JOHN HUFF,

Grievant,

v. Docket No. 05-DOH-088

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

John Huff ("Grievant"), employed by the Division of Highways ("DOH") in District Six as a Transportation Worker 3 Craftsworker, filed a level one grievance on December 2, 2004, seeking reinstatement to the Transportation Worker 4 Welder ("TW4") classification, with a 10% salary increase. Grievant additionally requests back pay from November 16, 2004, the date when the TW4 classification was to have been effective. After the grievance was denied at levels one, two, and three, appeal to level four was made on March 14, 2005. A level four hearing was conducted in the Grievance Board's Wheeling office on June 28, 2005, at which time Grievant represented himself, DOH was represented by counsel, Barbara Baxter, and the Division of Personnel ("DOP") was represented by Assistant Director Lowell D. Basford. The parties waived the opportunity to file proposed findings of fact and conclusions of law, and the grievance became mature for decision at the conclusion of the hearing.

The following findings of fact have been derived from a preponderance of the evidence made part of the record at levels three and four.

Findings of Fact

1. Grievant has been employed by DOH in District Six since September 1996, and has been classified as a TW3 Craftsworker since April 2004. 2. In April 2004, Grievant applied to have his position reallocated to TW4, based upon his work as a certified welder.

3. Sometime later, Paul Alig, a coworker, also requested to have his position reallocated to TW4 Welder. This request was approved by the Division of Personnel.

4. In July 2004, Grievant completed another position description in his effort to have his

position reallocated. By memorandum dated September 1, 2004, Mr. Basford, advised DOH Human Resources Director Jeff Black that DOP had determined Grievant's position would be appropriately classified as a TW4, based on the information provided. 5. On November 9, 2004, Shelley Gorby, of DOH Human Resources, notified District Six officials that Grievant's "reallocation from TW3CW to TW4WELD will be effective 11-16-04." Grievant was so notified by his supervisor, Bill Wilhelm.

6. DOH Human Resources officials remained concerned whether Grievant's position should be reallocated. Because Mr. Alig had recently been reallocated to Welder, it was questioned whether a second welder was needed in a small district. Additional information was requested from District Six relating to Grievant's duties, and the amount of time he actually spent welding.

7. On December 7, 2004, Assistant District Six Engineer Lloyd Adams reported the number of hours Grievant worked in an upgrade capacity for the calendar year 2004 to be 43.6% of his total working hours. These hours not only included the time spent welding, but also time he was upgraded for serving as a temporary crew chief, and the hours he operated a track hoe. Mr. Adams further noted that since Grievant's reclassification to TW3 on May 16, 2004, he had worked in an upgrade capacity only17.3% of the time. The position descriptions indicated that Grievant spent 60% (April) and 70% (July) of his time welding.

8. On December 20, 2004, Mr. Black transmitted an additional position description to DOP, and asked for a reconsideration of Grievant's request for a reallocation. Mr. Black explained that "[i]t appears the information completed by the employee is not substantiated by agency records."

9. Upon review of the additional information, DOP determined that Grievant's position was correctly classified as a TW3.

10. Grievant was never notified that his request for reallocation was denied, and only learned the outcome while inquiring about his salary.

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 § 4.21 (2004); 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. Grievant argues that his position should be reallocated to TW4WELD because he welds as much, or more, than Mr. Alig. He does not believe that he has been treated fairly. DOH and DOP assert that the review of Grievant's actual duties, and the time they require, supports his classification of TW3.

Grievant's primary argument is that he has been unfairly treated, i.e., treated in a discriminatory manner. "'Discrimination' means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of theemployees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, grievant must show:
(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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004). Grievant has established that he is similarly situated to Mr. Alig, whose position was reallocated, while Grievant's was not. However, while Grievant asserts that he spends as much time welding as Mr. Alig, there was no review by Mr. Adams, or any other evidence, to support that claim. Therefore, Grievant has failed to prove that the difference in treatment was unrelated to their actual job duties.

While it is undisputed that Grievant engages in welding as assigned, the evidence does not support a finding that his duties more closely match those of TW4 than TW3, as set forth in the DOP position descriptions. DOP 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. Dep't of Health,

Docket No. 90-H-444 (Apr. 22, 1991); See generally, Dollison v. W. Va. Dep't of Empl. 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. Dep't of Health and Human Res., 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). Additionally, class specifications are descriptive only and are not meant to be restrictive. Mention of one duty or requirement does not preclude others. W. Va. Div. of Personnel Admin. Rule, § 4.04(a); Coates v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-041 (Aug. 29, 1994). Even though a job description does not include all the actual tasks performed by a grievant, that does not make the job classification invalid. DOP Admin. Rule, § 4.04(d). Finally, DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993). Under the foregoing 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. In a case such as this, it is necessary to compare the relevant classification specifications, which are restated below: (See footnote 1)

TRANSPORTATION WORKER 3

Nature of Work

Under limited supervision, at the journey level performs skilled work in the construction and maintenance of highways, related buildings and structures, and erecting and operating a drilling rig. May serve as a working shop leader in a County Garage. Operates a variety of heavy motorized maintenance equipment such as power graders, bulldozer, backhoe, and semi-trailer. Transports equipment across state to construction or maintenance sites; makes major repairs to roads and bridges. Performs major overhaul of gasoline and diesel powered automotive and highway maintenance equipment. Performs full-performance experienced work maintaining and repairing a variety of equipment used in heating, ventilation, cooling and general operation of public buildings. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Examples of Work

Adds rods or augers to drill using wrench.

Removes core samples from core barrel and places in core boxes;labels core boxes for depth and location of sample.

Assists in the cleaning and maintenance of drilling rig and related tools and equipment.

Drives medium to heavy truck to transport drilling rig to drilling site.

Installs and ties reinforcing steel bars in concrete forms using wire, pliers and rulers to comply with the required specifications of bridge foundations.

TRANSPORTATION WORKER 4

Nature of Work

Under limited supervision, at the advanced level performs specialized work in the construction and maintenance of highways and related buildings and structures. Positions assigned to this classification are reserved for employees/applicants having achieved the required certification established by the Department of Transportation. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

Examples of Work

Repairs or constructs bridges with fabricated steel by welding using electric metal arc welding equipment according to American Welding Society Standards (AWS).

Repairs highway maintenance equipment and vehicles using gas and electrical welders, torches and other welding equipment.

Welds or extend-welds metal re-bar or piling together to strengthen concrete forms or extend pilings in the erection of new bridges.

Cuts and grinds structural steel using acetylene gas cutting torches and power grinders.

Climbs high steel structures to perform welding tasks on metal bridge components.

Grievant does not deny that he engages in the examples of work listed for a TW3., and does not specifically contest Mr. Adams' calculations. On the contrary, he concedes that he

had originally estimated his welding time to be less than 70%, and did not know how it had been changed. The evidence indicates that Grievant had been assigned more welding duties than usual earlier in the year during two periods inclement weather. At that time, his welding assignments may have been comparable to those of Mr. Alig. However, Mr. Basford testified that the reallocation of a position is based on work completed over a long span of time, and that an employee must be performing in the higher classification at least 50% of the time. Mr. Adams' calculations establish that Grievant does not meet this criterion.

Grievant's frustration in this matter is understandable since he believes that his classification was upgraded, and then taken away, based on the information provided byhis supervisor. In fact, the reallocation had never been implemented, and the error was corrected before any changes were made. Grievant may also be correct that his welding duties are comparable to those of Mr. Alig; however, it cannot be determined that he is misclassified based on another employee, who may well in the wrong classification himself. Such mistakes by an employer should be corrected, but do not constitute discrimination. Ritchie v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-181 (May 30, 1997). In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

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

3. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, grievant must show:

(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.

4. Grievant has failed to establish a *prima facie* case of discrimination because he did not prove that the difference in treatment was unrelated to actual job duties.

5. The erroneous classification of an employee does not constitute discrimination for another employee. Ritchie v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-181 (May 30, 1997).

6. Grievant has failed to prove by a preponderance of the evidence that he is misclassified.

Accordingly, the 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, and 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.

AUGUST 22, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Because the "Examples of Work" sections are so extensive for these classifications, only five examples of each will be included.