DONALD L. CROSSTON,

Grievant,

v. DOCKET NO. 96-DOH-503

WEST VIRGINIA DEPARTMENT OF HIGHWAYS,

and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

Donald L. Crosston, Grievant, is a Transportation Realty Agent III, and filed this grievance against his employer, the West Virginia Department of Highways (Highways) on April 3, 1996. The West Virginia Division of Personnel (Personnel) was made a party at Level IV.

Grievant alleges discrimination and favoritism. The grievance statement is reproduced below:

> The reclassification of Transportation Realty Agents varies from one agency to another. Promotion criteria is not uniform and varies depending on who reviews applications within the Division of Personnel. Present T.R.A. IV's in the State have been recently promoted with similar or lesser qualifications.

As relief, Grievant seeks "[p]romotion to T.R.A. IV (See footnote 1) as requested by the District Engineer on 8-24-95[,] with back pay to original date of request."

Grievant was denied relief at the lower levels of the grievance procedure. Grievant's appeal was received by the Grievance Board on November 25, 1996. On January 15, 1997, a LevelIV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia. This case became mature for decision on February 18, 1997, with receipt of Grievant's and Highways' post- hearing submissions. Personnel's post-hearing submission was received earlier.

The specifications of Grievant's current classification (TRA III), and the classification he seeks as relief, TRA IV, are reproduced below:

TRANSPORTATION REALTY AGENT III

Nature of Work

Under general supervision, performs advanced level professional work in real property appraisal, real property rights acquisition, relocation assistance, property management, and right of way engineering and surveying. Performs related work as required.

Distinguishing Characteristics: This class is distinguished by the advanced, lead worker level of work.

Examples of Work

Performs all function[s] on complex major projects such as negotiations, relocation assistance, and property management.

Negotiates through personal contacts with owners or their agents the purchase of real property for right-of-way purposes when such purchase involves complicated problems and/or special clients.

Appraises real property to determine value.

May be required to testify in court or at hearings to provide right-of-way and/or appraisal expertise.

TRANSPORTATION REALTY AGENT IV

Nature of Work

Under limited supervision, performs advanced level, work in real property appraisal, real property rights acquisition, relocation assistance, property management, and right of way engineering and surveying. Serves as a supervisor for a section or major unit. Performs related work as required.

Distinguishing Characteristics: This class is distinguished bythe advanced, supervisory level of work.

Examples of Work

Performs functions on complex and special client projects in negotiations, relocation assistance, and property management.

Negotiates through personal contacts with owners or their agents the purchase of real property for right-of-way purposes when such purchase involves complicated problems

and/or special clients.

Appraises real property to determine value.

Applies policy governing one or more aspects of right-of- way/appraisal acquisition.

Assigns work to negotiators, relocation agents, and property managers in a district.

Coordinates general transportation realty activites with representatives of other divisions within the Division of Highways and when appropriate with representatives of other agencies of government.

Supervises training program for the division.

May be required to testify in court or at hearings to provide right-of-way and/or appraisal expertise.

The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant is employed by Respondent, is assigned to the District Eight Office, and is classified as a TRA III. He does not supervise a section, major unit, or any employees on a full-time, permanent, basis.

2. On August 24, 1995, Personnel disapproved Grievant's proposed promotion because "[a]ccording to the Position Description [F]orm [PDF] filled out by the employee it indicates that he does not supervise any employees." Level IV, Gr. Ex. #3.

3. Grievant submitted a "revised" PDF to Personnel, which also disapproved his promotion on March 26, 1996, and noted that his "duties have not changed" since August 24, 1995.

4. Personnel did not approve, for reallocation to TRA IV, two TRA IIIs in District Three for the same reason that Grievant'sreallocation was denied - lack of full-time, permanent, supervisory duties.

5. The central office staff for the Right of Way Division has been reduced in number, over the years, to the point that employees classified as TRA IVs may no longer supervise employees. However, they have state-wide functions and responsibility. Generally, assignments come from the central office, and review, correction, and approval (of the TRA III's work in the districts) is performed at the central office.

6. Appraisers are no longer in the TRA classification. A separate class series has been created for appraiser positions. 7. The PDF completed by Steven Bradley Owens, TRA IV, shows that

he supervises four employees in the Princeton office. Gr. Ex. 6. However, he does not perform supervisory duties on a daily basis.

8. The PDF completed by Timothy F. Reilly, TRA IV, shows that he supervises four employees in the Moundsville office. Personnel Ex. 1. However, he does not perform supervisory duties on a daily basis.

9. The PDF completed by Dennis M. Carpenter, TRA IV, shows that he carries the functional title of “Assistant District Administrator” and that he supervises the employees of the

Moundsville office. Level IV, Personnel Ex. 2. However, he does not perform supervisory duties on a daily basis.

10. The PDF completed by David A. Burnette, TRA IV, showsthat he has the functional title of “Chief of Relocation Research”. Personnel Ex. #3. He is assigned to the central office, and has state-wide responsibility and functions.

11. The PDF for Thomas A. Crutchfield, TRA IV, shows that he has the functional title of “Acquisition Agent”. Personnel Ex. #4. He is assigned to the central office, and has state-wide responsibility and functions.

12. The PDF for David A. Neil, TRA IV, shows that he has the functional title of “Chief of Estimates and Field Review”. Personnel Ex. #5. He is assigned to the central office, and has state-wide responsibility and functions.

13. David Wilson is assigned to the central office, and has state-wide responsibility and functions.

14. Joel Nunes, Charles Rabel, Ben Burford, Dominick Bria, and Robert Pratt are classified as Appraisers.

15. Mr. Nunes, Norman Parkins, Charles Aliff, and David Neil supervise employees or a unit.

DISCUSSION

Grievant alleges both discrimination and favoritism. W. Va. Code §29-6A-2(d) defines discrimination as:

> "Discrimination" means 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.

W. Va. Code §29-6A-2(h) defines favoritism as:

> "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

A prima facie showing of discrimination or favoritism (See footnote 2) consists of a grievant establishing:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to her 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.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

If a grievant successfully proves a prima facie case, a presumption of discrimination exists, then a respondent may rebut it by articulating a legitimate reason for its action. However, a grievant may still prevail if he can demonstrate the reason proffered by a respondent was pretextual. Ritchie v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); Singleton v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-490 (May 24, 1996).

Grievant attempted to prove that he is similarly situated to the following sixteen Highways employees: Joel Nunes, NormanParkins, Charles Rabel, David Burnette, Charles Aliff, Dominick Bria, Thomas Crutchfield, David Wilson, David Neil, Ben Burford, Robert Pratt, Linda Harrah, Darrell Harvey, Dennis Carpenter, Timothy Reilly, and Bradley Owens. (See footnote 3) Level IV, Gr. Ex. 1. With respect to Ms. Harrah and Mr. Harvey, whose names also appeared on Grievant's Exhibit 1, at Level IV, Grievant failed to produce sufficient evidence for a comparison, and with respect to establishing similarity with them Grievant failed to meet his burden of proof.

Grievant, a TRA III, is not similarly situated to the following employees because they are in a different classification series, Appraiser, than Grievant: Messrs. Nunes, Rabel, Burford, Bria, and Pratt. Grievant is not similarly situated to the following individuals because they supervise employees or a unit: Messrs. Nunes, Parkins, Aliff, and Neil. Grievant is not similarly situated to the following individuals because they are responsible for state-wide functions: Messrs. Crutchfield, Burnette, Neil, and Wilson.

At Level IV, Mr. Lowell Basford, Assistant Director of Classification for the West Virginia Division of Personnel, testified that supervision duties were not mandatory in the TRA IV class specification for positions which perform state-wide functions with state-wide responsibilities. See Peck v. W. Va. Div. of Highways, Docket No. 97-DOH-099 (Sept. 29, 1997). Suchpositions are currently located at the central office in Charleston, West Virginia. Personnel's interpretation and explanation of the class specifications 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, 189 W. Va. 342, 431 S.E.2d 681 (1993).

With respect to TRA IVs Carpenter, T. Reilly, and Owens, Grievant proved by a preponderance of the evidence that he is similarly situated, and established a prima facie case of discrimination and favoritism. Grievant's prima facie case was rebutted by a legitimate non-discriminatory reason.

Personnel asserted that the positions were properly classified at the time based on the information on the PDF (specifically question 23), while Highways simply asserted that the PDFs submitted by Messrs. Carpenter, T. Reilly, and Owens were “erroneous”. Specifically, question 23 of the PDF asks the employee to “List names and class titles of employees under your immediate supervision.” Mr. T. Reilly, from District Six, and Mr. Owens, from District Ten, each listed four employees under question 23. Mr. Carpenter, District Six, wrote “Employees of the Moundsville Office, District 6[.] [I] [s]upervise under authority given by [the] District Administrator.” Level IV, Personnel Ex. 2. Based on the responses provided by Messrs. Carpenter, T. Reilly, and Owens, Personnel assigned them to the TRA IV classification.

However, Messrs. Carpenter, T. Reilly, and Owens do notsupervise anyone on a full-time, permanent basis. Each of the three above employees only supervises when their immediate supervisor (the district agent) is absent. Grievant asserts that if Personnel carefully examined the PDFs (specifically question 27) of Messrs. Carpenter, T. Reilly, and Owens, it would have discovered

that they do not supervise anyone on a full-time, permanent basis.

Question 27 of Mr. Carpenter's PDF does not state that he supervises only in the absence of the District Agent. Question 27 of Mr. T. Reilly's PDF provides: “The Right of Way Agent in the Assistant District Agent's capacity (Agent IV), acts in behalf of the District Agent as a supervisor when he or she is absent. Also delegation of supervisory functions including those of supervising other staff members on a day to day basis. This position is also responsible as the District Property Manager as well as supervising relocation procedures.” Level IV, Personnel Ex. 1. Question 27 of Mr. Owens' PDF provides: “The Transportation Realty Agent, in the Assistant District Agent[']s (working title-Transportation Realty Agent [IV]) capacity must act on behalf of the District Agent as supervisor in his absence. Other supervisory functions[,] including supervision of other staff members[,] is delegated on a day to day basis. This position is also responsible as District Property Manager, Primary Negotiator, Relocation Agent, and Logo Program Coordinator.” Level IV, Gr. Ex. 6.

A fair reading of the PDFs of Messrs. T. Reilly and Owenswould not necessarily cause one to know that they do not supervise anyone on a full-time, permanent basis. Question 27 does not ask for temporary or sporadic duties, or duties assigned in the absence of one's supervisor. Whether Messrs. Carpenter, T. Reilly, and Owens made a mistake in completing their respective PDF, or whether their respective supervisor's made a mistake in not being clear on their employee's PDF, or whether Personnel made a mistake in examining the PDF, is irrelevant in this case.

Mistakes by Respondents do not usually entitle a grievant to relief. See Goins v. Raleigh County Bd. of Educ., Docket No. 97- 41-116 (Oct. 17, 1997); Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989); Crowder v. Kanawha County Bd. of Educ., Docket No. 20-86-307-1 (June 25, 1987). Specifically, the Grievance Board has held that a mistake does not constitute discrimination. Ritchie v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). In McFarland, the county board of education intended to reduce by 15% the county supplements of all professional staff. Ms. McFarland asserted a claim of discrimination because three professionals were overlooked, and their respective county supplement was not reduced. In denying her grievance, the Grievance Board found that the county supplements of the three professionals in question were not reduced because of a mistake, which in that case was determined to be a legitimate, non-

discriminatory reason.

The same rationale would apply in the instant case to bar Grievant's discrimination and favoritism claims. At Level IV, Mr. Jeff Black, Director of Human Resources for Highways, credibly testified that he remembered Personnel did not approve, for reallocation to TRA IV, two TRA IIIs in District Three for the same reason that Grievant's reallocation was denied - lack of full-time permanent supervisory duties. He also did not qualify for the TRA IV classification because he was not responsible for state-wide functions.

The remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that he performs, is not to similarly misclassify the grievant. Akers v. W. Va. Dept. of Tax and Revenue, 194 W. Va. 956, 460 S.E.2d 702 (1995). Grievant presented no evidence to show that he performs the work of the TRA IV. Instead, he simply asserted that because other positions with supervisory duties have been assigned the TRA IV class that he should likewise be evaluated to the TRA IV class, even though he does not perform the higher duties.

Grievant is not misclassified as a TRA III. Grievant's current classification constitutes the "best fit" for his required duties. See Simmons v. W. Va. Dept. of Health and Human Resources/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). Mr. Basford testified that the TRA III class specification is almost a direct match with the duties assigned to Grievant'sposition.

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

CONCLUSIONS OF LAW

1. In nondisciplinary matters the grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Unrue v. W. Va. Dept. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. W. Va. Code §29-6A-2(d) defines discrimination as:

> "Discrimination" means 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.

3. W. Va. Code §29-6A-2(h) defines favoritism as:

> “Favoritism” means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

4. A prima facie showing of discrimination or favoritism (See footnote 4) consists of a grievant establishing:

(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 her 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.

Hindman v. W. Va. Div. of Corrections, Docket No. 94-CORR-262 (Feb.27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996).

5. If a grievant successfully proves a prima facie case, a presumption of discrimination exists, then respondent may rebut it by articulating a legitimate reason for its action. (See footnote 5) However, a grievant may still prevail if he can demonstrate the reason proffered by a respondent was pretextual. Ritchie v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); Singleton v. W. Va. Dept. of Health and Human Resources, Docket No. 95-HHR-490 (May 24, 1996).

6. Grievant established a prima facie case of discrimination and favoritism, which was rebutted by Respondents.

7. A mistake does not constitute discrimination. Ritchie v. W. Va. Dept. of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997); McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).

8. Personnel's interpretation and explanation of the class specifications at issue, if the language is determined to be ambiguous, should be given great weight unless clearly erroneous. See W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993).

9. Grievant failed to prove by a preponderance of the evidence a case of discrimination or

favoritism.

10. The remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that he performs, is not to similarly misclassify the grievant. Akers v. W. Va. Dept. of Tax and Revenue, 194 W. Va. 956, 460 S.E.2d 702 (1995).

Accordingly, the 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.

Dated:_October 31, 1997__ _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 TRA IV is an acronym for Transportation Realty Agent IV.

Footnote: 2 See Miller v. Lincoln County Bd. of Educ., Docket No. 97- 22-083 (July 23, 1997); Wallace v. W. Va. Dept. of Transp., Docket No. 96-DOH-121 (Nov. 19, 1996).

Footnote: 3 Some of these individuals are not similarly situated to Grievant for more than one reason.

Footnote: 4 See Miller v. Lincoln County Bd. of Educ., Docket No. 97- 22-083 (July 23, 1997); Wallace v. W. Va. Dept. of Transp., Docket No. 96-DOH-121 (Nov. 19, 1996).

Footnote: 5 While the burden of production may shift, the overall burden of proof never does. See, Texas Dept. of Comm. Aff. v. Burdine, 450 U.S. 248 (1981).