GEORGE HALL, et al.,

Grievants,

v. **Docket No. 96-BOT-310**

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

George Hall, Delbert Helmick, John Hardesty, David Core, David Sturms, James Nastassi and Danny Murray each filed grievances alleging that they had not been given appropriate credit for certain certifications required to perform their job duties, which credit would entitle them to a higher pay grade under Respondent's job classification system. Grievants, who were in various job titles within Pay Grade 12, requested an upgrade to Pay Grade 13 and back pay to April 16, 1996.

At level two, after hearings were conducted and recommendations made by Stephen Showers, Assistant Vice President and Grievance Evaluator, West Virginia University's president determined that he did not have the authority to grant the relief requested. After subsequent appeals to level four, Administrative Law Judge Nedra Koval remanded this matter again to level two for decision on the merits, and, apparently, no additional decisions were rendered at that level. Respondent, through its counsel, on September 20, 1996, submitted a “Decision/Response to Order of Remand” (presumed to be its level three decision) wherein it stated that positions requiring certification were being reviewed by the Job Evaluation Committee (“JEC”) (See footnote 1) and that reclassifications would beimplemented for certain positions, effective January 1, 1997. All of the grievants then appealed to level four, pursuant to the provisions of W.Va. Code § 18-29-4. These grievances were consolidated by Order dated November 22, 1996, after a determination by the undersigned that they involved substantially similar questions of fact and law.

On January 7, 1997, Respondent filed a “Motion to Dismiss” this grievance on the grounds that Grievants had been granted what they had requested at level four, i.e. credit for certifications and a

corresponding increase in pay grade, effective January 1, 1997, leaving no further matters for adjudication by this Grievance Board. (See footnote 2) After hearing arguments of the parties on January 17, 1997, the undersigned determined that there were no substantial remaining issues of fact which had not previously been developed at level two, but that there was a disagreement among the parties as to Grievants' entitlement to back pay. Accordingly, the parties submitted their respective arguments in writing by February 25, 1997, at which time this matter became mature for decision.

The following factual findings are appropriately made from the record developed below and the additional submissions introduced at level four.

Findings of Fact

1. At all times relevant to this proceeding, Grievants have been employees of the physical plant facilities at West Virginia University.

2. Grievant Hall was employed as an Electrician at Pay Grade 12 at the time of the filing of his grievance. Effective January 1, 1997, he was reclassified as a Certified Skilled Craft Specialist at Pay Grade 13.

3. Grievant Helmick was employed as a Trades Worker at Pay Grade 12 at the time of the filing of his grievance. Effective January 1, 1997, he was reclassified as a Certified Trades Worker at Pay Grade 13.

4. Grievant Hardesty was previously employed as a Lagger at Pay Grade 12, and he was reclassified as an Asbestos Abatement Worker at Pay Grade 13, effective January 1, 1997.

5. Grievant Nastassi was also employed as a Trades Worker at Pay Grade 12, and the January 1, 1997, reclassification designated him as a Certified Trades Worker at Pay Grade 13.

6. Grievant Murray was employed as a Plasterer-Mason at Pay Grade 12, prior to January 1, 1997; he was then reclassified as an Asbestos Abatement Worker at Pay Grade 13.

7. Grievants Hall, Helmick, Hardesty, Nastassi, and Murray held certifications issued by the Environmental Protection Agency ("EPA") in freon and/or asbestos handling and performed duties associated with these certifications as of April 16, 1996. All have used their certification(s) since that time during the regular course of their required job duties. 8. Grievants' positions were among several reviewed by the JEC and West Virginia University between April of 1996 and the end of

December, 1996. (See footnote 3) Pursuant to this review, Grievants were reclassified, effective January 1, 1997, into new and existing job titles as set forth in Findings 2 through 6, above. The reclassifications were accomplished after the JEC determined that these individuals were required to have state and/or federal certifications.

9. The job titles "Certified Skilled Craft Specialist" and "Certified Trades Worker" were created during the job review process referred to in the immediately preceding paragraph, specifically for the purpose of recognizing that all individuals placed in these classifications are required to have freon and/or asbestos certifications.

10. For the period of April 16, 1996, through December 31, 1996, the JEC required the University to pay Grievants a "differential pay" for all times during that period when they performed duties requiring certification. However, some of the grievants have claimed they had not received the differential, and Respondent did not provide proof that it was, indeed, paid to every grievant.

Discussion

The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that he is not properly classified. 156 C.S.R. 1 § 4.17; W.Va. Code § 18-29-6. The grievant asserting misclassification must identify the job he feels he is performing; otherwise, the complaint becomes so vague as to defy an adequate rebuttal or analysis. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991). Grievants haveclearly articulated their belief that they are performing jobs which require EPA certification, which Respondent concedes was not recognized in their prior classifications.

Although issues of misclassification are not new to this Grievance Board, the issue set forth in the instant grievance is, in most aspects, one of first impression. The "Mercer" (See footnote 4) classification system under which the State College and University Systems of West Virginia ("SCUSWV") currently operates was first implemented in 1994, pursuant to the provisions of W.Va. Code § 18B- 9-4. (See footnote 5) Corresponding regulations setting forth policies and definitions in the area of personnel matters governing classified employees under the new system are contained in 128 C.S.R. 62 and 131 C.S.R. 62 (for the Universities and Colleges, respectively). These regulations also define and explain the Mercer system's basis, which is a "point factor methodology" whereby various factors are used to evaluate jobs and are then assigned weights to determine each job title's

pay grade. See 128 C.S.R. 62 § 2.27 and § 2.28. The specific issue of a reclassification under the Mercer system and entitlement to back pay has not yet been addressed through the grievance process.

Grievants have maintained throughout all levels of this proceeding that their job duties have not changed; all of them have needed and have utilized their EPA certifications in the course of their normal, everyday responsibilities (see Level II transcripts for “Hall,” “Hardesty,” and “Core, et al.”). Accordingly, they filed these grievances, requesting that they be given credit under the Mercer point factor methodology for these required certifications. Although this was, indeed, ultimatelyaccomplished and is reflected in the documentation provided by Respondent, the JEC elected to “reclassify” Grievants effective January 1, 1997, without back pay. Any work which Grievants performed between April 16, 1996, and December 31, 1996, requiring certification was to be documented by the employee, who would receive “differential pay” (presumably at a higher rate of pay than normal salary) during the time those duties were being performed.

Respondent has not articulated the basis for its position that Grievants are not entitled to back pay, but has merely maintained that these grievances must be dismissed. However, Respondent's actions are governed by the personnel regulations for SCUSWV, which must be applied to the instant situation. There are two possible justifications for Respondent's position. First, the times prior to January 1, 1997, when Grievants utilized their EPA certifications were “interim responsibilities” not required in their everyday duties. Second, the “reclassification” of Grievants on January 1, 1997, was an “upgrade” caused by a substantial change in each Grievant's normal duties and responsibilities, whereby they were placed into new job titles. If these propositions are correct, interim “differential pay” was appropriate for temporary assignments, and a Grievant who has been upgraded would not be entitled to back pay.

“Interim Responsibilities” is defined in the personnel regulations as follows:

> A significant change in duties and responsibilities of an employee on a temporary basis justifying an interim promotion or upgrade for salary purposes. Such a temporary reassignment shall normally be for no less than four consecutive weeks and no more than twelve consecutive months and shall only occur when the responsibilities being undertaken by the employee are those of another position that is vacant because of the incumbent's illness or resignation or because of temporary sufficient change in the duties and responsibilities of a filled position . . . .

128 C.S.R. 62 § 2.9 (emphasis added). “Promotion” is defined as:

> Movement from a position requiring a certain level of skill, effort and authority to a vacant or newly created position assigned to a different job title and higher pay grade requiring a greater degree of skill, effort, and authority.

128 C.S.R. 62 § 2.8 (emphasis added). Finally, “upgrade” is defined in the regulations as:

> An advancement of the employee's current position to a higher pay grade as a result of a significant change in the position's existing duties and responsibilities. When a position is upgraded, the employee does not move to a different position in a higher pay grade. Rather, it is the employee's position that is moved to a higher pay grade because of a significant increase in the position's existing responsibilities, as determined by job evaluation . . . .

128 C.S.R. 62 § 2.10 (emphasis added).

Grievants have proven by a preponderance of the evidence that their normal, everyday duties required them to possess certification in asbestos or freon and that no change or increase in their responsibilities has occurred since at least April 16, 1996. Likewise, all of them contend that these duties were not temporary in any respect. Respondent has failed to provide any evidence to rebut Grievants' contentions. In fact, Respondent's and the JEC's actions actually support Grievants' position. Respondent's “Motion to Dismiss” states, in part, that “[t]he JEC was . . . reviewing these positions when these grievances were filed” and, as recommended by the level two evaluator, “the JEC . . . [determined] . . . if such certification is required to perform the duties and responsibilities of such positions.” The implication is that Grievants' existing responsibilities at the time their positions were reviewed (See footnote 6) led to the JEC's conclusion that certification was required and that, accordingly, Grievants were misclassified. Even if it were appropriate to characterize Grievants' reclassifications as upgrades, there is no justification for delaying the effective date of the upgrades to January 1, 1997, when there was undisputed evidence that Grievants were performing the duties which prompted the “upgrades” as early as April of 1996. In fact, when the JEC made its final determination to reclassify Grievants, the Director of the Physical Plant was directed to implement the “upgrades” on January 1, 1997, and also to provide differential pay for April 16, 1996, through December 31, 1996, for the periods these employees used their certifications. (See documents provided in support of Respondent's Motion to Dismiss.) This is obviously an admission by Respondent that Grievants were determined to be misclassified as of April 16, 1996, because of their

performance of duties requiring EPA certification. Respondent cannot now “recharacterize” its actions to avoid providing back pay to Grievants during the period they were misclassified.

In addition to the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that he is not properly classified. 156 C.S.R. 1 § 4.17; W.Va. Code § 18-29-6.

2. Classified employees of West Virginia's higher education institutions may grieve any change in their assigned classification or job title under the SCUSWV classification system. W.Va. Code § 18B-9-7(b). 3. Grievants Hall, Helmick, Hardesty, Nastassi and Murray proved by a preponderance of the evidence that they were misclassified as of April 16, 1996, due to their performance of required job duties which required certification in asbestos abatement or freon.

4. Respondent did not prove that there were any changes in the above grievants' job duties on January 1, 1997, which would have necessitated upgrades of their positions. 128 C.S.R. 62 §§ 2.10 and 14.1.

5. The duties performed by the above-named grievants requiring certification between April 16, 1996, and January 1, 1997, were not interim responsibilities for which only differential pay was necessary. 128 C.S.R. 62 § 2.9.

6. A grievant who proves he was misclassified is entitled to back pay for so long as he worked in the incorrect classification, or from the date he sought reclassification, along with prejudgment interest. Blankenship v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-438 (Sept. 30, 1991); Fuller v. Cabell-Huntington Health Dept., Docket No. 90-H-169 (Nov. 29, 1990).

7. Grievants Core and Sturms did not require certification to perform their duties, and they are not entitled to any change in their job classifications.

Accordingly, this grievance is **GRANTED** with respect to Grievants Hall, Helmick, Hardesty, Nastassi and Murray, and Respondent is directed to issue back pay to Grievants, effective April 16, 1996, in the amount of the difference between the pay they received under their prior classifications and the pay they would have received in their January 1, 1997, reclassifications. Inaddition, Respondent is ordered to pay Grievants prejudgment interest in accordance with W.Va. Code § 56-6-

31. The grievances of Grievants Core and Sturms are hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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 § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: March 19, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

Ultimate responsibility for review of classification decisions made or proposed by higher education institutions rests with the Job Evaluation Committee, which is established and defined in 131 C.S.R. 62 § 11.5.

Footnote: 2

Grievants David Core and David Sturms were not granted any upgrade or change in classification, because it was determined by Respondent that their positions did not require any certification. After this determination was made, Grievants Core and Sturms declined to pursue their grievances at level four.

Footnote: 3

The record is unclear as to exactly when this review process began, but it has been mentioned many times since the initial level one filing of these grievances. Therefore, it will be assumed that this was an ongoing process between April and December of 1996.

Footnote: 4

This name refers to the company which assisted SCUSWV in developing the classification system, William M. Mercer, Inc.

Footnote: 5

This Board's decision in Burke v. Bd. of Directors, Fairmont State College, Docket No. 94- MBOD-349 (Aug. 8, 1995), provides an extensive discussion of the background of the Mercer reclassification project and definitions of various terms of art specific to the Mercer reclassification.

Footnote: 6

All of the grievants submitted updated position descriptions of their duties to the JEC at some time prior to their January 1, 1997, reclassifications, but their exact dates are unknown, because the position descriptions themselves were not introduced into evidence. The updated descriptions were prepared in accordance with 128 C.S.R. 62 § 10.1.