

**ROBERT HALL,**

**Grievant,**

**v. Docket No. 00-DNR-053**

**DIVISION OF NATURAL RESOURCES/**

**BEECH FORK STATE PARK and**

**DIVISION OF PERSONNEL,**

**Respondents.**

## **DECISION**

This grievance was filed by Grievant Robert Hall against his employer, Respondent, Division of Natural Resources/Beech Fork State Park ("DNR"), on or about September 22, 1999, alleging he was being worked out of classification. As relief he sought to be assigned work related to his classification. The Division of Personnel ("DOP") was joined as an indispensable party at Level IV.

[\(See footnote 1\)](#)

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

### **Findings of Fact**

1. Grievant has been employed by DNR, at Beech Fork State Park as an Electrician, for nine years.
2. Beech Fork State Park is an 80 acre park located on a lake, with 15 to 20 buildings, and three employees: a Supervisor I, an Electrician, and a Park Aide. During the summer the park hires two additional employees. The employees are responsible for building maintenance and taking care of the grounds, including utilities, mowing the grass, roofing, and plumbing.
3. Electrical work at the park entails maintaining 275 campsites with electric pedestals, 2

residential homes, office facilities, a multi-purpose center, a variety store, a game room, a 10 room maintenance building, a 2 bay garage and a 3 bay garage, 4 60 foot shower buildings, 3 30 foot restroom buildings, a restroom/boat dock building, 6 dual pump sewage lift stations, a sewage treatment plant, a pool and pool building, 6 cabins, and 4 picnic shelters with electric.

4. Grievant's supervisor, Daniel Wiley, has been assigning Grievant primarily non-electrical duties, such as plumbing, automotive repairs, carpentry work, trash pick-up, grass mowing, and other building and grounds maintenance duties. When Grievant first began working at Beech Fork State Park he performed primarily electrical duties, but over the years, the percentage of time he has spent performing electrical duties has gradually lessened. Grievant now spends only five to ten percent of his time performing electrical duties. However, Mr. Wiley has been assigning other employees with limited or no electrical skills to perform some electrical duties; and occasionally this occurs at the same time Grievant is assigned to perform non-electrical duties. Sometimes these other employees do not tell Grievant what they have done, and when they are unable to correct the problem and Grievant goes to work on the problem, he runs the risk of injury.

5. DNR has enough electrical work at Beech Fork State Park to occupy at least 25 % of Grievant's time.

6. Grievant's performance appraisals have not been affected by the assignment of non-electrical duties to him, and he has been recommended for merit increases.

### **Discussion**

Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997). Although Grievant argued he could not be assigned duties which were totally unrelated to electrical work, such as plumbing, welding, trash pick-up, and automotive repairs, as he did not believe these duties fell within the category "related work" on the classification specification for Electrician, he stated he did not mind such assignments, and recognized the necessity of assigning him other duties with such a small staff. However, he did not believe 95% of his time should be spent performing non-electrical type duties when there was electrical work which needed to be done, and was being done by other employees. He stated other employees had expressed to him that they were afraid to perform the electrical work which had been assigned to them, and that it was not safe either

to these employees or to him for unskilled laborers to be performing electrical work.

Grievant further argued that these non-electrical assignments affect his evaluations, because he is being evaluated based upon how well he performs these other duties. He particularly disagreed with his evaluation including a statement that he "performs a wide variety of general building and grounds maintenance work: assist in wastewater treatment operation as necessary." He testified he has no skill in automotive repairs, and limited carpentry skills, for example, but has been expected to perform such repairs and carpentry work, and his supervisor evaluates how well he performs these assignments. To date, however, although Grievant's supervisor has given him ratings he disagreed with, when Grievant has protested these, the Park Superintendent has adjusted the ratings, so that Grievant has not received a poor rating on his performance evaluations, and he has been recommended for merit increases. Accordingly, as Grievant has not demonstrated his performance evaluations have been affected to date, this issue is considered speculative at this point, and will not be addressed.

The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees. . ." Wilds v. W. Va. Dept. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n., Docket No. 95-PSC-501 (Jan. 31, 1996).

Farley v. West Virginia Parkways Authority, Docket No. 96-PEDTA-204 (Feb. 21, 1997).

Finally, Grievant argued he was hired as an Electrician, and DNR had to assign him the duties of an Electrician and could not change his duties.

DNR argued at Level III that the issue presented by Grievant was a mere disagreement with management philosophy, and was not grievable, absent a showing that the assignments had an effect on Grievant's job performance, or his health and safety. It argued Grievant's supervisors have the right to decide the best way to divide the workload in order to achieve the agency's goal. DNR submitted no oral or written argument at Level IV.

Some of Grievant's complaints do represent a non-grievable disagreement with his supervisor's priorities. For example, Grievant believed there was electrical work to be done which should have been a priority, but he had been assigned other duties he considered to be less important. The crux of his grievance, however, is that he is working out of classification. A claim that the grievant is

working out of classification is grievable. The typical working out of classification grievance involves a claim that the employee is performing the duties of a classification in a higher pay grade, and the employee is seeking back pay, and either to be placed in that classification, or to have the duties removed. While Grievant does not have a back pay claim, he still has an interest in his proper classification.

Further, Grievant has alleged a safety concern with his supervisor's assignment of electrical work to employees with no electrical skills, and has offered un rebutted evidence supporting this assertion. This likewise is grievable. Smith v. Parkways Economic Development and Tourism Authority, Docket No. 97-PEDTA-484 (Apr. 17, 1998).

The first issue which will be addressed is whether Grievant is working out of classification, and whether he can be assigned duties which are not within his classification.

DOP's classification 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 the Work" section of a classification specification is its most critical section. See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). DOP's interpretation and explanation of the classification specifications should be given great weight unless clearly wrong. See, W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

The "Nature of Work" section of DOP's classification specification for Electrician reads as follows:

An employee in this class performs skilled electrical work in the installation, alteration, repair, and maintenance of electrical equipment and wiring used in communication, light, and power systems. Assignments, supervision, and review are received from Building Maintenance Supervisor. The employee may supervise maintenance staff on a project by project basis. Performs related work as required.

Lowell D. Basford, DOP's Assistant Director of the Classification and Compensation Section, stated that, in determining an employee's proper classification, the predominant duty rule may apply, which means that the duty which the employee performs more than half the time forms the basis for

his classification. However, he explained that when the position has mixed duties, as is the case with Grievant's position, the duties performed 25% of the time can be class controlling if those duties are significantly more complex than the other mixed duties, or there is a recognizable difference in the skills required to perform the duties, the pay grade for a position performing these duties is higher, and if these duties would form the basis for selecting applicants for the position. This is the case with Grievant's duties, and so long as he performs electrical duties at least 25% of the time, DOP would consider him to be properly classified as an Electrician. Mr. Basford stated, however, that it is up to each employer to determine what the duties of a position will be, and citing DOP's Administrative Rules 4.4(c) and 4.5(d), the employee's duties may certainly be changed by the employer.

DOP's Administrative Rule 4.4(c) states:

A class specification shall be construed as a general description of the kinds of work characteristics of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed [sic] or implied power of the appointing authority now or hereafter vested with the right to prescribe or alter the duties of any position.

Rule 4.5(d) states, "[t]he position description shall not be construed in any way to limit the express or implied authority of the appointing authority to prescribe or alter the duties of any position." These Rules must be considered in context. It is the employing agency, not DOP, which makes the decision as to what services an employee will perform. Parsons v. W. Va. Bureau of Employment Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993). However, while the employer may change the duties of a position to meet its needs, and may assign an employee some duties which are not within the classification specification (Hager v. Dep't of Health and Human Resources, Docket No. 95-HHR-241 (Sept. 29, 1995)), it may not simply assign duties to an employee which are of a nature that they render him misclassified, without taking the steps necessary to have the position properly classified.

If an employer assigns "out of class" duties to an employee on a frequent or long-term basis, the employee may be entitled to deletion of the responsibilities and compensation for the period in which they performed out of their classification, if those duties were assigned to a higher paying classification. Beer v. Div. of Highways, Docket No. 95-DOH-161 (Feb. 27, 1996); Shremshock v. W. Va. Dept. of Trans., Docket No. 94-DOH-095 (Aug. 31, 1994).

Reed v. WV Div. of Corrections, Docket No. 97-CORR-127 (May 22, 1998).

It is clear that DNR is working Grievant outside his classification of Electrician. This situation is not

only improper, it is unfair to Grievant. If DNR does not need an Electrician at Beech Fork State Park, it needs to tell Grievant this so that he can either move on or come to terms with the fact that he will not be doing electrical work, and his position needs to be placed in a different classification.

However, the testimony of the park's superintendent, Debbie Keener, was that there was certainly enough electrical work to fill at least 25% of Grievant's time, and there was no need to have Grievant's position placed in another classification. Apparently, Grievant's supervisor believes that other work is more important. It is not the undersigned's role, however, to evaluate whether Grievant's supervisor, Mr. Wiley, has his priorities straight. That is the role of Mr. Wiley's supervisors.

It should also be noted that, while DOP's Administrative Rules allow an employer to change an employee's job duties, the Administrative Rules provide that it is the "appointing authority" who may make these changes. While the parties did not argue this, it appears that unless Mr. Wiley has been designated as the "appointing authority," or his actions are approved by the appointing authority, Mr. Wiley has no authority to alter Grievant's duties in a manner that renders Grievant misclassified. This authority would lie higher up the chain of command with Mr. Wiley's supervisors. Ms. Keener indicated that it would be the role of the District Administrator, the Deputy Chief, or the Chief to initiate a reclassification of Grievant.

The second issue involves the assignment of electrical duties to employees who have limited or no electrical skills. While working with electricity is always dangerous if proper precautions are not taken, Grievant testified it is particularly dangerous for employees with limited or no electrical skills to perform electrical work at Beech Fork State Park, because there is a lake at the park, and much of the electrical work which must be done is in a wet area. He testified this is not only dangerous for the employee performing the work initially, but it is also dangerous for him, as he often is called upon to fix the problem correctly when the work performed by the unskilled employee has failed to be effective. He has entered situations where he has not been informed of the actions taken by the unskilled employee, and when he begins his work he has insufficient information on the situation, which can be dangerous for him when dealing with electricity.

Grievant has demonstrated a valid safety concern with the manner in which his supervisor assigns electrical duties. It is dangerous for such duties to be assigned to employees who are not skilled in electrical work, and this danger is unnecessary when Beech Fork State Park has an Electrician on staff. It is difficult to understand the rationale for assigning an Electrician to repair equipment, paint, or

mow grass, and assigning an unskilled employee to perform electrical repairs. While there may be emergency situations at times when Grievant is not available, or is busy with another electrical emergency, the undersigned cannot imagine any other time that electrical duties should be assigned to an unskilled employee at Beech Fork State Park. Even in those instances, the undersigned questions whether it is safe for an employee with little to no electrical skills to be given such assignments; however, as these other employees are not grievants here, this issue will not be further addressed. Grievant cannot grieve on behalf of other employees. Smith, supra.

The following Conclusions of Law support the Decision reached.

### **Conclusions of Law**

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).
2. DNR has been working Grievant out of his classification.

Accordingly, this grievance is **GRANTED IN PART**. Respondent is **ORDERED** to either assign Grievant electrical duties at least 25 % of the time, or take steps immediately to have the position he currently occupies placed in the proper classification. Respondent is **FURTHER ORDERED** to cease assigning electrical duties to employees at Beech Fork State Park other than Grievant, except in situations where it is absolutely necessary to do so.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

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**BRENDA L. GOULD**

## Administrative Law Judge

**Date: April 28, 2000**

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[Footnote: 1](#)

*The grievance was denied at Level I on September 3, 1999, and Grievant appealed to Level II. The grievance was denied at Level II on September 9, 1999, and Grievant appealed to Level III on October 6, 1999. A Level III hearing was held on December 2, 1999. The grievance was denied at Level III on February 3, 2000, and Grievant appealed to Level IV on February 8, 2000. A Level IV hearing was held on March 22, 2000. Grievant represented himself, DNR was represented by Donald L. Darling, Esquire, and DOP was represented by Lowell D. Basford, Assistant Director of the Classification and Compensation Section. The parties declined to submit written argument, and this grievance became mature for decision at the conclusion of the Level IV hearing on March 22, 2000.*