CHARLES W. HOLMES,

Grievant,

v. **Docket No. 97-DOH-553**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS,

and

WEST VIRGINIA DEPARTMENT OF ADMINISTRATION,
DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This is a grievance by Charles W. Holmes (Grievant) submitted pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondents, West Virginia Department of Transportation, Division of Highways (Highways), and West Virginia Department of Administration, Division of Personnel (Personnel), have refused to compensate him properly for the duties he has performed since being selected to fill a position vacancy for a Highway Engineer III in April 1995. This grievance was initiated at Level I on October 24, 1997. Following adverse decisions at Levels I and II, Grievant appealed to Level III on November 14, 1997. Highways was unable to provide a hearing at Level III within the statutory time limits contained in W. Va. Code § 29-6A-4(c), and Grievant appealed to Level IV on December 17, 1997, as permitted by W. Va. Code § 29-6A-3(a). Following apre-hearing telephone conference on February 23, 1998, a Level IV hearing was held in this Grievance Board's office in Charleston, West Virginia, on April 3, 1998. (See footnote 1) The parties agreed to a briefing schedule at the conclusion of that hearing, and this matter became mature for decision on May 20, 1998, following receipt of post-hearing submissions from all parties. (See footnote 2)

The following Findings of Fact pertinent to resolution of this grievance have been determined

based upon a preponderance of the credible testimony and exhibits presented at Level IV, including a Joint Stipulation of Fact admitted at the Level IV hearing. (See footnote 3)

FINDINGS OF FACT

1. At all times pertinent to this grievance, Grievant has been employed by Respondent Department of Transportation, Division of Highways (Highways) in the personnel classification of Senior Engineering Technician (Materials) which is in Pay Grade 16. See JS at 2.

2. Grievant was certified as a Senior Engineering Technician by the National Institute for the Certification of Engineering Technicians (NICET) on May 1, 1980. J Ex Q. Senior Engineering Technician, at Pay Grade 16, is the highest classification which is attainable through NICET certification. JS at 2.

3. From February 1990 to May 1995, Grievant was assigned to fill a Staff Engineer position in the Consultant Review Section of Highways' Structures Division. JS at 1.

4. In early 1995, the Structures Division received approval to organize a Technical Services Section which would consist of a Section Manager - Highway Engineer III (Pay Grade 18), two Highway Engineer II positions (Pay Grade 17), a NICET Senior Engineering Technician position (Pay Grade 16), and an Office Automation Coordinator II (Pay Grade 11). JS at 1. See J Ex B.

5. On April 7, 1995, Highways posted a vacancy announcement for a Highway Engineer III (HE III), in Pay Grade 18, to serve as Section Head of the newly-formed Technical Section. JS at 2; J Ex C.

6. Grievant applied for the posted vacancy on April 18, 1995. JS at 2.

7. The HE III classification requires registration as an engineer in the state of West Virginia. JS at 2. Grievant is not a registered professional engineer in West Virginia, and has not completed the minimum educational requirements to be eligible for such status. JS at 2; Holmes testimony.

8. Grievant was interviewed for the position by James Sothen, Director of Highways' Structures Division. See JS at 2. Mr. Sothen determined that Grievant was best qualified to perform the duties of the new position, and selected him to fill the advertised vacancy. Sothen testimony. Grievant was aware that he was not eligible for promotion to HE III unless and until he completed the necessary education and licensing requirements. 9. At the time Grievant accepted the position, Mr. Sothen told Grievant that he would work with higher management and Personnel in an effort to find a method to properly compensate him for performing the additional duties associated with the Technical

Services Section Manager position. Sothen testimony.

10. On numerous occasions between July 1995 and October 1997, when this grievance was filed, Grievant would inquire of Mr. Sothen regarding progress on obtaining additional compensation for his position, and Mr. Sothen would consult with appropriate officials in Highways and advise Grievant concerning the status of their efforts to obtain such compensation.

11. Since June 1, 1995, Grievant's working title has been Technical Services Section Manager. Grievant's immediate supervisor is Mr. Sothen. The Technical Services Section performs the following functions within Highways' Structures Division:

(a) Provides advice and technical support to designers, consultants and other Highways divisions and districts on project development, design, materials, fabrication, constructability, maintenance, and repair of highway bridges.

(b) Prepares, updates, revises, and distributes the structural design manual and associated standard detail drawings.

(c) Reviews highway bridge project plans and specifications prepared by consultants and in-house designers to maintain acceptable quality level and technical accuracy prior to advertisement for construction.

(d) Creates, updates, and maintains the Structures Division Technical Library and special subject files. (e) Develops and implements training programs for engineering, technical, and administrative personnel from the Structures Division and the ten Highways district bridge sections.

(f) Prepares, updates, maintains, and distributes structural design directives.

(g) Plans, purchases, administers, and maintains the Structures Division computer hardware, software and local area network, and provides user support for Structures Division personnel.

(h) Prepares, updates, revises, and distributes standard and project- specific special provisions and plan notes.

(i) Directs selection, coordinates, and monitors research projects at West Virginia University sponsored by the Structures Division.

(j) Prepares new and suggested revisions to Highways standard specifications and represents the Structures Division on Highways' Specification Committee.

(k) Represents Highways on various national-level committees, including the American

Association of State Highway and Transportation Officials (AASHTO), AWS, PCI and SCEF. (See footnote 4)

(l) Prepares and responds to questionnaires and surveys from other state departments of transportation, the Federal Highways Administration, material manufacturers, universities, and private researchers. (m) Evaluates newly-developed products and technology, and coordinates trial applications on selected bridge structures.

(n) Prepares the annual budget for the Technical Services Section and training and travel budgets for the Structures Division.

(o) Represents the Structures Division on and/or chairs various Highways technical task groups and committees. See J Exs I & P.

12. Since approximately June 1, 1995, Grievant has been performing the following general duties in his assigned position as Technical Services Section Manager:

(a) Plans, organizes, and supervises the functions of the Technical Services Section as described in Finding of Fact Number 11, above.

(b) Performs all associated duties and responsibilities of a Development Project Manager for preparation of construction plans and specifications for an estimated $20 million rehabilitation of a major highway bridge structure.

(c) Serves by appointment of the Secretary of Transportation as Highways' Metric Conversion Coordinator, responsible for organizing and chairing the 42- person statewide Department of Transportation (DOT) Metric Conversion Committee, which is charged with guiding DOT through the conversion process to the metric measurement system.

(d) Serves as Vice Co-Chairman of the national joint AASHTO/AWS Bridge Welding Committee which is responsible for preparation of the national code for welding and fabrication of steel highway bridges. (e) Represents Highways on the statewide interagency West Virginia Water Quality Advisory Board which is responsible for oversight of regulations prepared by the West Virginia Division of Environmental Protection for control of water quality.

(f) Represents Highways on the statewide interagency West Virginia Board of Health Wellhead Protection Committee, and serves as the liaison with other Highways divisions and district offices regarding appropriate protective measures for public water supply wellheads located throughout the state.

(g) Represents Highways on the West Virginia Soil Conservation Agency statewide interagency committee to prepare the statewide flood damage assessment and mitigation plan for West Virginia. See J Exs I & P.

13. Lowell Basford is Personnel's Assistant Director responsible for classification and compensation matters. Jeffrey Black is Highways' Director of Human Resources.

14. On August 22, 1996, Mr. Sothen submitted a memorandum proposing Grievant's promotion to an Administrative Services Manager III at Pay Grade 18. This proposal was approved by Mr. Sothen's supervisors, Norman Roush, the Chief Engineer of Development, and Fred VanKirk, the Commissioner of Highways. See J Ex E; VanKirk testimony. Thereafter, in December 1996, the necessary paperwork to secure this promotion was submitted to Personnel, through Mr. Black .

15. On February 18, 1997, Personnel returned the proposed promotion package without approving Grievant's promotion to Administrative Services Manager III. See J Ex K-1. Mr. Basford determined that Administrative Services Manager III was not a proper classification for the duties Grievant was performing as Technical Services Section Manager. Basford testimony. See JS at 3. 16. Mr. Black advised Mr. Sothen to resubmit the request once Highways had obtained approval from Personnel to establish a new classification of Transportation Services Manager III at Pay Grade 18. JS at 3. See J Ex K-1.

17. On February 13, 1997, Commissioner VanKirk submitted a proposal to the State Personnel Board requesting that a new classification of Transportation Services Manager III at Pay Grade 18 be established to apply to seven unidentified employees in Highways. JS at 3; J Ex K; VanKirk testimony. Mr. Black understood that Grievant's position was one of the positions which would fall under the proposed classification specification for Transportation Services Manager III. Black testimony.

18. Effective July 16, 1997, the State Personnel Board approved establishment of a new classification for Transportation Services Manager III. JS at 3: Basford testimony. The new classification specification provides substantially as follows:

TRANSPORTATION SERVICE MANAGER III

Nature of Work: Under administrative direction, manages a specialized organizational unit within

the Division of Highways. The operation, policy, work processes and regulatory requirements are typically not predictable and stable. The scope of responsibility includes planning and organizing the work procedures, directing the work of subordinate technical/professional employees, developing employees, evaluating unit operations, developing budget needs, researching new work procedures, interpreting standards, statutes, regulations and policies. Serves as an upper-level manager assisting the Transportation Systems Director or Highway Engineer 5 and provides supervision to a team of technical, professional employees in the area of assignment. Performs related work as required.

Distinguishing Characteristics: Positions in this class have responsibility for a specialized engineering or para-professional engineering section in the area of assignment within the Division of Highways. The position reports directly to the Transportation Systems Director or Highway Engineer 5 who utilizes the position as a professional resource. Unlike the Transportation Services Manager II, the work processes are not typical and predictable and this position requires specific expertise in a particular field. Incumbents may advise engineering consultants and designers in regard to subject matter expertise.

Examples of Work

Plans, directs, oversees and coordinates the activities of the section in the area of assignment.

Develops and recommends policies and procedures in the area of assignment.

Supervises the monitoring of unit activities to determine compliance with state and federal regulations, policies and work standards.

Supervises and trains staff; may direct regional or other field staff.

Recommends the selection of staff; conducts interviews for prospective employees.

Prepares reports reflecting the operational status of the unit and/or agency programs.

Compiles and/or analyzes data; develops programs, procedures and technical manuals from this data.

May attend hearings or serve on committees providing facts or knowledge of the area of assignment.

May provide technical expertise to engineering consultants or designers in the area of assignment.

May develop and implement training/research programs for engineering, technical and/or administrative personnel in the area of assignment.

J Ex K.

19. On July 23, 1997, Mr. Sothen submitted a package to reallocate Grievant's position from a Senior Engineering Technician (Materials) in Pay Grade 16 to a Transportation Services Manager III in Pay Grade 18. J Ex O.

20. On August 7, 1997, Personnel returned the package to Highways as “disapproved,” noting that the action should be submitted as a reclassification rather than a reallocation. J Ex S.

21. Personnel's Administrative Rule on position reallocation provides: “Whenever substantial changes occur in the duties and responsibilities assigned to a position, the Director shall reallocate the position to its proper class.” 143 C.S.R. 1 § 4.07 (1995). 22. Personnel's Administrative Rule provides the following pertinent guidance regarding reclassification: “Upon its own initiative, or at the request of an appointing authority, the [State Personnel] Board may reclassify positions by the creation or abolition of classes, or the revision of the definition of the work of the classes brought about by changing work methods, new technology or reorganization.” 143 C.S.R. 1 § 4.06(a) (1995).

23. Personnel's Administrative Rule also provides: “When a position is reallocated to a different class, the salary of the incumbent shall be adjusted in accordance with salary regulations for promotion. . . .” 143 C.S.R. 1 § 5.04(f)3 (1995). Accordingly, Grievant would be entitled to at least two additional pay increments upon reallocation of his position to either Administrative Services Manager III or Transportation Services Manager III, as each of those classifications is in Pay Grade 18, two grades above Grievant's current classification. 143 C.S.R.1 § 5.05(a) (1995).

24. Mr. Sothen refused to sign a personnel transaction form to reclassify Grievant from a Senior Engineering Technician (Materials) to Transportation Services Manager III because Grievant would not receive any additional compensation through the reclassification process. Sothen testimony; JS at 4. See J Ex T.

25. In October 1995, Grievant received a five per cent merit raise. That raise was not intended to compensate Grievant for the additional duties he assumed upon becoming the Technical Services Section Manager.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

Grievant argues that he should be compensated as a Highway Engineer III in Pay Grade 18 retroactive to the time he began performing his current duties as head of the Technical Services Section. Grievant argues that, "[e]xcept for infrequent short term assignments, an employer may not impose upon an employee in the classified service duties which are outside the specifications established by Personnel for his or her position." Toney v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994). See generally AFSCME v. Civil Serv. Comm'n of W. Va. (AFSCME I), 174 W. Va. 221, 324 S.E.2d 363 (1984). But see Hager v. W. Va. Dept. of Health & Human Resources, Docket No. 95-HHR-241 (Sept. 30, 1995). However, it is equally well established that an employee who voluntarily serves in a higher classification without a guarantee of additional pay may not later successfully claim that he should have received the pay of the higher classification. Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); Freeman v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-237 (Dec. 26, 1990). See Deel v. Bureau of Employment Programs, Docket No. 96-BEP-361 (Mar. 11, 1997); Spencer v. W. Va. Dept. of Health & Human Resources, Docket No. 93-HHR-523 (Oct. 28, 1994); Thornton v. W. Va. Workers' Compensation Fund, Docket No. 90-WCF-077 (Dec. 26, 1990). See also Gregg v. Bd. of Trustees, Docket No. 94-MBOT-863 (Dec. 18, 1996).

The record in this matter indicates that Grievant applied for an HE III position knowing that he did not hold the credential required for either promotion or reclassification to that position at Pay Grade 18, and with no reasonable expectation of securing thatcredential in the foreseeable future. In these circumstances, he has no basis to complain that he was not being paid as an HE III. See Harvey, supra; Freeman, supra.

However, Grievant further asserts that, as of the time he assumed his duties as Technical Services Section Manager, he was misclassified as a Senior Engineering Technician, because he was performing the duties of an Administrative Services Manager III. Moreover, assuming his duties properly fell within the Administrative Services Manager III classification, Grievant submits that Personnel erred in rejecting his "promotion" to that classification in February 1997. Personnel,

through Mr. Basford's testimony, explained that Grievant's “promotion” to Administrative Services Manager III was rejected primarily because Grievant was not performing the duties of that classification, according to his job description. Accordingly, it is necessary to determine if Grievant has been misclassified as a Senior Engineering Technician rather than as an Administrative Services Manager III.

Classification Specifications at Issue

The relevant portions of the classification specifications for the Senior Engineering Technician and Administrative Services Manager III positions at issue are reproduced herein as follows:

SENIOR ENGINEERING TECHNICIAN

(Construction, Design, Maintenance, Materials,

Survey, Traffic Operations)

Nature of Work: Under limited supervision, performs para-professional engineering work within one of the highway construction career fields: construction, design, maintenance, materials, survey, or traffic operations. Assists a professional engineer and may be delegated authority by the professional engineer in matters where engineering precedent has been established. Is certified as a NICET Senior Engineering Technician and must be willing to relocate as the Department needs dictate. Quota limitations will be set by management concerning the staffing level of classified positions per organization. Positions in this class typically include the following functional roles: Utilities Supervisor, Reconstruction/Resurfacing Supervisor, Survey Coordinator, Maintenance/Equipment Management Analyst, Project Engineer/Supervisor, Maintenance Assistant at district level, Section Leader or Staff Assistant at division level. Performs advanced level technician duties established in work elements by NICET.

Examples of Work

(Following are examples of the kind and level of work typically assigned to positions in this class. The NICET certification requires verification of general and special work elements in the specialty area).

Prepares complete bid proposal for a complex project including adequate provisions for compliance with all Federal, State, Local and AASHTO requirements, cost estimates, time estimates and bidding procedures.

Maintains project/design cost records, evaluate performance of subordinates, safeguards and assures good condition of materials and equipment and operates within requirements of agency, state, local and FHWA Technical and Administrative Programs.

Establishes effective working relations within unit and with units employed on similar work, as well as with consultants, suppliers, government agencies and municipalities.

Assures quality of all work performed or supervised.

Prepares comprehensive engineering and environmental reports.

Prepares reports, summaries and accident reports and compiles data required to permit effective management.

Prepares schedules of priorities for recurring maintenance operations and monitors compliance with established schedules.

Utilizes equipment and personnel effectively and assure[s] the quality of all work supervised.

Performs initial review of major construction plans to insure that the latest principles of highway safety are being utilized.

Supervises and coordinates inventory and analysis of traffic control devices on all highways within area of responsibility.

DOP Ex 1.

ADMINISTRATIVE SERVICES MANAGER III

Nature of Work: Under administrative direction, manages an organizational section providing administrative and support services within a division. The operations, policy, work processes, and regulatory requirements of the section are complex, varied, dynamic, and requiring substantial depth of analysis and interpretation of theory, principles, practices, and regulations of a professional or administrative field. Involves the supervision of professional, technical and clerical employees. The scope of responsibility includes planning the operations and procedures of the unit; directing the work of employees; developing employees; evaluating unit operations; developing budget needs; researchingnew procedures and improvements; interpreting statutes, regulations, and policies. Performs related work as required.

Distinguishing Characteristics: The Administrative Services Manager III is distinguished from the Administrative Services Manager II by responsibility to manage a statewide administrative support function of the department. Positions having responsibility to manage a department-wide support function involving an established professional field (i.e., accounting) including the supervision of a significantly large staff of professional, technical, and clerical employees may also be allocated to this class.

Examples of Work

Plans, develops and executes through professional, technical and clerical staff, a statewide administrative support program or a primary department-wide program of considerable complexity.

Directs the daily operations of the staff and may direct regional or other field staff.

Develops and implements operating procedures within regulatory and statutory guidelines; develops and approves forms and procedures.

Renders decisions in unusual or priority situations; consults with supervisors and other state managers in reviewing same.

Evaluates the operations and procedures of the unit for efficiency and effectiveness.

Recommends the selection and assignment of staff to supervisors; conducts interviews and background inspections for prospective employees.

Determines need for training and staff development and provides training or searches out training opportunities.

Assists in the development of the division and/or agency budget for personnel services, supplies, and equipment.

Researches professional journals, regulations, and other sources for improvements to agency and unit programs and procedures.

Complies a variety of data related to the operation of the unit and/or agency.

Interprets statutes, regulations and policies to staff, other managers, and the public.

Represents the division or department in grievance hearings and serves as a witness in same.

Prepares reports reflecting the operational status of the unit and[/]or agency programs.

May participate in local conferences and meetings.

J Ex F.

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 generally its most critical section. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dept. of Employment Sec., 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 Health & Human Resources, 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 Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue 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).

The testimony of Mr. Black and Mr. Sothen indicated that Administrative Services Manager III was the best fit for Grievant's duties of all classification specifications at Pay Grade 18. Mr. Black acknowledged that Grievant's duties might still fit within the Senior Engineering Technician classification, although he did not consider that an ideal classification for Grievant's current duties.

Mr. Basford's testimony on behalf of Personnel was straightforward and unequivocal. The Administrative Services Manager III classification is intended for a position that primarily involves providing administrative and related support services, not highly technical services. Although Grievant's duties include providing certain administrative and supportservices within the Structures Division, the primary focus of the position is on providing technical services of at least a para-professional nature relating to construction and maintenance of bridge structures. Grievant may perform some duties outside his current classification without being misclassified. See Dooley v. W. Va. Dept. of Health & Human Resources, Docket No. 90-H-498 (Mar. 19, 1991). Mr. Basford further

noted that the Senior Engineering Technician class specification states that someone in that classification may typically serve as a “Section Leader,” the role Grievant substantially fulfills in the Technical Services Section of Highways' Structures Division.

Mr. Basford's interpretation of the respective class specifications does not appear contrary to the ordinary meaning of the language employed in those specifications. See Watts v. W. Va. Dept. of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 887 (1995). Further, Mr. Basford's explanation and application of those specifications to the actual job duties performed by Grievant was not demonstrated to be clearly erroneous. See Blankenship, supra; Sword v. Bureau of Employment Programs, Docket No. 97-BEP- 434 (Mar. 19, 1998). Accordingly, a preponderance of the evidence indicates that the classification specification for Senior Engineering Technician comes closer to providing the “best fit” for Grievant's assigned duties than the specification for Administrative Services Manager III. See Simmons, supra. Inasmuch as Grievant's duties do not fall within the classification specification for Administrative Services Manager III, it was not improper for Personnel to reject Highways' proposed “promotion” of Grievant to that classification.

Highways similarly attempted to reallocate Grievant to Transportation Services Manager III, a new classification which was not in existence at the time Grievant assumed the duties of his present position. The ultimate effect of this proposed “reallocation” wouldhave been promotion of Grievant from a position in Pay Grade 16 to a position in Pay Grade 18, with the additional compensation which accompanies such a change in accordance with the Administrative Rule. See 156 C.S.R. 1 §§ 5.04(f)3, 5.05(a) (1995). Personnel's Assistant Director, Mr. Basford, explained that a “reallocation” involves a change of duties assigned to a particular position which results in the position being allocated to a different classification. Mr. Basford was familiar with the recent creation of the Transportation Services Manager III classification, explaining that Personnel applies its reclassification rule rather than its reallocation rule to positions which properly fall within a newly-created classification. Therefore, any transaction other than a reclassification would not be approved by Personnel.

Mr. Basford also suggested that Grievant's duties might not support reclassification to the Transportation Services Manager III classification. However, that issue does not need to be addressed because Personnel's sole reason for rejecting the transaction was that it should be treated properly as a reclassification, not a promotion or reallocation. In addition, because no significant pay

raise would attach to a reclassification, Grievant has not previously requested reclassification to Transportation Services Manager III.

Grievant's contention that the Highway Engineer III position he was occupying as a Senior Engineering Technician should have been reallocated to a Transportation Services Manager III is not persuasive. Much like the Administrative Services Manager III classification, Grievant seeks to make Personnel's nomenclature fit the situation in order to obtain the desired result. Personnel's explanation that application of a newly-created classification specification to an existing position is neither a reallocation nor a promotion was not shown to be clearly wrong. See Blankenship, supra.

It is undisputed that Grievant is performing the duties of Technical Services Section Manager in a highly competent and satisfactory manner. It is likewise uncontested that this position is more demanding than the job Grievant previously held while classified as a Senior Engineering Technician. Although it is not clear from the record why the Technical Services Section Manager position was posted as a Highway Engineer III when a Senior Engineering Technician can satisfactorily perform all duties assigned to the position, Grievant is not seeking to have the position reposted in a more appropriate classification. Were that to occur, it is possible that another Highways employee might apply who would be better qualified for assignment in that classification.

Grievant's supervisors, up to and including the Commissioner of Highways, are in agreement that Grievant should receive additional compensation for the duties he is performing. However, it has not been demonstrated that Personnel's failure to approve the proposed transactions regarding Grievant was contrary to established statewide regulations governing such matters, or that those regulations are contrary to W. Va. Code § 29-6-10, the statute which generally governs compensation of state employees. See Crowder v. W. Va. Dept. of Tax & Revenue, Docket No. 94-T&R-545 (Feb. 28, 1995). At all times pertinent to this grievance, Grievant has been compensated within the pay scale for the classification he properly held at that time. Therefore, Grievant has not shown that his compensation was improper under W. Va. Code § 29-6-10. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of

proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. In order to prevail in a misclassification claim, a grievant 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).

3. 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. See generally, Dollison v. W. Va. Dept. of Employment Sec., Docket No. 89-ES-101 (Nov 3, 1989).

4. 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 (1993).

5. Personnel's interpretation of the classification specifications for the positions of Senior Engineering Technician and Administrative Services Manager III, as they apply to the duties being performed by Grievant, are not clearly erroneous and, therefore, should be accorded great weight. Blankenship, supra. 6. As of the point in time when Grievant sought to have his position reallocated to Administrative Services Manager III, as demonstrated by a preponderance of the evidence, Grievant's job duties best fit within the class specification for Senior Engineering Technician.

7. Under the circumstances presented by this grievance, Personnel did not abuse its discretion, or act in an arbitrary and capricious manner, when it disapproved Highways' request to reallocate Grievant's position from a Senior Engineering Technician (Materials) to an Administrative Services Manager III.

8. Similarly, Personnel did not abuse its discretion, or act in an arbitrary and capricious manner, when it subsequently refused to reallocate Grievant's position from a Senior Engineering Technician (Materials) to a Transportation Services Manager III.

9. Grievant is being properly compensated, within the requirements of W. Va. Code § 29-6-10,

for the duties he currently performs. See Largent v. W. Va. Div. of Health, 192 W. Va. 239, 452 S.E.2d 42 (1994).

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 30, 1998

Footnote: 1

Grievant was represented by Lynn Belcher of the West Virginia State Employees Union. Highways was represented by counsel, Julie M. Meeks. Personnel was represented by Lowell Basford, Assistant Director for Classification and Compensation.

Footnote: 2

Personnel argued in its post-hearing submission that Grievant's claim regarding misclassification was untimely. This Grievance Board has recognized that misclassification is a continuing violation which may be raised at any time, so long as it has been ongoing within ten days prior to the filing of the grievance. Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP-411 (June 8, 1998). See Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Footnote: 3

This stipulation will be cited herein as "JS at ."

Footnote: 4

The record does not further identify these acronyms.