GEORGE HALL, et al.,

Grievants,

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

BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Procedural History

George Hall, Delbert Helmick, John Hardesty, David Core, David Sturms, James Nastassi and Danny Murray each originally filed grievances on or about April 16, 1996 alleging that they had not been given appropriate credit for certain certifications required to perform their job duties, for 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 to level two for decision on the merits. No additional decisions were rendered at that level. Respondent, through its counsel, on September 20, 1996, submitted a “Decision/Response to Order of Remand” wherein it stated that positions requiring certification were being reviewed by the Job Evaluation Committee (“JEC”), (See footnote 1) and that reclassifications would be implemented for certain positions, effective January 1, 1997. All of the aforementioned grievants then appealed to level four, pursuant to the provisions of W.Va. Code § 18-29-4. These grievances were consolidated by Order dated November22, 1996, after a determination by Administrative Law Judge V. Denise Manning 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 their EPA certifications and a corresponding increase in their pay grade, effective January 1, 1997, leaving no further matters for adjudication by this Grievance Board. After hearing arguments of the parties during a conference held on January 17, 1997, ALJ Manning 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 ALJ Manning believed the matter was mature for decision.

On March 19, 1997, a decision was issued by ALJ Manning granting the grievance of Grievants Hall, Helmick, Hardesty, Nastassi and Murray. Respondent was directed to issue back pay to those grievants, effective April 16, 1996, in the amount of the difference between the pay they received under prior classifications and the pay they would have received in their January 1, 1997 reclassifications. ALJ Manning denied the grievances of Grievants Core and Sturms upon determining that certification was not required for their jobs. (See footnote 2)

Respondent appealed the decision issued on March 19, 1997, by ALJ Manning, granting the grievances of Grievants Hall, Hardesty, Helmick, Murray and Nastassi to the Circuit Court of Monongalia County. Respondent's primary issue on appeal was its contention that the “hearing” at level four conducted on January 17, 1997, was not an actual “hearing,” but merely a “status conference” to discuss motions and procedures in preparation for the level four hearing, and, therefore, Respondent did not have a full opportunity to present its case. Grievants, on the other hand,maintained that during the “status conference” the parties agreed to waive the Level IV hearing and submit the matter on the record created to date. The meeting of January 17, 1997, was not recorded by any means. On August 25, 1997, the Circuit Court of Monongalia County “ORDERED that the decision of the Administrative Law Judge dated March 19, 1997, is VACATED and that this matter is REMANDED to the Administrative Law Judge for a Level IV Grievance Hearing.” The Court further “ORDERED that the parties submit this matter to mediation pursuant to the provisions of West Virginia Code § 18-29-10 before the Level IV Grievance Hearing.” The matter was remanded to the Grievance Board per the Court's Order.

After an unsuccessful attempt at mediation by Administrative Law Judge Sue Keller, the matter

was transferred to Administrative Law Judge Jeffrey S. Weatherholt for decision. A pre-hearing conference was held on December 10, 1997, at which time it was agreed there were no outstanding motions which needed to be decided, and the matter could proceed for hearing and subsequent decision. The level four hearing was held before ALJ Weatherholt on January 29, 1998 (See footnote 3) . On May 5, 1998, the matter was transferred for administrative reasons to the undersigned ALJ for decision.

Discussion

These grievances have now been debated for more than two years and a rather voluminous record has been created. However, after extensively reviewing the entire record developed below and the additional submissions introduced at level four, including listening to the recordings of the December 10, 1997 pre-hearing conference and the January 29, 1998 level four hearing, the remaining issue is still whether or not the Grievants were “misclassified” as of April 16, 1996, and, therefore, should have been upgraded from pay grade 12 to pay grade 13 effective April 16, 1996,instead of January 1, 1997, and, subsequently, should receive full back pay for the period between April 16, 1996, and December 31, 1996. Respondent's position is its decision to pay the employees differential pay for the actual hours they worked in the areas in which certification was required from April 16, 1996, until the Grievants were reclassified on January 1, 1997, is sufficient and all that is required.

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; Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8,1995). Whether a grievant is properly classified is substantially a factual determination that must be made on a case-by-case basis. Burke, supra. See Snider v. W.Va. Bureau of Environment, Docket No. 95-DEP- 306 (Sept. 29, 1995).

As a matter of background for this case, the “Mercer” classification system under which the State College and University Systems of West Virginia (“SCUSWV”) (See footnote 4) now operates was 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.

Grievants have sufficiently proven they were performing jobs which required EPA certification during the April 16, 1996 through December 31, 1996 time period. Respondent has since recognized this and added, effective January1, 1997, the requirement to their new classifications. Further, Grievants have proven throughout all levels of this proceeding, and Respondent does not dispute, that their job duties have essentially not changed. All have needed and have utilized their EPA certifications in the course of their normal, everyday responsibilities (see transcripts from Level II for “Hall,” “Hardesty,” “Core, et al.,”and the recordings from the Level IV hearing) from before April 16, 1996, through January 1, 1997. Accordingly, they filed these grievances, requesting that they be given credit under the Mercer point factor methodology for these required certifications, which would put them in pay grade 13. Although this was ultimately done, as is reflected by documentation provided by Respondent and at the level four hearing by the testimony of Teresa Crawford, a Senior Compensation Analyst in the Department of Human Resources at West Virginia University, the JEC did not elect to “reclassify” Grievants until January 1, 1997, without back pay. Although the Respondent was aware of the potential “misclassification” in April 1996, no changes were made until approximately eight months later. 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” (at a higher rate of pay than normal salary) during the time those duties were actually being performed (See footnote 6). Respondent maintains that Grievants were adequately compensated for the work they did in the areas requiring certification, are not entitled to back pay, and any payment of back pay would create a windfall for the Grievants.

In her original decision last March, ALJ Manning determined that, under the SCUSWV personnel regulations, which would apply in the instant matter, there were only two possible justifications for Respondent's position. Either the times prior to January 1, 1997, when Grievants utilized their EPA certifications were “interim responsibilities” not required in their everyday duties, or the “reclassification” of Grievants on January 1, 1997, was an “upgrade” caused by a substantial change in each Grievant's normal duties and responsibilities, requiring their placement 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).

After reviewing all the evidence presented in this case, the undersigned ALJ can find no reason to disagree with ALJ Manning's original assessment, although no deference was given, however, to any conclusions or findings made in the original decision. Grievants have proven by a preponderance of the evidence that their normal, everyday duties required them to possess the EPA certification in asbestos or Freon/refrigeration and that no change or increase in their responsibilities has occurred since at least April 16, 1996. Likewise, it has been shown that these duties were not temporary. Respondent has failed to produce any evidence to rebut Grievants' contentions effectively. In fact, Respondent's and the JEC's actions actually seem to support Grievants' position. The evidence clearly indicates thatGrievants' existing responsibilities at the time their positions were reviewed (See footnote 7) led to the JEC's conclusion that certification was required and that, accordingly, Grievants

were misclassified.

It is clear that Respondent was aware Grievants were “misclassified” as of April 1996. 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 is undisputed evidence that Grievants were performing the duties which prompted the “upgrades” prior to 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. He was also directed, either before or after January 1, 1997, to provide differential pay for April 16, 1996, through December 31, 1996, for the periods these employees used their certifications. Because of their performance of duties requiring the EPA certification from April 16, 1996 until December 31, 1996, it is clear to this ALJ that Grievants were misclassified during this time.

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

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 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.

4. Grievant Nastassi was 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.

5. 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.

6. Grievants Hall, 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, and prior to January 1, 1997, during the regular course of their required job duties.

7. Grievants' positions were among several reviewed by the JEC and West Virginia University

between April 16, 1996, and December 31, 1996. Pursuant to this review, Grievants were reclassified, effective January 1, 1997, into new and existing job titles as set forth in Findings 2 through 5, above. The reclassifications were accomplished after the JEC determined that these individuals were required to have state and/or federal certifications.

8. The job titles “Certified Skilled Craft Specialist” and “Certified Trades Worker” did not exist before January 1, 1997. They 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.

9. The job titles “Asbestos Abatement Worker”, “Heating, Ventilation, and Air Conditioning Mechanic,” and “Refrigeration Technician” were upgraded effective April 16, 1996.

10. For the period of April 16, 1996, through December 31, 1996, the JEC required west Virginia University to pay Grievants “differential pay” for all times during that period when they performed duties requiring certification.

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, 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/refrigeration.

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).

Accordingly, this grievance is **GRANTED** with respect to Grievants Hall, Hardesty, Murray and Nastassi, and Respondent is directed to issue back pay to these Grievants, for the time period from April 16, 1996, to December 31, 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, minus any offset for payments of differential pay during this time. In addition, Respondent is ordered to pay Grievants prejudgment interest in accordance with W.Va. Code § 56-6-31. 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: August 25, 1998 _____

RANDY K. MILLER

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 Sturms and Core chose not to pursue their grievances any further after they were denied by ALJ Manning and are not a part of this decision.

Footnote: 3

Only Grievants Hall, Hardesty, Nastassi and Murray remained from the original group of grievants. ALJ Weatherholt

was advised at the January 29, 1998 hearing that Delbert Helmick, one of the original grievants, was satisfied with the relief granted him since the original decision of ALJ Manning and he no longer wished to pursue his grievance. Grievants Hall and Nastassi were present at the level four hearing. Hardesty and Murray did not appear in person at the level four hearing, but expressed their desire to continue with their grievances through their representatives, David Walden and Terry McManis, who were present for the hearing.

Footnote: 4

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

Footnote: 5

This Board's decision in Burke v. Bd. of Directors, 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

The amount of the differential pay received and/or owed, however, is disputed, with at least one Grievant maintaining he did not believe he received the full amount of differential pay owed him.

Footnote: 7

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 the 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.