BILL SANSON,

Grievant,

v v.

Docket No. 98-BOT-455

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Bill Sanson, employed by the Board of Trustees (Respondent) as a Trades Worker at West Virginia University (WVU), filed a level one grievance on July 16, 1997, in which he stated that he was required by his job description to maintain asbestos abatement certification. Based upon this job requirement, he requested either an upgrade, or the removal of the requirement from his job description. The grievance was granted in part, and denied in part, at level one, when Jeff Miller, Assistant Director for Housing Facilities in the Department of Housing and Residence Life, agreed to remove the requirement from Grievant's job description. Grievant appealed to level two where the matter was denied on October 29, 1998. Grievant waived consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the matter to level four on November 12, 1998. An evidentiary hearing was conducted on March 30, 1999, at which time Grievant was represented by Diane Ridgway, of LIUNA, Local 814, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision on May 14, 1999, the due date for Respondent's reply to Grievant's proposed findings of fact and conclusions of law. (See footnote 1) The facts of this matter are undisputed and may be set forth as follows.

Findings of Fact

1. Grievant has been employed by Respondent as a Trades Worker in the WVU Department of Housing and Residence Life at all times pertinent to this grievance.

2. Since at least 1991, Grievant's job description required that he hold an asbestos abatement certification and the ability to perform such work.

3. Effective January 1994, Grievant's job title became Trades Worker as part of West Virginia

higher education's new classification system, commonly referred to as the Mercer plan after the name of the individual who had developed it.

4. The position of Trades Worker is compensated at Pay Grade 12 under the Mercer plan, and Grievant has continuously been compensated at that level since January 1994.

5. In 1996, the higher education Job Evaluation Committee (JEC) reviewed the classification determinations of those positions requiring asbestos abatement certifications. The JEC determined that the classification of those employees required to hold such certifications would be adjusted to Certified Trades Worker, Pay Grade 13, effective January 1, 1997.

6. Based upon an evaluation of operational need, Grievant's position was not identified as one required to retain an asbestos abatement certification. Grievant was advised of this decision in either December 1996, or early January 1997. 7. Grievant was not required by Respondent to perform any asbestos abatement work after January 1, 1997.

8. In January 1997, Grievant completed a Quantitative Fit Testing scheduled by WVU. This procedure involves his respirator and is required for Grievant to maintain his asbestos abatement certification.

9. By memorandum dated April 18, 1997, Grievant advised Mr. Miller that in December 1996, he had been told that two workers would be upgraded for asbestos abatement. Grievant continued, that Wayne Helmick was designated to receive one of the upgrades, but that Grievant had not yet received his.

10. A revised position description for Trades Worker, Pay Grade 12, which did not require the incumbent hold asbestos abatement certification, was completed and signed by Grievant on August 26, 1997.

Discussion

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.

At level four Grievant amended his requested relief to backpay for the period of January 1, 1997, through August 25, 1997. He argues that the requested relief is proper because the certification was

a condition of his employment until the revised job descriptionwas signed. Grievant concedes that he did not work on any asbestos projects during the time period in question, but asserts that he attended the respirator training in January at Respondent's request, and that he was ready and able to perform the work, if asked. On cross-examination, Grievant admitted that he was advised in December 1996 that the certification would no longer be needed if the individual was not assigned that type of work, and he was never told that he must maintain the certification.

It appears that Grievant had an expectation of an upgrade based upon a representation that two individuals would be assigned the asbestos work. However, there is no evidence that Respondent's administrators acted in a manner to create the belief that Grievant would be the second individual selected for upgrade. On the contrary, Mr. Miller testified that upon further consideration, it was determined that only one asbestos worker would be needed. Respondent did schedule Grievant for his Quantitative Fit Testing, but there is no evidence that his participation was required. It is unfortunate that a misunderstanding has apparently led to this matter; however, Grievant was not upgraded in January 1997, he was verbally advised that he would no longer be required to maintain asbestos certification, and was not required to perform asbestos assignments after January 1, 1997. While Respondent's rather prolonged delay in revising the job description may have increased Grievant's concern regarding his status, he is not entitled to any backpay for the period of January 1 through August 25, 1997.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following 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 has failed to prove that he is entitled to backpay for a period of time in which his job description had not been revised to reflect that asbestos abatement certification was no longer required of the Trades Worker position.

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. Any 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 tosuch appeal and should not be so named. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 20, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Proposed findings and conclusions were to be filed on or before April 16, 1999. Respondent's submission was received on April 20, 1999. Ms. Parker represented that she timely mailed Grievant's proposals; however, they were not received by the undersigned until April 29, 1999. Respondent objected to the late filing, and was givenuntil May 14, 1999, to file a response.