HAROLD CREEL,

Grievant,

v v.

Docket No. 99-BOT-119

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Harold Creel, employed by the Board of Trustees as a Lead Plumber at West Virginia University (Respondent), filed a level one grievance on January 6, 1999, in which he alleged a violation of the Memorandum of Accord when Respondent failed to award him differential pay for acting as a temporary supervisor. Grievant requests the differential pay for December 29 and 30, 1998. No action was taken at level one because Guy Varchetto, Assistant Director at Health Sciences Maintenance Engineering, lacked authority to award the relief. Following an evidentiary hearing the grievance was denied at level two, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). Appeal was made to level four on March 19, 1999. A level four hearing was conducted in the Grievance Board's Morgantown office on May 25, 1999, at which time Grievant was represented by Diane Parker of L.I.U.N.A., Local 814, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law filed by both parties on June 22, 1999.

The facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by Respondent for approximately thirteen years and has been assigned as a Lead Plumber at Health Sciences Maintenance Engineering, paygrade 14, at all times pertinent to this matter.

2. On December 29 and 30, 1998, Grievant filled in for his supervisor, who is compensated at

paygrade 17.

3. On August 31, 1982, Local 814 and Respondent entered into an agreement entitled "Memorandum of Accord" (Memorandum). The stated purpose of the Memorandum was to maintain the "existing harmonious relationship between the University, the Union, and the University employees represented by the Union . . . ", but was not to be construed as a collective bargaining agreement. The agreement addresses a number of employment issues, including temporary assignments, and remains in effect at the present time.

4. Section 15 of the Memorandum , "Temporary Assignments", states in pertinent part:
Employees in any job classification are expected to perform any duties which are assigned. . . . When an employee in a lower classification is transferred temporarily to a higher classification he or she shall receive the higher rate of pay for the days worked in that classification.

5. October 25, 1993, Respondent's Title 128, Series 62 "Personnel Administration", became effective. Section 2.9 of this Legislative Rule addresses "Interim Responsibilities" 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 temporaryreassignment shall normally be for no less than four (4) consecutive weeks and no more than twelve (12) 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. If the temporary reassignment of responsibilities meets the test for a temporary upgrade or promotion under this rule, the affected employee shall have his/her base salary adjusted upwards consistent with a promotion or upgrade under this rule. At the end of the temporary reassignment the affected employee shall have his/her salary reduced to its original level.

5. As a result of a statewide reclassification process commonly referred to as the Mercer reclassification after the individual who developed the plan, Grievant was classified as a Plumber - Lead, effective January 1, 1994. The Position Information Questionnaire (PIQ) completed by Grievant and approved by Respondent, states that the general purpose of his job, including that he "shall fill in as acting supervisor in the absence of the Trade Supervisor."

6. Respondent has not compensated any employee who has worked in a higher classification for

a period of less than four weeks since 1994.

Discussion

Grievant argues that as a member of Local 814, he enjoys an exclusive status provided by the Memorandum, including differential pay for every day he fills in for the supervisor. Grievant asserts that his interpretation of the Memorandum and Series 62 is consistent because, Series 62 states that the salary change normally is not implementedfor periods of less than four weeks, but does not specifically prohibit it for shorter periods of time. Further, Grievant notes, that individuals who are appointed to interim promotions receive the higher salary the first day of their appointment. Considered together, Grievant asserts that he is entitled to the higher salary for the two days, and that the payment will not be in violation of Series 62.

Not surprisingly, Respondent views the situation differently. Grievant is not entitled to the higher pay for the two days, Respondent asserts, because the provisions of Series 62 require an employee to perform the duties of the higher classification for a specific period of time, and Grievant did not meet the minimum standard. Second, Respondent argues that Grievant is required by his PIQ to fill in as acting supervisor, that this factor was considered when assigning his job title and, therefore, his performance of the work has already been fully valued.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

While accepting that the Memorandum provided certain “rights and privileges” to employees who were members of Local 814, it also specifically provides that “Board of Regents' classification guidelines have to be followed in making pay grade salary changes. . . .” (See footnote 1) While the language of Series 62 is not mandatory, but provides that only interim promotions shall normally be for no less than four consecutive weeks, the undersigned is not persuaded by the evidence that the Memorandum would guarantee Local 814 employees such a benefit.

Finally, the undersigned agrees with Grievant that the Memorandum and Series 62 are consistent regarding the issue, but only to a limited extent. Both provide for an employee to receive the higher salary when he is temporarily performing the duties of a higher classification. However, Series 62

includes more specific criteria as to which situations warrant the higher pay, while the Memorandum provides no guidelines. In general, more specific language is controlling over general language in policies such as these.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. 2. Grievant failed to prove that he is entitled to additional compensation for two days he filled in as acting supervisor.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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: July 2, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Prior to the creation of the Board of Trustees and Board of Directors, the Board of Regents was the governing body for institutions of higher education in West Virginia.