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JAMES SNIDER

V.

DOCKET NO. 90-COMM-353

WEST VIRGINIA DEPARTMENT OF COMMERCE

D E C I S I O N

INTRODUCTION

James Snider (hereinafter Grievant) filed this grievance on August 20, 1990, after being brought into the classified service system pursuant to an act of the legislature and because his subsequent classification into the position of Building Maintenance Supervisor II ultimately carried with it a resulting decrease in salary from \$24,816.00 per year to \$17,316.00 per year.

Grievant has been employed by the State since April 14, 1980, and had worked at the Blennerhassett Historical State Park (hereinafter Park) under the control and authority of the Blennerhassett Historical Park Commission (hereinafter Commission) which was established by statute in 1975, W.Va. Code, 29-8-1 et seq. (1975), to plan, develop and execute a program for the creation of the Park.

Grievant was employed by the Commission and ultimately assigned the title of Director of Operations with the above-

mentioned salary. The Commission was given the authority to "employ and fix the compensation of such personnel as it considers necessary or expedient". W.Va. Code, 29-8-3(9). Grievant was responsible for the supervision of maintenance at the Park and as the record reflects often provided the required physical labor to carry out the maintenance that was needed in order to keep the Park operational. The Park has generally been staffed by only approximately ten (10) full-time employees along with various part-time, seasonal employees and volunteers. Due to the nature of the location of the Park, which is on an isle outside of Parkersburg, West Virginia, the only method of transportation to and from the Park has been by boat or ferry across the Ohio River. Grievant became solely responsible for the transportation of people and material across the Ohio River to the Park due to the limited staff coupled with his acquired knowledge and experience in river navigation.

The Commission was established as a public corporation and its employees were not covered under the State civil service system pursuant to W.Va. Code, 29-6-4. In 1979, the Legislature passed W.Va. Code, 29-8-1 et seq., which amended the previous statutory provisions creating the Commission and transferred the duties and responsibilities of the Commission to the Division of Commerce (hereinafter Commerce). The pertinent language of Code, 29-8-2 is as follows:

As of the first day of July, one thousand nine hundred eighty-nine, there is established within the division of commerce the Blennerhassett historical state park commission. As of said date, all assets, real and personal property, debts, liabilities, duties, powers and authority of the Blennerhassett historical park

commission are hereby transferred to the division of commerce.

This Code section goes on to address the inclusion of the Park employees into the classified service by the following language:

All employee positions in the former Blennerhassett historical park commission are hereby transferred to the division of commerce and shall be included in the classified service of the civil service system pursuant to article six [29-6-1 et seq], chapter twenty-nine of this code. Any person included in the classified service by the provisions of this section who is employed in any of such positions as of the effective date of this amendment [Acts 1989, c. 20: July 1, 1989; Acts 1990, c. 33: June 7, 1990] and reenactment shall not be required to take and pass qualifying or competitive examinations upon or as a condition to being added to the classified service: Provided, That no person included in the classified service by the provision of this section who is employed in any of such positions as of the effective date of this section [Acts 1975, c. 112, March 7, 1975: Acts 1989, c. 20, July 1898; Acts 1990, c. 33: June 7, 1990] shall be thereafter severed, removed or terminated from such employment prior to his entry into the classified service except for cause as if the person had been in the classified service when severed, removed or terminated.

This paragraph of the 1989 amendment is silent as to how Commerce was to treat the salary status of those employees of the Park who previously had their salary established by the Commission. However, the previously-cited portion of the Code does state that "all assets, real and personal property, debts liabilities, duties, powers and authority of the Blennerhassett historical park commission are hereby transferred to the division of commerce" (emphasis added).

W.Va. Code, 29-8-3 establishes the general powers of Commerce with respect to the Park. This section begins by stating, "[T]he administrator of the division of commerce, with respect to

developing and maintaining Blennerhassett state park, may exercise all powers and duties granted to him and his predecessor in respect to the development and operation of other state parks" Before this Code section amended the previous provision, the Commission had the power and authority to "employ and fix the compensation of such personnel as it considered necessary or expedient." Code, 29-8-3(9) (1975). Clearly, under Code sections 29-8-2 and 29-8-3, Commerce has the authority and power to fix the compensation of those employees brought under its jurisdiction just as the Commission previously had the authority to set the salaries for the same employees before its authorizing statute was amended.

Grievant challenges the authority of Commerce to lower his salary by arguing that he was given, in effect, a demotion without cause. He also challenges the actions of Commerce by arguing that it arbitrarily computed a salary to assign to him and he further attacks the method by which his salary figure was derived on the basis of discrimination. Grievant also argues that his new salary violates the equal pay for equal work principle pronounced in W.Va. Code, 29-6-10(2), and that Personnel's action in this case was more akin to a reclassification under the rules of the West Virginia Division of Personnel (hereinafter Personnel). Regarding Grievant's classification, he claims that he has been improperly classified and requests that Personnel further create a classification that more closely fits the abilities and duties that he has performed at the Park since his employment with the Commission.

Commerce argues that it did have the authority to establish the salary of Grievant within the range of salaries for other Building Maintenance Supervisor IIs under its jurisdiction and that the method utilized for determining Grievant's salary was not arbitrary and capricious. Commerce further argues that the proper procedures and statutory guidelines were utilized in determining the appropriate classification and salary for Grievant, and that the decrease in salary is commensurate with the responsibilities and duties that he performs at the Park now that it has become included under its coverage.¹ Lowell D. Basford, Assistant Director of the Classification and Compensation Section of Personnel, also testified at the hearing concerning the procedure and process which was utilized by Personnel in recommending to Commerce the salary range and classification that it recommended as appropriate for Grievant.

Because this case involves an employee who has been brought into the classified service plan from a position not included in the plan, Commerce and Personnel had to work together in order to follow the statutory and regulatory guidelines applicable to that action. According to the testimony of Mr. Basford and a review of

¹Grievant filed a request for a Level IV grievance hearing on August 20, 1990. By this request, Grievant challenged his classification of Building Maintenance Supervisor II and the subsequent reduction in his salary. This complaint was further expanded on at both the Level III and Level IV hearings, and also with the submission of Grievant's Proposed Findings of Fact and Conclusions of Law. The undersigned will treat the pertinent issues of law as having been properly raised by Grievant and this decision shall be based upon the legal issues presented in both Grievant's and Commerce's post-hearing briefs.

the statutory powers and duties granted to Personnel, for the purposes of this case, Personnel was only responsible for determining Grievant's proper classification under the State classified system. As stated before, Commerce has the ultimate authority to set the salary of its own employees so long as that salary is within the range of established salaries for the employee's proper classified position, is not established in an arbitrary or capricious manner, and is not based upon discrimination.

The definition of "class or class of positions" is "a group of positions sufficiently similar in duties, training, experience and responsibilities, as determined by specifications, that the same qualifications, the same title and the same schedule and benefits may be equitably applied to each position in the group." W.Va. Code, 29-6-2(e). The definition of "classified service" is "an employee whose job satisfies the definitions for class and classify and who is covered under the civil service system." W.Va. Code, 29-6-2(h). After July 1, 1989, Grievant became a member of the classified service by statute. However, he was not actually assigned one of the specific positions in the classified plan until October 5, 1990, when he was notified by memo from Personnel that it recommended he be classified as a Building Maintenance Supervisor I. Grievant was initially classified as a Building Maintenance Supervisor I but immediately exercised his right to have Personnel review his classification and a reclassification study and job audit was performed. It was then recommended by Personnel and

accepted by Commerce that Grievant should maintain the classification of Building Maintenance Supervisor II.

FACTS

Mr. Basford was initially approached by a member of the legislature and was asked to help write the legislation bringing the Park employees under the control of Commerce. Anticipating that this action would indeed take place, Personnel met with all of the employees of the Park on April 21, 1989. Personnel was concerned with making a proper determination of what classified positions the Park employees should be assigned after July 1, 1989. The Park employees were asked to fill out job description forms for Personnel's review. Grievant had filled out a position description form and submitted it to Personnel as early as March 22, 1989.

On July 16, 1989, Personnel notified Commerce by letter of the tentative allocations of job classifications and salary that Personnel had assigned to each of the Park employees.² This was a recommendation based upon the current findings of Personnel and Commerce was given an opportunity to comment on these allocations. Grievant was tentatively assigned to the position of Building Maintenance Supervisor II with a salary of \$24,111.60 per year. Commerce reviewed this July 6, 1989, letter and disagreed with

²Again, Personnel does not assign actual salaries to civil service employees but only provides advice or recommendations on salary based upon its review of other employees in the classified system that have the same classified position as the employee in question. The appointing authority does not have the benefit of being able to review this kind of extensive information on its own.

Personnel's allocations. This is evident from a July 13, 1989, memo from Cordie Hudkins, District Administrator, to Charles Spears, Director of the Division of Parks and Recreation. Mr. Hudkins suggested that Grievant be assigned the title of Building Maintenance Supervisor I with a salary of \$14,500.00 per year.

Because Commerce did not agree with Personnel's classification of Grievant, it contacted Personnel and expressed its concern that Grievant should not be classified consistent with the July 6, 1989, letter. Commerce was able to convince Personnel that Grievant should be classified as a Building Maintenance Supervisor I because certain elements of the job that had previously been performed by Grievant were to be removed from his responsibility and these duties would be performed by other individuals in Charleston. Testimony by Mr. Basford indicated that with this new information Personnel looked for the complexity and independent difficulty of the job that Grievant was to perform and the percentage of time that he was to spend supervising other employees. This evaluation was called the "preponderance of duty rule".

On October 5, 1989, Grievant was notified by Michael Smith, Director of Personnel, that he was to be assigned to the position of Building Maintenance Supervisor I. It is not clear from the record what discussion or correspondence took place concerning Grievant's salary at that time. By letter of October 20, 1989, Grievant requested a reconsideration of his job classification allocation and Personnel subsequently performed a reclassification study and job audit on his position. On November 28, 1989,

Personnel informed Commerce of the results of this reclassification study and again recommended that Grievant be assigned the position of Building Maintenance Supervisor II with a salary within the range of pay grade 12. Not until May 31, 1990, was Grievant notified by Commerce that his position classification would be Building Maintenance Supervisor II carrying with it a salary of \$17,316.00 per year, effective July 1, 1990.

DISCUSSION

Grievant makes two distinct arguments. First, that he is improperly classified and that Personnel should create a separate and distinct classification for him similar to the title that he held with the Commission. Second, that the resulting decrease in his salary was improper on the grounds of abuse of discretion and discrimination. Grievant ultimately wishes to retain a classification that he feels more closely matches his jobs duties and skills than does the classification of Building Maintenance Supervisor II and believes that he is not being properly paid as compared to the salaries of other employees who hold the Building Maintenance Supervisor II position with similar years of experience. Grievant is complaining of two distinct actions which took place at two different times.

Grievant's classification argument is actually grounded in the theory that he is misclassified in the position of Building Maintenance Supervisor II. "In a classification-related complaint, a grievant must show that he or she was performing the duties of

one professional categorization, as revealed by the official CSS specifications thereof, while being assigned to another. In essence, this may be accomplished by demonstrating that a position more closely matches one CSS classification description than another." Witchison v. W.Va. Div. of Health / Personnel, Docket No. 90-H-444 (April 22, 1991); Cooper-Richmond v. W.Va. Dept. of Human Services, Docket No. 89-DHS-284 (March 4, 1991); Akers v. W.Va. Tax Dept., Docket No. 89-T-173 (Sept. 22, 1989). The problem that the Grievant confronts is that he does not at any time propose that there exists any other classified position that more closely matches his duties than that of Building Maintenance Supervisor II. In fact, in Grievant's post-hearing brief it is stated that, "Mr. Snider would concede that of all the job descriptions that he has reviewed, a Building Maintenance Supervisor II is a classification which might match the closest to his functions as an employee." Grievant has only requested that he be returned to his old classification, one that is not in the classified plan, or that a new classification be created for him. In classification cases, the grievant maintains the burden of proof. See, Vance v. W.Va. Dept. of Health and Human Resources / Personnel, Docket No. 89-DHS-506 (Jan. 24, 1990). The burden is not upon Commerce or Personnel to prove why Grievant should be assigned to the position of Building Maintenance Supervisor II but for Grievant to prove why he should not. Given the admission of Grievant that the classification of Building Maintenance Supervisor II is the

classification that is the "best fit"³ for his job duties and the fact that he has not attempted to prove that he should be assigned to a different but specific position in the classified plan, this argument must fail.

From this conclusion, Grievant's argument that Personnel should have created a new classification for him such as Director of Operations, the title that he previously held under the Commission, must also fail. Section 5 of Personnel's Administrative Rules discusses the preparation of a classification plan. Two subsections which are applicable to this argument are as follows:

5.01. Preparation of Plans - The Board, after conferring with the appointing authorities concerned, shall formally adopt and make effective a comprehensive classification plan for all positions. The plan shall be based on an investigation and analysis of the duties and responsibilities of each position, and each position shall be allocated by the Director of Personnel, after consultation with the appointing authority concerned, to its proper class in the classification plan. When complete, the classification plan shall include for each class of position an appropriate title, a description of the duties and responsibilities, and the minimum requirements of training, experience, and other qualifications.

5.02. Revision of Plans - Existing classes may be abolished or changed, or new classes added, in the same manner as the classification plans were originally adopted.

This language indicates that only Personnel has the authority to create classes of positions after consultation with the appropriate appointing authority. An employee may relate concern to their

³"Best-fit" is a term used by Personnel to enable it to correctly classify employees into specific classification specifications that fit closest to their actual job duties and responsibilities.

appointing authority or to Personnel about their classification but that employee does not have the right to require that a new classification position be created if it can not be demonstrated that the employee is indeed misclassified. Personnel has broad discretionary authority to establish classified positions in the classified plan and Grievant must demonstrate an abuse of that discretion.

Testimony was provided by Mr. Basford that Personnel not only consulted numerous times with Commerce concerning the appropriate classification for Grievant, but also performed a job audit and analysis of his duties, past, present and future. Personnel looked at the percentage of time that Grievant was supervising employees as opposed to actually doing physical labor and then reviewed the duties and responsibilities of other state employees of the Division of Tourism and Parks to compare the responsibilities and duties of Grievant with other Building Maintenance Supervisor IIs. It can not be concluded from the evidence at the Level III hearing that Personnel abused its discretion in classifying Grievant in his current position or by not creating a new position in the classified plan. There are numerous other employees in the park system that have the same classification and the same type of responsibilities and duties that Grievant maintains. The testimony demonstrated that each of the Building Maintenance Supervisor IIs within the park system have varying job responsibilities and skills dependent upon the type and location of his or her respective park. However, the overall responsibilities, supervisory duties, and

nature of work of these various employees are substantially the same, i.e., the maintenance of park facilities.

Concerning Grievant's salary argument, he also claims that he was reclassified, and therefore, under the Administrative Rules of Personnel, his salary should have remained the same because it would have been within the range of salaries for the position of Building Maintenance Supervisor II.⁴ However, Grievant was not reclassified. A reclassification is an action taken by Personnel either on its own initiative or at the request of the appointing authority to reclassify a position "by the creation or abolishment of classes, or the revision of the definition of the work of the classes brought about by changing work methods, new technology or reorganization." Section 5.05, Administrative Regulations of the West Virginia Division of Personnel, Chapter 29-6-10, Series 1. Grievant's initial classification was not abolished or revised; Grievant, Personnel and Commerce simply continued to use the available channels of procedure to ultimately arrive at a classification that was determined to be the "best fit" for the duties of Grievant. Grievant's classification was also not abolished or changed on the basis of work method, new technology or reorganization.

Grievant's change in classification from a Building Maintenance Supervisor I to a II is more akin to what is called a

⁴Under the West Virginia Administrative Regulations for the Division of Personnel, Section 6, subsection 6.04(f)(2)(a)(2), when an employee is reclassified to a classification with a higher minimum and "where the salary of the incumbent coincides with a step in the new range, the salary shall remain unchanged".

reallocation. A "reallocation" is defined by Personnel as a "[r]eassignment of a position from one classification to a different classification on the basis of a significant change in the kind or difficulty of duties and responsibilities assigned to the position or to correct a position misclassification." Section 3, Administrative Regulations of the West Virginia Division of Personnel. When a reallocation occurs, that employee's salary is to be effected by applying the rules for salary on promotion and demotion. See, Personnel's Regulations, Section 6.04(3)(f).

In the alternative, Grievant argues that he was in effect given a demotion without sufficient cause under Section 12 of Personnel's rules. The definition of a demotion is contained in Section 3 of these rules and is defined as:

A change for cause in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower step in the pay range assigned to the classification. The two types of demotions are: a) Disciplinary Demotion - A reduction in pay or a change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct. b) Demotion Without Prejudice - A change in classification of an employee to a lower classification or a reduction in pay due to work necessity.

This case represents perhaps a novel issue in that it took so long for Grievant to actually receive the classification he is now complaining about and that eventually he received a higher classification with a lower salary. However, as of July 1, 1989, Grievant was a classified employee under the provisions of the civil service system. Grievant was just not placed into an actual

position in the plan until October 5, 1989, when he was informed by Personnel that he would become a Building Maintenance Supervisor I.

Initially, Grievant could not have been demoted because he ultimately ended up with a classification higher than that of his original classification. However, on July 1, 1990, when Grievant officially received a decrease in salary, he was actually demoted at that time based upon the definition of demotion without prejudice under Personnel's rules and regulations. It can be stated that Grievant's reduction in pay was required due to work necessity, and therefore, he was demoted although he maintained the same position classification of Building Maintenance Supervisor II. The next step in the analysis is to determine if this reduction in salary was properly based upon Grievant's demotion.

Personnel's rule 6.06 entitled Pay on Demotion states that:

An employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification shall have a pay reduction to at least the maximum rate of the new classification. The employee's salary may remain the same if his pay is within the range of the new classification, or his pay may be reduced to a lower step in the new range. If the employee's salary before demotion falls within the range for the lower class, but does not coincide with a step in that range, his salary shall be reduced at least to the next lower step in the new range. (emphasis added).

Upon an initial reading of this rule it would appear that there is nothing intended to guide the situation where an individual receives a demotion without prejudice based upon a salary decrease. However, when one reads the sentence that is underlined, it is apparent that an employee's salary may be reduced absent an abuse of discretion when his salary was within the range of his new

classification before the demotion. This is the standard by which Commerce's action will be judged.

It is arguable that Grievant should have been classified as a Building Maintenance Supervisor II from the time he became included in the classified system because this was Personnel's initial recommendation and it was the recommendation that was finally agreed on by Commerce after the job audit and reclassification study were performed. However, there is no legal basis for holding Commerce to this initial recommendation and for obvious reasons it takes time to work within the classified system to arrive at a correct classification for an employee who is brought into the system without the benefit of having previously held a position within the classified plan. It would have been more beneficial for all concerned if Grievant could have been correctly classified in July 1989 when he was initially brought under the coverage of the classified system, however, this would have required some very pertinent foresight on behalf of both Commerce and Personnel and these two agencies cannot be held to such a strict standard to act before guiding legislation is actually passed. To do so would often require an inordinate amount of wasted time to be spent on anticipated legislation that may never be enacted. Grievant has not demonstrated any bad faith on behalf of Commerce for their reluctance to agree with Personnel's initial recommendations.

In this case, it took Commerce from November 28, 1989, until May 31, 1990, to agree with Personnel's classification recommendation of Building Maintenance Supervisor II and to then

establish Grievant's salary at \$17,316.00 per year. At issue is whether this in itself constituted arbitrary and capricious decision-making. The undersigned is inclined not to accept this single fact as indicative of arbitrary and capricious decision-making because Grievant actually received the benefit of the delay by continuing to receive the higher salary. However, it must be stated that Grievant was likewise not at fault in causing the delay in his salary determination being made. Other factors affecting Grievant's salary must be looked at along with this delay in time before a final determination can be made.

Grievant has worked for the State for approximately eleven (11) years and the majority if not all of that time has been in the performance of maintenance-type duties at the Park. As of April 29, 1991, there were six (6) other Building Maintenance Supervisor IIs employed for the Tourism and Parks Division. The salaries of these individuals ranged from \$15,576.00 to \$19,920.00 per year.⁵ Of the individuals described, the employee with the highest salary had fourteen (14) years of experience; the employee who made

⁵This information was derived from a computer generated printout from Personnel. A letter prepared by Rich Hartman to Robert Nunley, the Administrative Law Judge who originally heard the case, dated May 6, 1991, provided information similar in nature to the computer printout but did not contain two employees who were listed in Personnel's printout. The salary of these two individuals are \$15,576.00 and \$18,324.00 respectively and their years of experience are not known by the undersigned. The Hartman letter does state that, "This, along with additional information also in the Level III decision was obtained in April 1990, and does not reflect the current salaries or years of experience. Thus, it is possible that the two employees listed in Personnel's printout were newly hired as of April 1990, which could would account for the discrepancy in the exhibits.

\$19,848.00 had one (1) year of State experience plus twenty-five (25) years of maintenance experience in the U.S. Air Force; the employee who had nine (9) years of experience made \$16,932.00; while one employee who only had two (2) years of experience had a salary of \$16,212.00.

The entire list of those employees who occupy the classification of Building Maintenance Supervisor II in the State system included a range of salaries from \$30,660.00 to \$15,576.00 with this lowest salary corresponding to one of the employees of the Tourism and Parks Division. Also, the highest paid Building Maintenance Supervisor II for Commerce was twelfth on the list but maintained 14 years of experience. The average salary of all of these employees was \$19,650.00 and the average salary for only those employees of Commerce excluding Grievant was \$17,802.00. Clearly, the employees who work for Commerce make a lower average salary than other similarly situated employees of other State agencies. Grievant's salary decrease brought him approximately \$2,300.00 below the average of all Building Maintenance Supervisor IIs but only \$486.00 below the average for the Commerce employees compared to the 1991 salaries. Again, it is important to note that this is comparing Grievant's 1990 salary with other employees' 1991 salary. There is no evidence of whether Grievant received a salary increase in 1991 that would have offset this comparison.

Grievant was actually assigned a salary \$52.00 over the average of the employees employed as of April 1990. According to Hartman's letter of May 6, 1991, Commerce provided evidence that

they utilized a formula in order to help them arrive at the salary figure to award to Grievant. This formula contained the following factors:

Years in service	10
Current salary	\$24,816.00
Number of Building Maintenance Supervisor IIs in the division	4
Average years in service	6-1/2
Average salary	\$17,064.00
Highest salary currently employed	\$18,912.00
Lowest salary currently employed	\$15,204.00

This formula or list of factors was also approved by Personnel before Commerce actually utilized it to derive Grievant's salary. There is no showing that Commerce acted arbitrarily or capriciously in setting Grievant's salary at the level \$17,316.00. It is recognized that Commerce uniformly pays its employees under the State average but this is tolerable as long as it is done reasonably and consistent with the doctrine of equal pay for equal work. It is also understood that Grievant's decrease in pay of approximately \$7000.00 is hard for Grievant to assume, however, his salary was not derived at unfairly when considering the salaries paid other Building Maintenance Supervisor IIs in Commerce. Secondly, the length of time that it took Commerce to arrive at a justifiable salary figure in itself does not establish that Grievant was treated unfairly given this salary comparison. Testimony was provided that Grievant was compensated for his years of experience and this is demonstrated by looking at the order of the salaries of those employees in the Tourism and Parks Division of Commerce. The undersigned realizes that the salaries of the employees of Commerce are lower than that of other state agencies,

however, it must be noted that it is not the duty of the undersigned to second-guess or substitute his judgment for that discretionary authority of Commerce in determining the philosophy and manner by which it spends its resources.

Grievant has made the argument, albeit briefly, that he has been discriminated against by Commerce in their action of decreasing his salary. "Discrimination" is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employee or are agreed to in writing by the employee." W.Va. Code, 29-6A-2(d). In order for Grievant to prove that Commerce acted in a discriminatory manner, he must establish a prima facie case of discrimination by showing that:

- (a) he is similarly situated, in a pertinent way, to one or more other employee(s);
- (b) 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) such differences were unrelated to the actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to in writing by the Grievant.

Holcomb v. W.Va. Dept. of Highways, Docket No. 89-DOH-398 (Oct. 31, 1989) citing, Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a prima facie showing of discrimination is made and the employee rebuts grievant's argument, grievant must demonstrate by a preponderance of the evidence that the offered reason was mere pretext. Holcomb, Id.

In this case, Grievant has met his burden of proof in showing that a prima facie case of discrimination exists; that he has been

paid lower than the average salary of the Building Maintenance Supervisor IIs in the State classified system but maintains a considerable amount of years of experience above the average.⁶ Commerce has tried to rebut this showing of discrimination by proving that its Building Maintenance Supervisor IIs are consistently paid slightly lower than the average of all of the State Building Maintenance Supervisor IIs and that by establishing Grievant's salary within the range that it pays overall as an agency, the other Commerce employees are not discriminated against. This is a legitimate business reason and grounded in sound theory. A business must look out for the well-being of all of its employees and treat them all fairly in order to receive efficient work and respect from them. Grievant has failed to prove that this reason is merely pretextual for paying him a lower salary or saving money. Grievant's salary has simply been set consistent with the legitimate business philosophy of maintaining a certain amount of salary uniformity within an agency's jurisdiction. There are inherent shortcomings in being funded by a governmental entity and Commerce is no exception, however, it has chosen to maintain a salary structure that would appear fair to all of its employees. Therefore, Grievant's argument must fail.

Finally, Grievant claims that his salary was set too low and that Commerce violated the equal pay for equal work doctrine which is pronounced in W.Va. Code, 29-6-10(2). This Grievance Board has

⁶Lowell Basford testified that the average years of experience for State employees is approximately seven (7) years or experience.

decided many cases on the issue of equal pay for equal work and the holding from the majority of those cases is that this doctrine only means that an employee must be paid somewhere within the established salary range for his correct position classification. See, Largent v. W.Va. Dept. of Health / CSS, Docket No. H-88-012 (Sept. 15, 1989). In this case, the salary range for Building Maintenance Supervisor IIs was \$14,568.00 through \$26,472.00 per year as of January 1, 1990. Grievant's salary is within the range specified. Therefore, Grievant's argument must fail.

The above discussion is hereby supplemented with the following appropriate Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Grievant is currently employed by the West Virginia Division of Commerce as a Building Maintenance Supervisor II.

2. Grievant was initially hired by the Blennerhassett Historical Park Commission on April 14, 1980, and eventually achieved the title of Director of Operations with a corresponding salary of \$23,623.95.

3. By legislative enactment, the Blennerhassett Historical Park was merged into the state park system under the jurisdiction of the Division of Commerce as of July 1, 1989. The Division of Commerce retained all of the powers and duties that were initially reserved for the Blennerhassett Historical Park Commission.

4. As a result of the Blennerhassett Park being placed under the organization and control of the Division of Commerce, various employees of the Park chose to either leave employment with the

state or to be transferred to the Division of Commerce. Grievant chose to be retained by the Division of Commerce.

5. By statute, W.Va. Code, 29-8-2, it was mandated that Grievant become a member of the State civil service system and occupy a classified position within the classified plan.

6. After extensive review, correspondence and time, Grievant was assigned the position of Building Maintenance Supervisor I by the West Virginia Division of Personnel. Grievant requested that this classification be reviewed and the Division of Personnel conducted a reclassification study and job audit on Grievant's position. At the conclusion of this study, the Division of Personnel recommended to the Division of Commerce that Grievant be classified as a Building Maintenance Supervisor II and Commerce accepted this recommendation.

7. By letter dated May 31, 1990, Grievant was notified that his official civil service classification would be that of Building Maintenance Supervisor II with the corresponding pay of \$17,316.00 per year. The Division of Commerce utilized a formula to assign a pay rate to Grievant based upon what other employees in the Division of Commerce park system were paid.

8. As a result of this reduction in pay, Grievant filed a grievance and requested that he be reclassified to a new position and his salary be returned to \$23,623.95 per year.

CONCLUSIONS OF LAW

1. "In a classification-related complaint, a grievant must show that he or she was performing the duties of one professional

categorization, as revealed by the official CSS specifications thereof, while being assigned to another. In essence, this may be accomplished by demonstrating that a position more closely matches one CSS classification description than another." Atchison v. W.Va. Div. of Health / Personnel, Docket No. 90-H-444 (April 22, 1991); Cooper-Richmond v. W.Va. Dept. of Human Services, Docket No. 89-DHS-284 (March 4, 1991); Akers v. W.Va. Tax Dept., Docket No. 89-T-173 (Sept. 22, 1989).

2. In classification cases, the grievant maintains the burden of proof. See, Vance v. W.Va. Dept. of Health and Human Resources / Personnel, Docket No. 89-DHS-506 (Jan. 24, 1990).

3. Prior to the enactment of W.Va. Code, 29-8-1 et seq., the Blennerhassett Historical State Park Commission maintained the power and authority to "employ and fix the compensation of such personnel as it considered necessary or expedient." W.Va. Code, 29-8-3(9) (1975).

4. The Division of Commerce maintains the power and authority to set the salaries of the employees that were transferred to its jurisdiction as a result of the legislature amending W.Va. Code, 29-8-1 et seq. (1975). The key language of W.Va. Code, 29-8-2 (1989) reads as follows:

As of the first day of July, one thousand nine hundred eighty-nine, there is established within the division of commerce the Blennerhassett historical state park commission. As of said date, all assets, real and personal property, debts, liabilities, duties, powers and authority of the Blennerhassett historical park commission are hereby transferred to the division of commerce (emphasis added).

5. An employee of the State does not have the right to

require that he or she be classified to a newly created position unless the Division of Personnel makes that determination upon its own initiative or with consultation from the appointing authority. See, Section 5, Administrative Regulations of the West Virginia Division of Personnel, Chapter 29-6-10, Series 1.

6. Grievant was demoted without prejudice when his salary was decreased while he maintained the classification position of Building Maintenance Supervisor II. See, Section 3, Administrative Regulations of the West Virginia Division of Personnel, Chapter 29-6-10, Series 1.

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

8. In order for Grievant to prove that Commerce acted in a discriminatory manner, he must establish a prima facie case of discrimination by showing that:

- (a) he is similarly situated, in a pertinent way, to one or more other employee(s);
- (b) 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) such differences were unrelated to the actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to in writing by the Grievant.

Holcomb v. W.Va. Dept. of Highways, Docket No. 89-DOH-398 (Oct. 31, 1989) citing, Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

9. Once a prima facie showing of discrimination is made and

the employer rebuts grievant's argument, grievant must demonstrate by a preponderance of the evidence that the offered reason was mere pretext. Holcomb, Id.

10. The doctrine of equal pay for equal work means that an employee must be paid somewhere within the established salary range for his correct position classification. See, Largent v. W.Va. Dept. of Health / CSS, Docket No. H-88-012 (Sept. 15, 1989).

11. Grievant has failed to meet his burden of proof in showing that he has been improperly classified by the Division of Personnel or that his salary has been improperly calculated by the Division of Commerce either through an abuse of discretion or as a result of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of the decision. W.Va. Code, 29-6A-7. Neither the West Virginia Education and State Employee Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. This office should be promptly advised of any intent to appeal this decision so that the record can be prepared and transmitted to the appropriate court.


ALBERT C. DUNN, JR.
Administrative Law Judge

DATED: February 28, 1992