelines was not provided to the appropriate individuals.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In non-disciplinary matters a grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Crow v. W.Va. Dept. of Corr., Docket No. 89-CORR-116 (June 30, 1989); Bonnett v. W.Va. Dept. of Highways, Docket No. 89-DOH-043 (Mar. 29, 1989).

2. Grievant has established by a preponderance of the evidence that he assumed the duties of Highway Engineer IV for two substantial periods of time, and these assignments required that he assume duties outside his regular classification of Engineer In Training II.

3. An employee cannot be denied a temporary upgrade when he was assigned and performed the duties of a higher classified position contrary to employer policy.

4. An employee cannot be denied a temporary upgrade because the request for such personnel action was not filed prior to his assumption of the duties when notice of timelines had not been provided to the employee's supervisors.

Accordingly, the grievance is **GRANTED** to the extent that DOH is Ordered to process temporary upgrades for the two periods of time at issue and award Grievant any difference in salary to which he is entitled.

February 27, 1996