BERTHOLD STOLLINGS,

Grievant,

v. Docket No. 97-DEP-411

DIVISION OF ENVIRONMENTAL PROTECTION
and DIVISION OF PERSONNEL,

Respondents.

DECISION

This grievance was initiated on or about August 27, 1996, by Grievant Berthold Stollings against his employer, Respondent Division of Environmental Protection ("DEP"). The grievance states that Grievant was reclassified as a Technical Analyst I on August 19, 1996, and notes his notification letter erroneously states he is not a Registered Professional Engineer. This reclassification was a result of the statewide reclassification project by the Division of Personnel ("Personnel"). Grievant sought classification as an Engineer III, retroactive to the end of his six month probationary period, and backpay to that time (approximately June 1995).

By letter dated August 22, 1996, Grievant pointed out to Personnel that he was a Registered Professional Engineer, and he was then classified as an Engineer I. Grievant then was allowed to amend his grievance to include a claim that he should have been hired as an Engineer II, not an Engineer I. On October 22, 1996, Grievant submitted a Position Description Form toJoe Parker, Deputy Assistant Chief of DEP's Office of Mining and Reclamation, indicating he was seeking to be classified as an Engineer III, and that this grievance was being placed on hold pending review of this form. As a result, Grievant was classified as an Engineer II. Grievant then pursued his grievance, seeking as relief classification as an Engineer III, effective from the date he filed his grievance, backpay, and attorney fees. Grievant also continued to argue he should have been classified as an Engineer II from the time he was hired until completion of his probationary period, rather than an Engineer I, and that he should have been promoted to Engineer III at the end of his six month probationary period, and seeks to be so classified retroactive to that time, with backpay. (See footnote

1)

The following Findings of Fact are made based upon the evidence presented at Levels III and IV.

Findings Of Fact

1. Grievant has been employed by the Division of Environmental Protection ("DEP") since December 16, 1994, and is assigned to the Logan Office of the Office of Mining andReclamation ("OMR"). Grievant was hired as an Engineer I, at a rate of pay in excess of the minimum for the pay grade for an Engineer I.

2. As a result of the statewide reclassification project, Grievant was reclassified by the Division of Personnel ("Personnel") from an Engineer I to a Technical Analyst I, on August 19, 1996. This classification was erroneous as it was based upon a mistake of fact. On September 5, 1996, Grievant was reclassified as an Engineer I, because he was a Registered Professional Engineer ("RPE").

3. Grievant submitted a Position Description Form on October 22, 1996, and was then reclassified as an Engineer II.

4. Grievant has a Bachelor's Degree from West Virginia University in mining and industrial engineering. He worked in the coal industry as an engineer for 26 years prior to his current employment.

5. Grievant reviews coal mining permit applications and applications for permit modifications. He serves as team leader on some permit applications, coordinating the review of the applications by various employees to assure that the application is processed in a timely manner, and that each employee completes the review of the area assigned to him. Grievant's review of permit applications may include review of drainage control plans, which requires use of the same formula as is used in the review of dam control applications. He has reviewed one application for abandonment and closure of a dam, and has on occasion worked on other dam control projects. The work he performs on a daily basis is complex. He checks all calculations and technical aspects of a permit application. He has had at least one project assigned to himbecause he is a RPE. He is usually assigned the larger strip mine applications, because of his expertise in that area.

6. Jim Pierce is an Engineer III in the Logan Office of DEP's OMR. He is a RPE. Almost all refuse and dam control applications and permit modifications are assigned to him for review. He also performs annual inspections of dams, and maintains the records of all dam control projects in the

southern region. The review of dam control applications is more complex than the review of coal mine applications. Mr. Pierce is also assigned coal mine applications for review, just as Grievant is.

7. John Scott is an engineer in the Logan Office of DEP's OMR, but is not a RPE, and is classified as a Technical Analyst III. He is usually assigned the small underground mine applications for review.

8. Prior to the most recent reclassification project, the distinction between an Engineer II and an Engineer III at DEP, was that an Engineer III worked on dam control projects. Some DEP employees who do not work on dam control projects are now classified as Engineer III's.

9. From December 16, 1994, to August 19, 1996, Grievant's salary was within the pay range for both an Engineer I and an Engineer II.

Discussion

Personnel argued this grievance should be dismissed as untimely filed, as Grievant knew he was an Engineer I when he was hired in 1994, and had to grieve that classification within ten days per W. Va. Code § 29-6A-4. The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brownv. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Personnel relied upon a letter sent to Grievant when he was hired, by then DEP Director David Callaghan, which stated he was being hired as an Engineer I. Grievant testified he did not recall ever receiving this letter.

Whether Grievant knew he was an Engineer I rather than an Engineer II when he was hired need not be addressed, as Grievant has not proven he is entitled to any relief should it be found that he should have properly been classified from December 16, 1994, through his probationary period, or through the time he was reclassified, as an Engineer II. Grievant's salary fell within the pay range for an Engineer II. Although Grievant theorized that he would have received a higher salary as an Engineer II, arguing he would have received the same percentage above the Engineer II minimum salary as the percentage above the Engineer I minimum salary he received, no evidence was presented that his salary would have been any different had he been classified as an Engineer II upon his hire. As no meaningful relief can be granted, to rule on this issue would represent merely an advisory opinion, which this Grievance Board does not issue. Owens v. Lincoln County Bd. of Educ., Docket No. 97-22-121 (Feb. 11, 1998).

Grievant's claim that he should have been classified as an Engineer III after completion of his probationary period through the time he was reclassified, is untimely. Grievant at all times knew he was not an Engineer III. Grievant based his claim that he should have been promoted to Engineer III at the end of his probationary period, upon a representation made in his interview. His six month probationary period ended long before this grievance was filed, and Grievant's claim based upon abreach of promise is untimely. Elliott v. Div. of Corrections, Docket No. 96-CORR-026 (Oct. 28, 1997). (See footnote 2)

Grievant's claim that he was not properly classified in the reclassification project, however, is clearly timely, and should have been addressed at Level III. Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues. However,

> [a]s with a salary dispute, any relief is limited to prospective relief and to back relief from and after [ten] days preceding the filing of the grievance. (See footnote 3)

Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). W. Va. Code § 29-6A-2. Grievant was reclassified on August 19, 1996. Even if misclassification were not a continuing practice, the reclassification would constitute a triggering event, and Grievant filed his grievance within ten working days of notification of his reclassification. Personnel argued a misclassification grievance could be considered untimely filed, citing Pryor, et al., v. Department of Transportation/Division of Highways, Docket No. 97-DOH-341 (October 29, 1997), and Elliott, supra. These cases have no bearing on the issue of whether misclassification is a continuinggrievance. Elliott involved a claim of a breach of promise, similar to Grievant's claim addressed above. Pryor involved employees who had performed work outside their classification for a period of time, but who were no longer performing the type of work which could arguably render them misclassified. In this case, Grievant continues to perform the same type of work he has always performed, and bases at least part of his claim of misclassification upon the work he was performing at the time the grievance was filed.

W. Va. Code § 29-6-10 authorizes Personnel to establish and maintain a position classifi cation plan for all positions in the classified service. 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

which he is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel job specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These 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. 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, DocketNo. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-control ling. Broaddus v. W. Va. Div. of Human Services, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Importantly, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, ___, 431 S.E.2d 681, 687 (1993). The holding of the Supreme Court of Appeals of West Virginia in Blankenship presents a state employee contesting his classification with a substantial obstacle to overcome in attempting to establish that he is misclassified.

Although Respondents cross-examined Grievant's witnesses, neither Respondent presented any of it own witnesses to dispute Grievant's claim that he should be classified as an Engineer III. Personnel presented no testimony or argument to explain the distinction between an Engineer II and an Engineer III, relying upon its position that the grievance was not timely filed. DEP took the position that Grievant is now an Engineer III, and should be so classified.

The classification specifications for Engineer II and Engineer III are reproduced below, in pertinent part:

ENGINEER II

Nature of Work

Performs professional engineering work in a wide variety of engineering services or

creative works, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems; planning the use of land and water; teaching of advanced engineering subjects, engineering surveys and studies; review of construction projects for the purpose of assuring compliance with drawings and specifications any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life,health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services.

Distinguishing Characteristics

Applies engineering techniques, procedures, and criteria within rules, regulations and operating procedures of the specialty area of assignment. May serve as staff expert in a particular area of emphasis. Incumbents must be licensed as a Professional Engineer by the West Virginia State Board of Registration for Professional Engineers as prescribed by WV State Code (Chapter 30, Article 13).

Examples of Work

Performs engineering designs, plans, calculation, inspections, and for specific projects.

Supervises the assignment and performance of support and technicians assigned to specific projects.

Conducts interim and final inspections of construction projects to determine compliance with applicable laws, regulations, and specifications.

Prepares and reviews complex plans and/or contracts for projects; calculates material quantities needed for construction projects; recommends alternative construction methods.

Writes reports detailing recommendations, conclusions, and findings from inspections and reviews.

Plots cross sections and topography, computes grade lines and earthwork, draws typical sections, and figures drainage.

Reads professional journals and trade publications to gain knowledge of new technologies; assigns reading materials to subordinates.

Attends state and national meetings and seminars to improve and share engineering knowledge.

ENGINEER III

Nature of Work

Under limited supervision, performs professional engineering work at the advanced level providing a wide variety of complex engineering services. Plans, designs, directs construction, maintenance, renovation, or inspection and/or reviews and evaluates projects, structures and facilities such as buildings, roads, dams, environmentally regulated operations, water supply and sewage systems, and/or reviews engineering plans and applications, and/or assesses the environmental impact of any such project. Work is in a specialty area such as construction/maintenance, coal, environmental assessment and control, mining, permit review, sanitation, transportation, utility regulation or water quality and pollution control. May perform in a supervisory or lead worker role. May involve both field and office activities. Performs related work as required.

Distinguishing Characteristics

Applies professional engineering techniques, procedures, and criteria within rules, regulations and operating procedures of the specialty area of assignment. This is advanced level work with complex assignments. May serve as coordinator of an engineering team or supervise clerical support staff. May serve as staff specialist in a particular area of special emphasis within the area of assignment.

Examples of Work

Performs data analysis to determine or establish performance standards/limits.

Coordinates complex construction projects with utility companies.

Determines horizontal and vertical construction alignments.

Conducts interim and final inspections of construction projects to determine compliance with applicable laws, regulations, and specifications.

Prepares and reviews complex plans and/or contracts for projects; calculates material quantities needed for construction projects; recommends alternative construction methods.

Writes reports detailing recommendations, conclusions, and findings from inspections and reviews.

Plots cross sections and topography, computes grade lines and earthwork, draws typical sections, and figures drainage.

Attends meetings or hearings to observe or attest to the findings of environmental impact.

Attends state and national meetings and seminars to gain and share engineering knowledge.

Read professional journals and trade publications to gain knowledge of new technologies; may assign reading materials to lower level engineers.

May review lower level engineers' project analyses of plans and/or contract for projects.

Grievant has proven the Engineer III classification is a better fit for his duties than the Engineer II classification. As set forth in the Nature of Work section of the Engineer III classification specification, Grievant "[u]nder limited supervision, performs professional engineering work . . .. reviews and evaluates projects, structures and facilities such as buildings, roads, dams, environmentally regulated operations, . . . and/or reviews engineering plans and applications . . .. Work is in a specialty area such as . . . coal, . . . mining, permit review, ... May perform in a supervisory or lead worker role." (Emphasis added.) Grievant's duties fall completely within thearea of surface mining permit review. The work he performs is complex according to the witness testimony. Likewise, as is set forth in the Distinguishing Characteristics section, Grievant routinely serves as the coordinator of the engineering team on projects, and serves as the staff specialist in the area of surface mine permit applications.

Grievant works in a complex, specialty area, which is specifically referred to in the Nature of Work section of the Engineer III classification specification, and his duties have fallen within this classification from before the effective date of the reclassification project. However, Personnel's regulations do not provide for a salary increase when one is reclassified as a result of the reclassification project, unless the employee's salary is below the minimum salary for the pay grade into which he is placed. See Kuntz and Wilford v. Dept. of Health and Human Resources/Bureau of Public Health, Docket No. 96-HHR-301 (Mar. 26, 1997). Grievant's salary is within the pay range of the pay grade for an Engineer III, and he is not entitled to backpay. Further, the undersigned has no authority to award attorney fees. Chafin v. Boone County Health Dept. and Div. of Personnel, Docket

No. 95-BCHD-362 (June 21, 1996); See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

The following Conclusions of Law support the Decision reached.

Conclusions Of Law

1. This Grievance Board will not issue advisory opinions. Owens v. Lincoln County Bd. of Educ., Docket No. 97-22-121 (Feb. 11, 1998).

2. As Grievant's salary from the time of his hiring was within the pay range for an Engineer II, he would be entitled to no relief were it determined he should have been hired as an Engineer II, and any decision on this issue would be merely advisory. 3. A grievance must be filed within ten working days of the date the event becomes known to the grievant. W. Va. Code § 29-6A-4.

4. Misclassification is a continuing practice and may be grieved at any time, but where a timeliness defense is raised, the relief is limited to ten working days preceding the filing of the grievance. Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

5. Grievant's claim that he should have been classified as an Engineer III prior to the statewide reclassification is not based upon a claim of misclassification, but is based upon a promise made at his interview that he would be promoted to Engineer III after six months, and is therefore untimely.

6. In order to prevail in a misclassification claim, a Grievant must prove by a prepon derance of the evidence that his duties for the relevant period more closely match those of another cited classification specification than the classification to which he is currently assigned. See generally, Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (Mar. 28, 1989).

7. 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 the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dept. of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). 8. Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly wrong. See, W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, ___, 431 S.E.2d 681, 687 (1993).

9. Personnel's interpretation of the classification specifications for the positions of Engineer II and III, as applied to Grievant, is clearly wrong.

10. Grievant established by a preponderance of the evidence that he was more properly classified in as an Engineer III than an Engineer II. However, he is entitled to no backpay. See Kuntz and Wilford v. Dept. of Health and Human Resources/Bureau of Public Health, Docket No. 96-HHR-301 (Mar. 26, 1997).

11. The undersigned has no authority to award attorney fees. Chafin v. Boone County Health Dept. and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996); See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondents are **ORDERED** to place Grievant in the classification of Engineer III, effective the same date he was initially classified as a Technical Analyst I as a result of the reclassification project. Grievant's claims that he should have been hired in 1994 as an Engineer II, that he should have been promoted to an Engineer III upon completion of the probationary period, and that he is entitled to backpay and attorney's fees are **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: June 8, 1998

Footnote: 1 Grievant's supervisor responded on August 27, 1996, that he was unable to grant relief, and Grievant appealed to Level II. The Level II decision was issued on September 10, 1996, stating the requested relief could not be granted as the reclassification was an action of the Division of Personnel, and noting that "[t]he reclassification does appear to be in error." Grievant appealed to Level III on September 24, 1996. Personnel was made a party at Level III,

and a hearing was held on May 8, 1997. The grievance was denied at Level III on September 9, 1997, as untimely filed, although no party had raised a timeliness defense. Grievant appealed to Level IV on September 15, 1997, and a Level IV hearing was held on January 26, 1998. Grievant was represented by Brian Abraham, Esquire, DEP was represented by L. Eugene Dickinson, Esquire, and Personnel was represented by Lowell D. Basford, its Assistant Director. This matter became mature for decision on February 26, 1998, upon receipt of the last of the parties' post-hearing written arguments.

Footnote: 2 Even if his claim were timely, those interviewing Grievant, his supervisor Larry Alt and Mr. Pierce, had no authority to bind DEP, but could only recommend Grievant's promotion, thus the representation was not binding on DEP. Chapman v. Dept. of Transp./ Div. of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997), citing Ollar v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993). Further, Grievant failed to prove his proper classification was Engineer III. William E. Griffith, Jr., Assistant Chief of Operations for DEP's OMR in Southern West Virginia, credibly testified that prior to Personnel's reclassification project, Engineer III's were assigned dam control projects and would be the lead engineers in the office. Grievant's work on dam control projects was very limited, and he was not the lead engineer in the office.

Footnote: 3 The education employees' grievance procedure provides that a grievance must be initiated within 15 working days of the date the event becomes known to the grievant, whereas the state employees' grievance procedure provides a ten working day filing deadline.