DELBERT GILLIAM,

Grievant,

v.

DOCKET NO. 96-DOH-511

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and DIVISION

OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Delbert Gilliam, filed the following grievance on August 27, 1996:

> I feel I am a victim of discrimination. For the past twenty six (26) months, I have performed the duties of a Transportation Crew Supervisor. During this time I have made several unsuccessful attempts to be reclassified as a Transportation Crew Supervisor. I have not been up graded for this position. There are currently two employees in this County doing the same job as myself and they are classified as Transportation Crew Supervisors. On one attempt to be reclassified, I was told by J. D. Brackenrich, who was the D.E., I did not supervise enough men to deserve this title. However, as recent as August of 1996 there was a Transportation Crew Supervisor position posted for Fayette A.P.D. which at the present has a smaller crew than myself. I perform the <u>same</u> duties as the Transportation Crew Supervisors at the out post at Lookout and at the County Headquarters in Oak Hill. I feel I am not being treated fair or equal with the other two Transportation Crew Supervisors but that I am being discriminated against! My latest attempt to be reclassified (August 1996) was also denied by Joseph Deneault. Therefore, I have filed this grievance.

Grievant seeks as relief:

> I would like my classification changed to Transportation Crew Supervisor and receive full back pay for the twenty six (26) months I have been working out of my classification and be made whole and equal in every way to all Transportation Crew Supervisors.

Following adverse decisions at the lower levels, Grievant appealed to level four on December 3, 1996. Hearing was held in the Grievance Board's Charleston, West Virginia office on February 7, 1997, at which time this case became mature for decision.

Findings of Fact

1. Grievant is employed by the Division of Highways ("Highways") in the Fayette County highway maintenance organization as a Transportation Crew Chief and has been in charge of the maintenance sub-station at Glen Farris since June 1994.

2. Michael Humphrey is a Transportation Crew Supervisor at Highway's Fayette County headquarters.

3. Darrell Hypes is a Transportation Crew Supervisor at Highway's Lookout substation.

4. Grievant supervises at least two crews the majority of the year, and, from time to time in the summer months, supervises three crews. Grievant does not have three subordinate crew chiefs.

5. Grievant schedules work, men, equipment, and materials, assigns crews, checks the progress of the crews, keeps time and records of his employees, equipment and materials, keeps records and files of all paper work at the Glen Farris substation, takes care of the gas and oil on a daily basis, answers the phone, takes and checkscomplaints, takes time sheets and gas reports to the County headquarters on a daily basis, trains employees in safety and proper maintenance operations, fills out evaluations on a yearly basis for all of his employees, and is responsible for all inventory at the substation. Grievant has signature authority at the substation.

6. The classification specifications for Highways, resulting from the statewide reclassification project, were effective November 16, 1993. The Division of Personnel ("Personnel") was responsible for drafting the classification specifications. After reviewing the specifications written by Personnel, Highways noticed some problems in different areas, including the crew chief area. Highways provided Personnel with some additional information and, after further review, Personnel modified those classification specifications. A second set of classification specifications was issued, which also contained the effective date of November 16, 1993. This second set was meant to replace the first set of classification specifications.

7. The first set of classification specifications were posted in the Fayette County headquarters, and were not replaced when the second set was issued.

8. Prior to the statewide reclassification project, Highways had three levels of supervision in the relevant area: Maintenance Crew Leader I and II, and Maintenance Crew Supervisor.

9. Personnel reduced the levels of supervision to two during the reclassification project: Transportation Crew Chief and Transportation Crew Supervisor. 10. Mr. Humphrey and Mr. Hypes were maintenance crew supervisors prior to the reclassification project. After the reclassification, they retained their classification as Transportation Crew Supervisor.

11. Mr. Jeff Black, Director of Human Resources for Highways, conceded that Mr. Humphrey and Mr. Hypes may be misclassified and directed their positions be reviewed. Mr. Black also conceded there are problems with the current classification series, in that it does not adequately address the situation which exists in the out post assignment or substation assignment. (See footnote 1)

Discussion

Grievant alleges he is misclassified and seeks the Transportation Crew Supervisor classification. Grievant also alleges he is being discriminated against because two other employees of Highways who hold that classification do not meet the requisite requirements for the position.

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 Personnel classification specification than that under which he 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. Dept. 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 Grievant's current classification constitutes the “best fit” for his required duties. 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 Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Admin. rule, § 4.04(a); Coates v. W. Va. Dept. of Health and Human Res., Docket No. 94-HHR- 041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. W. Va. Admin. Rule, § 4.04(d). Finally, Personnel's interpretation and explanation of the classificationspecifications at issue, if said language is determined to be ambiguous, should be given great weight unless clearly erroneous. See, W. Va. Dept. of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

In this grievance, an unusual situation exists, where there were two sets of classification specifications for the subject positions in existence during the relevant time period. The pertinent sections of those classification specifications follow.

TRANSPORTATION CREW CHIEF (1)

Nature of Work

Under general supervision, an employee in this class leads and participates in a crew performing maintenance and repair on highways. May be exposed to hazardous work conditions. An hourly rate of pay is assigned to this class. Performs related work as required.

Distinguishing Characteristics

The supervisory responsibility is limited to a single crew.

G. Ex. 1.

TRANSPORTATION CREW CHIEF (2)

Nature of Work

Under general supervision, an employee in this class leads and participates in a crew or crews performing maintenance and repair on highways, or engaged in core drilling activities. May be exposed to hazardous working conditions and inclement weather. Core drilling requires frequent travel. Performs related work as required.

Distinguishing Characteristics

The supervisory responsibility is limited to two crews or less.

G. Ex. 2.

TRANSPORTATION CREW SUPERVISOR (1)

Nature of Work

Under general supervision, an employee in this class leads two or more crews and participates in the maintenance and repair of highways. May be exposed to hazardous work conditions. An hourly rate of pay is assigned to this class. Performs related work as required.

Distinguishing Characteristics

Supervisory responsibility includes supervision of two or more work crews.

G. Ex. 3.

TRANSPORTATION CREW SUPERVISOR (2)

Nature of Work

Under limited supervision, an employee in this class leads three or more crews and participates in the maintenance and repair of highways, or leads a bridge maintenance crew and participates in the repair, renovation, maintenance of construction of bridges. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Distinguishing Characteristics

Supervisory responsibility includes supervision of three or more subordinate crew chiefs, or a single bridge crew, or an entire expressway organization.

G. Ex. 4.

All four classification specifications have effective dates of November 16, 1993. G. Exs. 1 and 3 were the classification specifications posted at the County headquarters on which Grievant relies to support his argument that he is misclassified. G. Exs. 2 and 4 are the classification specifications which Jeff Black, as well as Mr. Basford, testified were the specifications issued to replace G. Exs. 1 and 3. Looking at these classification specifications, specifically G. Exs. 1 and 3, it is easy to understand why Grievant believeshe is misclassified. G. Ex. 1 specifically limits the supervisory responsibility of that classification to a single crew. Grievant is responsible for two crews on a regular basis, and three crews during the summer months, and clearly meets the requirements of the Transportation Crew Supervisor as reflected by G. Ex. 3.

However, under the revised versions of those classifications, the supervisory responsibility of the Transportation Crew Chief is limited to two crews or less, while the supervisory responsibility of the Transportation Crew Supervisor is responsible for three or more crews, and specifically three or more subordinate crew chiefs. (See footnote 2) Under the revised specifications, Grievant falls squarely within the classification specification for Transportation Crew Chief. There is no dispute that there is a significant overlap in the examples of work between the two classifications, and that Grievant performs most, if not all, the duties listed on the Transportation Crew Supervisor classification specification.

Despite Fayette County headquarters' failure to post the correct set of classification specifications even after they had been revised, it in no way binds Personnel or Highways to those specifications in determining whether Grievant is misclassified. While it is an unfortunate mistake, it does not change the fact that the second set of classification specifications are the official documents under which the Respondents are operating with respect to the affected personnel.

Nevertheless, the effect of those classifications being posted is evident when comparing Grievant's job duties and responsibilities to those of Messrs. Humphrey andHypes. The testimony at Level IV indicated that Personnel and Highways were concerned that those two gentlemen had been misclassified, and indeed, based upon the information received from Mr. Basford, at least Mr. Humphrey was misclassified. It is possible that, because the wrong classification specifications were posted at the County headquarters since November 16, 1993, the error had not been detected earlier or brought to Personnel's attention prior to Grievant discovering the mistake.

Unfortunately for Grievant, the fact that at least one of those gentlemen has been misclassified

does not mandate that Grievant now be given that same classification, which would then render Grievant misclassified as well. Under the current specifications, the best fit for Grievant's duties and responsibilities lies within the Transportation Crew Chief classification specification. (See footnote 3) See Roberts v. W. Va. Dept. of Trans., Docket No. 96-DOH- 017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (Mar. 25, 1997). See also, Akers v. Dept. of Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995), wherein the West Virginia Supreme Court, in addressing the grievants' argument that because they perform the same work as other misclassified workers, they too, should be misclassified, references the Administrative Law Judge's decision:

> In rejecting this argument, the hearing examiner noted that many positions are misclassified and to legitimize such actions would "serve to undermine the basis of the classification plan and the principle of personnel and pay administration on which it is founded."

Akers, at 463. In the instant case, as in Akers, the record shows that other employees within Highways were misclassified, and no justification was provided to continue this misclassification. The appropriate remedy in a case such as this is not to reclassify Grievant, but rather, to remove the other misclassified employees from their classifications.

Grievant also raises a claim of discrimination in his statement of grievance. Discrimination is defined in W. Va. Code § 29-6A-2(d) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In this case, it must be found that the difference in Grievant's treatment by Respondent with respect to Mr. Humphrey and Mr. Hypes was "related to the actual job responsibilities" of Grievant's position. While Respondent erroneously classified at least Mr. Humphrey, that does not in any way reflect on Grievant's actual job responsibilities which fall squarely within the Transportation Crew Chief classification specification. Again, the appropriate remedy in a case such as this, where Grievant has shown that other employees are also misclassified, is not to misclassify Grievant, but to correct the mistake with respect to the other employees.

Conclusion of Law

1. Although the record shows that others may have been misclassified as Transportation Crew

Supervisors, where no justification was provided to continue misclassification, Grievant has failed to establish by a preponderance of the evidence that he is misclassified as a Transportation Crew Chief, or that the appropriate remedy would be to misclassify Grievant as well. Akers v. Dept. of Revenue, 194 W. Va. 456, 460 S.E.2d702 (1995); Roberts v. W. Va. Dept. of Trans.., Docket No. 96-DOH-017 (May 2, 1996), aff'd, Circuit Court of Kanawha County, Civil Action No. 96-AA-72 (Mar. 25, 1997).

2. Grievant has proven that he is responsible for supervising three crews during the summer months, and would be eligible for a temporary upgrade in classification and compensation for that time period.

3. Grievant has failed to prove that he has been discriminated against by Respondents, as the different treatment he has received in his classification is directly related to the actual job responsibilities of his position.

Accordingly, this grievance is **DENIED IN PART** and **GRANTED IN PART.** Respondent is hereby **ORDERED** to credit Grievant with temporary upgrades to the Transportation Crew Supervisor classification, and compensate him, if applicable, for the time periods during the summer months when he has been responsible for supervising three or more crews.

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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MARY JO SWARTZ

Administrative Law Judge

Dated: April 24, 1997

Footnote: 1

At the close of the level four hearing, Mr. Lowell Basford, Assistant Director, Classification and Compensation,

indicated he would review these position and provide the undersigned with the results of his review. No objection was made to this offer at the time it was made. Subsequently, on April 14, 1997, Mr. Basford presented the results of his review, finding that Mr. Humphrey's position was misclassified, but that Mr. Hypes' position did encompass responsibility for three (3) or more crews, and was therefore correctly classified. Grievant objected to consideration of this information on April 16, 1997, claiming it was not accurate. The undersigned received correspondence from Jeff Black, Director, Human Resources, on April 18, 1997, confirming and clarifying the information Mr. Basford presented. Because there was no objection made when Mr. Basford initially offered to furnish the undersigned with this additional information, Grievant's objection to its consideration is denied. In any event, the additional information serves only to confirm the outcome of this decision.

Footnote: 2

The remaining portions of that classification specification dealing with bridge crews or expressway organizations are not applicable in this situation.

Footnote: 3

Nevertheless, it does appear that Grievant is responsible for three crews during the summer months, at which time he would be working out of classification and would be eligible for a temporary upgrade of classification and compensation, if applicable.