CLIFFORD PRIEST, et al.,

Grievants,

v. **Docket No. 01-HE-240**

HIGHER EDUCATION INTERIM GOVERNING BOARD/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Clifford Priest, George C. Corder, Spurgeon Holmes, Dewey D. Molisee, James A. Ridgway, James B. Root, and Ralph E. Smith (Grievants), employed by West Virginia University (WVU or Respondent) as Trades Workers in the Maintenance Engineering Department of the Health Sciences Center, filed individual level one grievances on February 2, 2001, in which they alleged:

In lieu of the recent rash of upgrades/promotions, we the above signed strongly believe we are being discriminated against by not even being considered for upgrades and/or promotions.

1. The Preventive Maintance [sic] Shop is the only multi- skilled, multi-craft unit at H.S.C.

2. We are the only Unit that the workload (both scope and duties) has increased without compensation.

3. We are one of the few Units without Lead Personnel.

At Grievants' request, the grievances were consolidated for review. Guy R. Varchetto, Assistant Director of Health Sciences Maintenance Engineering Department, that he lacked authority to grant the requested relief at level one. Following an evidentiary hearing, the grievance was denied at level two, and appeal to level four was made on May 7, 2001. Following a delay due to a misunderstanding as to how Grievants wished to proceed, the grievance was submitted for decision on the lower-level record supplemented by proposed findings of fact and conclusions of law. The matter became mature for decision upon receipt of the proposals on or before March 18, 2002. At level four, Grievants elected to represent themselves, and Respondent was represented by Assistant

Attorney General Samuel R. Spatafore.

The following facts have been derived from the level two record.

Findings of Fact

1. Grievants Corder, Holmes, Ridgway, and Root were in positions classified as Trades Worker, pay grade 12, upon implementation of the “Mercer” higher education personnel classification system, January 1, 1994. They did not challenge their classification in 1994, or any time thereafter until the current matter was filed in February 2001.

2. Grievant Smith transferred to the position of Trades Worker effective November 1, 1994. Grievant Smith has not previously challenged his classification.

3. Grievant Priest was promoted to the position of Trades Worker effective July 12, 1998, and Grievant Molisee was promoted to Trades Worker effective October 1, 1999. Grievants Preist and Molisee have not challenged their classification prior to the filing of this matter.

Discussion

Initially, WVU contends this grievance is untimely because the grievance was not filed or appealed within the time limits contained in W. Va. Code § 18-29-4(a). Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't. of Health and Human Resources, Docket No. 98- HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP- 484 (Mar. 6, 1998). Should the employer demonstrate that a grievance has not been timely filed, the employees may demonstrate a proper basis to excuse their failure to file in a timely manner. Higginbotham v. W. Va. Dep't. of Public Safety, Docket No. 97-DPS- 018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

WVU argues that Grievants admit they filed this matter upon learning of the success of fellow workers in Board of Trustees/West Virginia University v. Creel, Civil Action No. 97-AA-63 (Mar. 8, 2000), ref'd, Supreme Court No. 001759 (Oct. 5, 2000), even though they did not file their own Mercer grievances. Further, Grievants claim to have been misclassified since 1999, yet waited two

years to grieve. Grievants offer no response to this issue. Upon implementation of the Mercer classification system in 1994, a time limit was placed on grieving the initial classifications assigned under the plan. Respondent's Policy 62, set forth in §128-62-18 provides in pertinent part:

18.1. An employee may seek a review of his/her initial classification under the new program implemented pursuant to this rule and may appeal such initial classification through the procedures of W. Va. Code §18-29 after completing such review. Such review or appeal shall be governed by the provisions of this rule and to the extent these provisions are inconsistent with W. Va. Code §18B-9-7 or W. Va. Code §18B-9-4, those code provisions are deemed null and void pursuant to the authorization contained in W.Va Code 18B-9-4 (c). If an employee does not first seek a review of his/her initial classification through the internal procedures set out herein, they shall be prohibited from grieving that classification under W. Va. Code 18-29.

18.2. An employee may seek a review of his/her initial classification, job title or pay grade by filing a request for review form after formal notification of his/her title and pay grade under the new program, but no later than January 31, 1994.

Thus, Grievants Corder, Holmes, Ridgway and Root, who were classified as Trades Workers in January 1994, and did not challenge their classification prior to January 31, 1994, are now barred from claiming misclassification since 1994. These Grievants may; however, now file claims alleging present misclassification if their duties have changed in a meaningful, identifiable manner since January 1, 1994. Grievants Priest, Smith, and Molisee may also challenge their present classification, since they have previously not done so, if their duties have changed since they were assigned as Trades Workers. In all cases, if a claim of misclassification is proven, relief will be limited to fifteen days prior to the date the grievance was filed. See Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). Respondent also asserts that Grievants failed to timely file a level two appeal after Guy Varchetto, Assistant Director of the WVU Health Sciences Maintenance Engineering Department, issued a level one decision on February 14, 2001. Grievants did not appeal this decision until March 12, 2001. W. Va. Code § 18-29-3(b) requires that “[w]ithin five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator . . . .” Grievants did not file a level two appeal within five days; however, the issue was not raised at the level two hearing, and the hearing evaluator specifically declined to rule it

untimely in her level two decision. Therefore, it is determined that Respondent has waived the issue of whether the grievance was timely filed at level two, and the matter will not be considered at level four.

The burden of proof in misclassification grievances is on the grievants to prove by a preponderance of the evidence that they are not properly classified. 156 C.S.R. 1 § 4.21 (2000); W. Va. Code § 18-29-6. Burke, et al., v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievants asserting misclassification must identify the job they feel they are performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttal or analysis. Rush v. Bd. of Directors/Fairmont State College, Docket No. 97-BOD-369 (Apr. 3, 1998); Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991).

Higher education grievants are not likely to meet their burden of proof merely by showing that their job duties better fit one job description than another, because the Mercer classification system does not use “whole job comparison”. The Mercer classification system is largely a “quantitative” system, in which the components of each job are evaluated using the point factor methodology. Therefore, the focus in classificationgrievances is upon the point factors the grievants are challenging. Grievants may challenge any combination of point factor degree levels, so long as they clearly identify the point factor degree levels they are challenging, and this challenge is consistent with the relief sought. See Jessen, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-1059 (Oct. 26, 1995). Finally, whether grievants are properly classified is almost entirely a factual determination. As such, the JEC's determination of degree levels and classification will be given great weight unless clearly erroneous. Thus, higher education employees challenging their classification will have to overcome a substantial obstacle to establish they are misclassified.

Grievants assert that their duties and responsibilities have evolved and expanded to the point that the classification Trades Worker is no longer applicable. They opine that the Mercer classification system does not include a title which accurately defines their work, and suggest a new classification title of Building Maintenance Technician be implemented for them at pay grade 14. Grievants additionally request that Lead workers be designated at pay grade 16.

Grievants raised many issues at level two, some of which relate to point factor degree levels in the areas of Scope, Direct and Indirect Supervision, and Working Conditions. Unfortunately, Grievants did not directly address the point factors, and did not provide the degree level which they

were seeking in those factors. Neither did they prove through a point factor analysis, that any of them should be classified as Lead workers. Because the claims asserted are so vague, and because Grievants failed to address the point factors upon which classification is based, it is impossible to determine that they are misclassified, or work in a Lead position. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. Higher education employees must demonstrate that their duties have changed in a meaningful, identifiable manner since January 1, 1994, in order to pursue a grievance over their classification, as grievants were required to grieve their initial classification under the Mercer system by certain deadlines in 1994. Rush v. Bd. of Directors/Fairmont State College, Docket No. 97-BOD-369 (Apr. 3, 1998); See Hardy v. Bd. of Directors/W. Va. Institute of Technology, Docket No. 94-MBOD-963 (Dec. 21, 1995).

2. Grievants employed in any classification after January 1994, may challenge their classification, but only once, if their duties have changed in a meaningful, identifiable manner.

3. The burden of proof in a misclassification grievance is on the grievants to prove by a preponderance of the evidence that they are not properly classified. The grievants asserting misclassification must identify the job they feel they are performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttal or analysis. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991). 4. Grievants failed to meet their burden of proof by demonstrating that their duties have changed in a meaningful, identifiable manner. Grievants further failed to identify a Job Title which more accurately reflects their work, or that the JEC's determination of degree levels assigned to the individual point factors for their positions was incorrect . 5. The Job Evaluation Committee's interpretation and explanation of point factors will be given great weight unless clearly wrong, where the proper classification of a grievant is almost entirely a factual determination. See Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995); Burke, et al., v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995).

6. Grievants have failed to prove that the Job Evaluation Committee's decision to assign them the classification of Trades Worker, pay grade 12, was clearly wrong or arbitrary and capricious.

Accordingly, this 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. 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: April 23, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE