BRYON STAFFORD,

Grievant,

v. **DOCKET NO. 96-BOT-368**

BOARD OF TRUSTEES/
WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, an Asbestos Abatement Worker-Lead, instituted this grievance on July 1, 1996, alleging that he had been performing the duties and responsibilities of Asbestos Abatement Shop Supervisor for a period of one year. He requests placement into the proper classification title with back pay and benefits from July 12, 1995. After denials of the grievance at the lower levels, this matter was filed at level four on August 14, 1996. A hearing was held in this Board's office in Morgantown, West Virginia, on November 15, 1996. This matter became mature for decision on December 20, 1996, the deadline for receipt of the parties' proposed findings and conclusions.

The following factual findings are made from the record developed at all levels of the proceedings.

Findings of Fact

1. Grievant is the Lead Asbestos Abatement Worker in West Virginia University's (“WVU”) physical plant. Pursuant to a position description submitted by Mr. Stafford, dated December 22, 1994, he was placed in this job title as of January 5, 1995.

2. Until July 12, 1995, the supervisor of the asbestos abatement shop was Jack McLaughlin, who passed away on that date. Mr. McLaughlin's classification title was Supervisor/Building Trades.

3. Grievant filled in temporarily as supervisor of the asbestos abatement shop from July 12 through July 19, 1995. Thereafter, two other individuals, Steve Adams and Robert Ware, worked

temporarily in the position until April 1, 1996.

4. On April 1, 1996, WVU combined the asbestos and paint shops in its physical plant and placed Homer Hart in the position of Supervisor-Asbestos/Paint Shop. WVU eliminated the position previously held by Mr. McLaughlin, pursuant to institution-wide budget reductions.

5. Grievant coordinates and supervises asbestos abatement jobs performed by the physical plant. He ensures that all legal requirements regarding asbestos abatement are fulfilled and keeps a daily log for each job. Grievant does not hire or fire shop employees, approve leave, or conduct performance evaluations; however, he has, at times, been asked by his supervisor to “sign off” on workers' time sheets. Some of Grievant's responsibilities increased after July 12, 1995, both as to quantity of work and nature of responsibility.

6. The only position description submitted by Grievant in support of his allegations is the December 22, 1994, job description described above, which reflects his duties as a lead worker, not as a supervisor.

Discussion

In non-disciplinary matters, the grievant bears the burden of proving his case by a preponderance of the evidence. W.Va. Code § 18-29-6. The grievant asserting misclassification must identify the job he feels he is performing, and he must prove that he was performing the duties of one job category while assigned to another. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991); Hayes v. W. Va. Dept. of Natural Resources, Docket No. NR-88-038 (March 28, 1989).

Regulatory provisions governing higher education personnel matters dictate that a “position description” must be compiled for every individual classified position, which must be used in the process whereby positions are reviewed to determine if employees are misclassified. 128 C.S.R. 62 § 10. Grievant's only position description, dated December 22, 1994, states that he has “[l]ead responsibilities while overseeing the work of asbestos abatement workers.” It also states that 50% of his time includes the following:

> Oversees the work of other lower level abatement positions within the unit by distributing daily work assignments, reviewing completed work, resolving priority conflicts, ensuring proper equipment and materials are available, and providing training.

This description was used to reclassify Grievant as a Lead Asbestos Abatement Worker on January

5, 1995. (See footnote 1) He did not submit any updated or revised description in support of his allegation that he has become a supervisor.

Grievant alleges that some of his responsibilities have increased since Jack McLaughlin's death. He spends more time keeping a daily log of asbestos abatement work, which used to be done by Mr. McLaughlin. Grievant also alleges that he has taken over the responsibility of handling thedetails of each job, including prioritizing work, assigning workers, and obtaining equipment. However, he admits that he has no authority to hire, fire or discipline employees. Documents were presented at level four showing that Grievant has initialed time sheets for other workers (although not on a regular basis), which is a duty he did not perform when Mr. McLaughlin was supervisor. Grievant testified he was told to do this occasionally by Bob Ware, who became Assistant Director of Craft Maintenance in August of 1995. (See footnote 2) Mr. Ware testified at level four that he did, indeed, request that Grievant perform this function, but he also stated that, since assuming his duties, he has had final supervisory authority over the asbestos shop employees, not Grievant. (See footnote 3)

Besides his own, the only supportive testimony provided by Grievant was that of Homer Hart at level two and Terry McManis, a union representative who assisted Grievant at the lower grievance levels, who testified at level four. Mr. Hart testified that he does not personally feel that he is qualified to be the supervisor over asbestos abatement, because he has no asbestos certification. He believes that the supervisor should have such certification, and he also stated that he relies upon the grievant to make sure that jobs are being done properly and legally. Mr. Hart did not, however, state whether or not he believed that Grievant had been performing the supervisory duties and/or had been working out of his classification. Mr. McManis' testimony was of little help; he stated that he believes Grievant is working out of his classification, although he has not reviewed the job descriptions for the two titles. He also stated that Grievant does not hire, fire, or perform variousother supervisory duties, because he does not have the authority to do so as a lead worker. Neither of these two witnesses gave any concrete facts to support Grievant's allegations of misclassification. In fact, Mr. McManis' testimony lends support to the conclusion that Mr. Stafford does not perform supervisory duties, because they are not part of the lead worker job description, so he is not misclassified.

Respondent's witnesses concur that Grievant is not working outside of his job description. Paul Walden, interim Director of Physical Plant, and Mr. Ware both stated unequivocally that Grievant's duties coordinating and overseeing asbestos abatement jobs are part of his responsibilities as a lead

worker. In order to be considered a supervisor, he would have the additional duties of hiring, firing, discipline, and general administrative responsibility of the department.

It is logical that a lead worker would have the responsibility of prioritizing, coordinating and supervising daily jobs of asbestos abatement, which is included in Grievant's December 22, 1994, job description of his lead responsibilities. Based upon the information available, Grievant has not demonstrated that he would be more appropriately classified as a supervisor.

It should also be noted that, as of January 1, 1994, all higher education classified positions were subject to the "Mercer" (See footnote 4) reclassification system, which uses a "point factor methodology" whereby the components of each job are evaluated using a numerical system. 128 C.S.R. 62. Under this classification system, an employee is not likely to meet his burden of proof merely by showing that the grievant's job duties better fit one job description than another, because the Mercerclassification system does not use "whole job comparison." It is largely a "quantitative" system, in which the components of each job are evaluated separately by applying the point factor methodology contained in the Job Evaluation Plan. See Burke, supra, and Creel v. Bd. of Trustees, 94-MBOT-458 (March 31, 1997). The parties did not argue or introduce any evidence challenging evaluation of Grievant's duties under the Mercer system, which would be essential to proving that Grievant should not be classified in the job title he currently holds.

In addition to the foregoing discussion, the following legal conclusions 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. W.Va. Code § 18-29-6.

2. Higher education classification decisions are based upon review of the position description of the employee alleging misclassification. 128 C.S.R. 62 § 10. In addition, these classifications are subject to review under the Mercer system point factor methodology. Burke v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995).

3. Grievant did not prove by a preponderance of the evidence that he has been performing the duties of a supervisor, rather than Asbestos Abatement Worker-Lead, since July 12, 1995.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia County, 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: April 30, 1997 _____ **V.**

DENISE MANNING

Administrative Law Judge

Footnote: 1

The undersigned assumes from all indications in the record that, prior to January 5, 1995, Grievant was a regular Asbestos Abatement Worker with no lead specification.

Footnote: 2

For a period of several months, Mr. Ware apparently functioned in a dual capacity as Assistant Director and as asbestos shop supervisor after Mr. McLaughlin's death.

Footnote: 3

Homer Hart, who became supervisor of the Asbestos/Paint Shop in April of 1996, did not testify at level four. It is unclear what the formal working relationship is between Mr. Hart and Mr. Ware, but the testimony indicates somewhat of an overlap in their supervisory duties regarding the grievant.

Footnote: 4

The reader is referred to Burke v. Bd. of Directors, Fairmont State College, Docket No. 94- MBOD-349 (Aug. 8, 1995), for a discussion of the background of the Mercer reclassification project, the procedural history of the Mercer grievances, and the definitions of various terms of art specific to the Mercer reclassification.