BLANCHE RYBECK,

Grievant,

v. **Docket No. 02-HEPC-224**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Blanche Rybeck, employed by West Virginia University (WVU or Respondent) as a Research Assistant, filed a level one grievance on March 28, 2002, after her salary was adjusted to reflect a prorating of years of service. For relief, she requests reinstatement of her total years of experience. The grievance evaluators at levels one and two both lacked authority to grant the requested relief. The grievance was denied following an evidentiary hearing at level three, and the matter advanced to level four on August 13, 2002. A level four hearing was conducted on October 17, 2002, at which time Grievant appeared pro se, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. The grievance became mature for decision upon receipt of post-hearing submissions filed by the parties on or before November 18, 2002.

The essential facts of this matter are not in dispute, and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant was employed by WVU in December 1998 as a Research Assistant II in the School of Pharmacy. This appointment was for twenty-four hours per week, or .64 Full Time Employee (FTE), and extends twelve months per year. Grievant was previously employed by WVU as a full-time employee from 1985-1988. 2. A full-time, twelve month employee at WVU works 37 ½ hours per week or 1950 hours per year. A full-time ninth month employee works 1463 hours per year. Grievant works 1248 hours per year, and her salary and benefits are prorated to reflect the hours she works.

3. The Notice of Appointment/Compensation issued by WVU for 1999-2000 identified Grievant

as having four years of service for placement on the salary schedule and determination of annual increment (longevity) pay.

3. The Notice of Appointment/Compensation issued by WVU for 2000-2001 identified Grievant as having five years of service for determination of salary and annual increment pay.

4. In response to an inquiry from School of Pharmacy Dean George R. Spratto, Cynthia S. Curry, Director of the Classification and Compensation Division of the WVU Department of Human Resources, advised that Grievant was to be credited for five years of service for placement on the salary schedule, and four years of service for determination of her annual increment.

5. As a result of this review, Human Resources calculated that Grievant had been over-compensated since 1999 for a total amount of approximately $2,300.00.

6. The Notice of Classified Employee Appointment for FY 2001-2002, issued July 2001, provided that Grievant had acquired four years of service for annual increment pay, and five years of service for placement on the salary schedule. Human Resources also verified that Grievant's service time for purposes of annual leave accrual was six years and two months.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A- 6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden of proof. Hammer, supra.

Grievant asserts that WVU is misapplying W. Va. Code § 18B-9-2 and Higher Education Procedural Rule, Title 133, Series 8, Section 2.1.1, by prorating her service twice. WVU argues that it is prorating less than full-time employees' years of service in compliance with the applicable Code section and regulations.

HEPC Procedural Rule, Title 133, Series 8, Section 2.1 provides as follows:

This subsection defines the different types of employment that institutions may use and the status

under the classification program and for benefits.

2.1.1 Full-Time Regular Employee (FTR). Any employee in a classified position created to last a minimum of nine months of a twelve month period and in which such employee is expected to work no less than 1, 040 hours during said period. The full- time equivalent (FTE) of such a position must be reported at no less than .53 FTE. Such an employee is covered under the classification program set out by this rule and is eligible for all applicable benefits of a full-time regular classified employee, subject to the qualifying conditions of each benefit. Such benefits shall be prorated in relation to a 1.00 FTE. Length of service as a full-time regular employee with the State of West Virginia shall be credited toward initial placement on the salaryschedule which may be subsequently enacted by the Legislature or adopted by the governing boards.

2.14 Base salary. The amount of salary paid annually to an employee, excluding any annual increment earned pursuant to W. Va. Code § 18B-9-5 or § 5-5-2. Total salary is base salary plus any increment earned.

2.16 Longevity. The total number of years employed at state institutions of higher education and other agencies of state government in West Virginia for purposes of determining placement on any salary schedule which may be subsequently enacted by the Legislature or adopted by the governing boards at the time of implementation of the classification program authorized by this rule.

W. Va. Code § 18B-9-2(j) defines “years of experience” as:

the number of years a person has been an employee of the state of West Virginia and refers to the horizontal column heading of the salary schedule established in section three of this article. For the purpose of placement on the salary schedule, employment for nine months or more equals one year of experience, but no classified employee may accrue more than one year of experience during any given fiscal year. Employment for less than full time or less than nine months during any fiscal year shall be prorated. In accordance with rules established by the commission, a classified employee may be granted additional years of experience not to exceed the actual number of years of prior, relevant work or experience at accredited institutions of higher education other than state institutions of higher education.

At level four, Ms. Curry explained that years of service for salary purposes, seniority for

retirement, and longevity for computing annual increment, are all various “tracks,” which may differ for any individual employee. A memorandum to Grievant dated February 28, 2002, from Ginger Burns, Human Resources Assistant, explained the situation as follows:

There are times when the Longevity years of service is less than the Salary Schedule step. Longevity counts actual months worked where as [sic] Salary Schedule counts actual months worked up to eight (8) months then it gives one (1)year credit for months worked between nine (9) months to twelve (12) months. Both longevity and Salary Schedule years of service calculations are prorated according to the employee's full time equivilencey [sic](FTE).

Thus Grievant's proposed step on Salary schedule and proposed longevity information was 4.90. However, the salary schedule step was rounded up to 5 years while the longevity information remained at 4.90 years. Since an entire year must be earned before it is counted, Grievant remained at four years for increment purposes.

Grievant's claim that she is a full-time, regular employee is correct, but limited to a determination of whether she is entitled to benefits. Grievant works more than the 1,040 hours, and more than nine months per year. She is also employed at more than .53 FTE. Therefore, she is entitled to all applicable benefits of a full-time, regular, classified, employee, subject to prorating. This status as a full-time regular employee is not applicable to Grievant when determining seniority or years of service for other purposes.

Grievant's perception that she is subject to a second prorating is inaccurate. Grievant does not dispute that her salary and earned leave are correctly reduced to reflect her less than full-time work week. Although Grievant works a full calendar year, her years of experience for salary and annual increment purposes must also reflect the fact that she works twenty-four hours a week.

Grievant additionally notes that prorating her years of experience will have a significant effect over a period of years in that her earnings will be lower than other employees classified as Research Assistant II. Ms. Curry agreed with Grievant's analysis of future earnings, but explained that over a period of time a 37 ½ hours a week employee will work many more hours than a 24 hour a week employee. The various computations of seniority, or years of experience, for salary and annual increment purposes is certainly complicated to the layman; however, the evidence shows that accrual is based upon hours worked. That is, an employee who works 1248 hours a year does not earn the same salary, or accrue the same amount of seniority or years of experience as an employee who

works 1950 hours a year. This is not a double prorating, but rather accrual based upon hours worked.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990).

2. W. Va. Code § 18B-9-2 requires that employment for less than full time or less than nine months during any fiscal year shall be prorated when determining an employee's years of experience.

3. Grievant failed to prove that Respondent has improperly calculated her years of experience for salary purposes under the applicable law and regulations.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). 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. However, the appealing party is required by W. Va. Code §29-5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: November 25, 2002 _____

Sue Keller

Senior Administrative Law Judge