CHARLES RIDGWAY, et al.,

Grievants,

v v.

Docket No. 03-DOH-262

WEST VIRGINIA DEPARTMENT

OF TRANSPORTATION/DIVISION OF HIGHWAYS

and DIVISION OF PERSONNEL,

Respondents,

D E C I S I O N

Grievants, Charles Ridgway, Penny Barton, Ed Barton, and David Lipscomb, filed this grievance on June 25, 2003, against their employer, the Division of Highways ("DOH"). Their Statement of Grievance states:

> We feel we have been discriminated against due to being denied reclassification to Transportation Engineering Technologists, Wage Code 8348. We all work within the position description for a Level 5 Technician.
>
> Relief sought: Reclassification to Transportation Engineering Technologist Wage Code 8348, with back pay from origianal [sic] date of submittal [sic] of 11/1/02.

This grievance was waived at Level I and denied at Levels II and III. Grievants appealed to Level IV on August 7, 2003, and a Level IV hearing was held on October 23, 2003. This case became mature for decision on the hearing date, as the parties elected not to submit any proposed Findings of Fact of Conclusions of Law. (See footnote 1)

Issues and Arguments

Grievants assert they are performing the work of Transportation Engineering Technologists because they are experts in their fields and supervise consultants. Respondents note Grievants do

have considerable expertise, and this expertise is recognized by their classification as Transportation Engineering Technicians - Senior. Respondent also notes Grievants do not supervise anyone, nor are they in charge of a unit or a division. Additionally, Respondents point out that the placement of employees in Transportation Engineering Technologist positions is decided by the State Highway Engineer, as he has the expertise to make these decisions. The State Highway Engineer has not specified Grievants' positions as ones to be placed in Transportation Engineering Technologist positions.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are all classified as Transportation Engineering Technicians - Senior within the Materials Control, Soils, and Testing Division. They have obtained the Fairmont certification that would allow them to be placed in a Transportation Engineering Technologist position. Grievants have been performing the same duties for many years.

2. Grievants ensure that the materials in their specific area conform to the required specifications; they implement quality assurance activities. They supervise and review the work of consultants who conduct testing and sampling of various materials, and then decide whether the material can be utilized by DOH.

3. Each of the Grievants has a specific area of expert technical knowledge within the Materials Division, and they frequently receive calls for information and direction from the Districts around the state. 4. While Grievants work closely with consultants, direct their work, and have input into whether their contract with the state will continue, they do not supervise any employees.

5. Grievants do not manage a program or a unit within the Materials Division.

6. Because of the highly technical nature of the Transportation Engineering Technologist positions, which require a high degree of expertise in a specific technical field, the State Highway Engineer of the Division of Highways makes the determinations about which positions should be classified as Transportation Engineering Technologists. Class specification - Transportation Engineering Technologist.

7. On July 18, 2000, Joseph Deneault, a Professional Engineer and the State Highway

Engineer, identified positions which would be classified as Transportation Engineering Technologists. On March 23, 2001, this list was revised. This list is not meant to be all-inclusive, as the class specification gives the State Highway Engineer the ability to modify the list. This list did not identify Grievants' positions as ones that should be classified as Transportation Engineering Technologists.

8. There are several DOH employees who are classified as Transportation Engineering Technologist, who do not supervise anyone, and whose positions are not on the March 23, 2001 list. These positions are typically ones where an employee replaced a professional engineer, when DOH did not have an engineer available to fill the position. Each of these positions had to be approved by the State Highway Engineer before they could be posted and/or filled by a Transportation Engineering Technologist. For example, David Whited became a Transportation Engineering Technologist when he replaced a Highway Engineer III who had retired. David Starcher was reallocated as a TransportationEngineering Technologist when he was promoted to position that had previously been filled by a professional engineer.

The pertinent sections of the classification specifications at issue are written below:

TRANSPORTATION ENGINEERING TECHNICIAN - SENIOR

Nature of Work

Serves in a senior level capacity performing advanced and/or expert duties, and supervisory duties associated with either the engineering or construction areas of highway and bridge construction and maintenance. Participates in a training program requiring 180 Technician Development Hours.

Distinguishing Characteristics

Transportation Engineering Technician - Senior (level 4) is distinguished from Engineering Technician (level 3) in that level 4 performs senior level work requiring expert technical knowledge and supervises or coordinates functions or sub-units under direction of a engineering technologist or a registered professional engineer. In the field of survey, this level is reserved for the survey party chief.

Examples of Work

Prepares complete bid proposal for 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 assures 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.

TRANSPORTATION ENGINEERING TECHNOLOGIST

Nature of Work

Serves in a managerial or program expert capacity in either the engineering or construction field/area of highway and bridge construction and maintenance. Manages a unit in a district or division, or may manage a specific division-wide technical function requiring expert level knowledge, or may be licensed land surveyor. As a unit manager, supervises lower level supervisors, technicians and/or professional employees.

Distinguishing Characteristics

Engineering Technologist (Level 5) is distinguished from Transportation Engineering Technician - Senior in that incumbents at this level are managers of operational units with significant technical characteristics as opposed to supervisors of specific projects or less technical units/functions, or they are responsible for a special division wide technical program that requires the highest degree of

expertise in that specific technical field. The State Highway Engineer of the Division of Highways will make determinations as to technical characteristics/expertise. In the field of survey, this level is reserved for the licensed land surveyor. (Emphasis added).

Examples of Work:

Provide managerial oversight for subordinate supervisors and the program/projects to which they are assigned.

Evaluate the work of subordinate supervisors and employees.

Review and/or calculate technical data relating to engineering and construction projects.

Review project design and construction plans prepared by consultants.

Communicate with consultant engineers to discuss prospective or ongoing projects and plans.

Perform field reviews of engineering and construction projects.

Meet with various parties having an interest in projects, including representatives of state government, legislators, community leaders, regulators, and other interest groups.

Monitor and manage budgets associated with projects.

Read and interpret complex design and construction plans.

Discussion

W. Va. Code § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as DOH which utilize such positions, must adhere to that plan in making their employees' assignments. Toney v. W. Va. Dep't of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994).

Grievants assert their positions are misclassified, and they have requested their positions be reallocated. (See footnote 2) Division of Personnel's Rule 3.78 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. Kuntz/Wilford v. Dep't of Health and Human Resources, Docket No. 96-HHR-301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the [current] class specification, does not require reallocation. The

performing of a duty not previously done, but identified within the class specification also does not require reallocation." Id.

Additionally, in order for Grievants to prevail upon a claim of misclassification, they must prove by a preponderance of the evidence that their duties for the relevant period more closely match another cited Personnel classification specification than the one under which they are currently assigned. See generally, Hayes v. W. Va. Dep't of NaturalResources, Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical, Captain v. W. Va. Div. of Health, Docket No. 90-H-471 (Apr. 4, 1991); for these purposes, the "Nature of Work" section of a classification specification is its most critical section. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether the Grievants' current classification constitutes the "best fit" for their required duties. Simmons v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human 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. W. Va. Dep't of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

Under the forgoing legal analysis, the West Virginia Supreme Court of Appeals' holding in Blankenship presents employees contesting their current classification with a substantial obstacle to overcome in attempting to establish that they are currently misclassified.

Further, Division of Personnel Rule 4.4 states:

> The Director shall consider the class specification in allocating positions and shall interpret it as follows:
>
> (a) Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.
>
> (b) In determining the class to which any position shall be allocated, the specifications for each class shall be considered as a whole. The Director shall give consideration to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the

positions that the class intended to include.

(c) A class specification is 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 or implied authority of the appointing authority to prescribe or alter the duties of any position.

(d) The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

This case presents a classification issue with an unusual twist. While the normal rules apply, and the question is still to look for the best fit for an employee's duties, in this instance the class specification states, "the State Highway Engineer of the Division of Highways will make determinations as to technical characteristics/expertise." Accordingly, the State Highway Engineer decides which positions should be classified as Transportation Engineering Technologists.

The first issue to discuss is Grievants' assertion they supervise the consultants with whom they work. While it is true that Grievants oversee these consultants and give them directions, these individuals are not state employees. Personnel is responsible for defining the terms used in its classification system, and these definitions should be applied unless they are clearly wrong and/or arbitrary and capricious. Loudermilk v. Dep't of Health andHuman Serv., Docket No. 00-HHR-304 (Dec. 29, 2003). Mr. Lowell Basford, Assistant Director of Classification and Compensation, noted the definition for supervisor within the classification structure is one who is "formally delegated responsibility for planning, assigning, reviewing and approving the work of three or more full-time employees which also includes initiating disciplinary actions, approving sick and annual leave requests, conduct performance evaluations, recommend salary increases, and is a step in the grievance process." (Emphasis added). Because consultants do not meet the definition of a state employee, Grievants do not supervise anyone. Further, Grievants do not perform many of the supervisory duties listed in this definition.

Grievants also assert they should be Transportation Engineering Technologists because they are experts in their areas, and this is the role of a Transportation Engineering Technologist. Grievants'

class specification, Transportation Engineering Technician - Senior, invalidates this argument. The class specification of a Transportation Engineering Technician - Senior states this employee, "[s]erves in a senior level capacity performing advanced and/or expert duties" and is "distinguished from Engineering Technician (level 3) in that level 4 performs senior level work requiring expert technical knowledge." (Emphasis added). Clearly, the employee classified as a Transportation Engineering Technician - Senior is expected to be an expert.

The Transportation Engineering Technologist is differentiated from the Transportation Engineering Technician - Senior because the Transportation Engineering Technologists "are managers of operational units with significant technical characteristics." The Division of Personnel defines the terms "Manager/Managerial" as one who "oversees a formally designated organizational unit or program that requires extended planning ofwork activities, control of resources, and all the means used to accomplish work within the assigned area of responsibility. Coordinates the work of the unit or program with the agency and external interest groups. Is held accountable for establishing and meeting the objective and goals of the unit or program." Further, the Transportation Engineering Technologist "Examples of Work Section" identifies the first two expected assignments as "[p]rovide managerial oversight for subordinate supervisors and the program/projects to which they are assigned," and "[e]valuate the work of subordinate supervisors and employees." (See footnote 3) Grievants do not perform these activities.

As previously stated, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. Blankenship, supra. In this instance, the Division of Personnel defers to the State Highway Engineer, and Grievants have failed to demonstrate his decision was "clearly wrong."

Grievants have also asserted they have been discriminated against by DOH's failure to reclassify them. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 4) of discrimination under W. Va. Code §§ 29-6A-2(d), must demonstrate the fol lowing:

(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 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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievants have not met their burden of proof and established a prima facie case of discrimination. They have not shown they perform duties similar to the individuals who are Transportation Engineering Technologists, nor have they demonstrated they supervise employees or manage a unit. Additionally, they have not shown they were similarlysituated to the employees who were classified as Transportation Engineering Technologist, but whose positions were not on the list. Grievants are not filling positions that were once filled by professional engineers.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. In order for a 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 the one under which he is currently assigned. See generally, Hayes v. W. Va. Dep't 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. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989).

4. The key to the analysis is to ascertain whether the Grievants' current classification constitutes the "best fit" for their required duties. Simmons v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). 5. 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).

6. The Division of Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. W. Va. Dep't of Health v. Blankenship, 431 S.E.2d 681, 687 (W. Va. 1993).

7. Grievants have not demonstrated by a preponderance of the evidence that they are misclassified, or that the position of Transportation Engineering Technologist is the "best fit" for their duties.

8. Grievants have failed to establish that the State Highway Engineer's decision to not place their positions on the Transportation Engineering Technologist list was arbitrary and capricious.

9. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

10. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), must demonstrate the following:

(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 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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

11. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

12. Grievants have not met their burden of proof and established a prima facie case of discrimination. They have not shown they are similarly situated to they employees to whom they compare themselves.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____ **JANIS I. REYNOLDS**

Administrative Law Judge

Dated: December 30, 2003

Footnote: 1

Grievants represented themselves, Respondent DOH was represented by its Attorney Barbara Baxter, and the Division of Personnel was represented by Lowell Basford, Assistant Director of Classification and Compensation.

Footnote: 2

Because of Grievants' confusion about the terms reallocation and reclassification, they had originally asked to be reclassified.

Footnote: 3

The Division of Personnel defines the "Examples of Work Section" of the class specification as "a part of the class specification describing duties and responsibilities typically assigned to positions in the class; generally listed in order of importance on the class specification with the most important duties listed first or those most representative of positions in the class. It is not necessary that any one position in the class include all the examples of work listed and positions may include examples of work not listed on the class specification." (Emphasis added).

Footnote: 4

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).