**JAMES A. WILSON,**

**Grievant,**

**v. Docket No. 01-HE-392**

**INTERIM GOVERNING BOARD/**

**WEST VIRGINIA UNIVERSITY,**

**Respondent.**

## D E C I S I O N

**James A. Wilson (Grievant) employed by West Virginia University (Respondent), filed a level one grievance on February 28, 2001, in which he alleged, "I am currently classified as a Certified Skilled Craft Specialist Pay Grade 13. Lead plumbers were upgraded to pay grade 15 and plumbers to pay grade 13. This violates W. VA. CODE § Code 18B-9-1." For relief, Grievant requested to be upgraded to pay grade 15, with back pay and benefits. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. Following an evidentiary hearing at level two, the grievance was granted in part, and denied in part. Specifically, Grievant was awarded retroactive application of a pay grade 13 assignment for the period of time Grievant held the classification title Plumber, and appropriate changes to his subsequent wage history. Respondent waived consideration at level three, and appeal was made to level four on June 8, 2001. A level four hearing was conducted on March 13, 2003. Grievant was represented by Mary Snelson of West Virginia Education Association, and Respondent was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on April 18, 2003.**

**The following findings of fact are derived from the record in its entirety.**

### Findings of Fact

**1. Pursuant to implementation of the classification system commonly referred to as the "Mercer" system, Grievant was assigned the title of Plumber, pay grade 12, effective January 1, 1994.**

**2. Grievant filed an initial classification appeal, seeking compensation at pay grade 14;**

**however, the Job Evaluation Committee (JEC) denied the appeal by memorandum dated June 30, 1994.**

**3. Grievant did not receive the June 30, 1994 memorandum.**

**4. Employees who were dissatisfied with the JEC's decision in the informal review were given thirty working days in which to file a grievance. Because Grievant had not received the informal response, he did not file a grievance.**

**5. Sometime in mid-1997, Grievant learned that other employees classified as Plumbers had prevailed in their grievance and received an upgrade to pay grade 13. Grievant inquired regarding his own appeal, and was told by an unidentified individual that no grievance had been received, and that it was too late at that time to file. Grievant accepted this statement and took no further action at that time.**

**6. Grievant requested a position review a number of times over the years, but was told there was no money for an upgrade. Grievant did not file a grievance at any time a request was denied.**

**7. Beginning December 1, 1997, Grievant held the position of Certified Skilled Craft Specialist, pay grade 13. Grievant's duties continued to be plumbing, and he was required to hold an active asbestos abatement certification. Grievant's Position Information Questionnaire (PIQ) indicates that he was not responsible for the supervision of other employees while in this position. 8. Grievant was awarded the position of Lead Plumber, pay grade 15, effective November 2002.**

**9. Respondent asserted the grievance was not timely filed at level two, in compliance with W. Va. Code § 18-29-3.**

**10. At level two of the grievance procedure, Grievant was awarded the same relief granted to the plumbers in Creel v. Bd. of Trustees/W. Va. Univ., Docket No. 94- MBOT-458 (Mar. 31, 1997), upgrade to pay grade 13 from 1994 until 1997 when Grievant held the title of Plumber, with appropriate changes to his subsequent classifications.**

## Discussion

**Grievant argues that he has consistently performed lead and supervisory duties, and requests that he be upgraded from pay grade 13 to pay grade 15 for the period of time between January 1, 1994, and November 2002. Respondent asserts that the matter was not**

**timely filed, and that the relief granted at level two was clearly wrong. Respondent requests that the level two decision be reversed, and Grievant ordered to return the monetary relief awarded.**

**As an untimely filing will defeat a grievance, it is necessary to address whether Grievant timely filed his grievance at level one. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).**

**It is undisputed that Grievant did not file a grievance within thirty days of receiving the JEC decision. However, even if measured from the time Grievant learned of theirregularity which occurred, he did not timely file a complaint. W. Va. Code § 18-29-4(a) provides in pertinent part:**

**Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the Grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the Grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.**

**By his own admission, Grievant became aware that the Mercer appeals filed by other plumbers had been acted upon by 1997, and that he relied upon a statement of an unidentified individual that it was too late to file an appeal. Grievant further concedes that he did not formally challenge his pay grade while classified as a Certified Skilled Craft Specialist, because he was told there was no money for upgrades. Unfortunately, Grievant followed this poor advice, and delayed well beyond the time limits within which a grievance must be filed. Respondent has met its burden of proving that this grievance was untimely filed, and Grievant's request to be upgraded to pay grade 15 from 1994 through 1997 when he was classified as a Plumber is denied.**

**Grievant's claim regarding the period of time he was classified as a Certified Skilled Craft Specialist is somewhat unclear, but seems to be that his salary was in violation of W. Va.**

**Code §18B-9-1, which states:**

**The purpose of the Legislature in the enactment of this article is to require the commission to establish, control, supervise and manage a complete, uniform system of personnel classification in accordance with the provisions of this article for all employees other than faculty and nonclassified employees at state institutions of higher education.**

**Although Grievant was still performing plumbing duties, the change in title and pay grade establishes that he was no longer a Plumber. Even if he should be considered a Plumber, he was compensated at pay grade 13, the same level awarded to Plumbers in Creel. Grievant opines that he continued to function as a Lead Worker, notwithstanding the fact that he was directed to complete the PIQ to indicate the contrary. However, at level four, Grievant conceded that he did not officially supervise any employee, and estimated that he worked alone approximately seventy percent of the time. It appears that Grievant coordinated the activities of other employees to complete an assignment, but did not act as the Lead Worker or supervisor of any employee. Therefore, Grievant has failed to prove that he was entitled to pay grade 15 while a Certified Skilled Craft Specialist.**

**Respondent's request that the level two decision be reversed is also denied. W. Va. Code § 18-29-3(t) provides:**

**Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§ 18-29-4] of this article and provided both parties in section seven [§ 18-29-7] of this article.**

**Respondent did not file an appeal of the level two decision, thereby waiving the claim that it was incorrect. Even if timely filed, Respondent's claim would be denied. W. Va. Code § 18-29-5(b) provides that in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole. Gray v. Div. of Corr., Docket No. 02-CORR-029 (Mar. 28, 2002); Hussion v. Interim Gov. Bd., Docket No. O1-**

**HE-382 (Jan. 31, 2002). Grievant clearly did complete and file a "Review and Appeals Form" on February 1, 1994, seeking an increased pay grade for his assigned position of Plumber. Receipt of the JEC decision would have served to prompt the filing of a grievance. As noted by the level two hearing evaluator, it is probable that Grievant would have been granted the same award as the Creel grievants if the appeal process had proceeded properly. Because the JEC decision never reached Grievant, contributing to his failure to timely file an appeal, the relief granted at level two is fair and equitable.**

**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. As an untimely filing will defeat a grievance, it is necessary to address whether Grievant timely filed his grievance at level one. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).**

**2. W. Va. Code § 18-29-4(a) requires that a grievance be filed within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the Grievant, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. 3. Grievant's claim for an upgrade and back pay from 1994 through 1997 was not timely filed.**

**4. Grievant has failed to prove that he was entitled to compensation at pay grade 15 while holding the classification title of Certified Skilled Trade Specialist or that Respondent had otherwise failed to establish a complete, uniform system of personnel classification in violation of W. Va. Code §18B-9-1.**

**5. W. Va. Code § 18-29-5(b) provides that in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole. Gray v. Div. of Corr., Docket No. 02-CORR-029 (Mar. 28, 2002); Hussion v. Interim Gov. Bd., Docket No. O1-HE-382 (Jan. 31, 2002).**

**6. Due to the initial processing error in 1994 in which Grievant did not receive the decision of the JEC regarding the informal review of his position, the relief awarded at level two is fair and equitable..**

**Accordingly, the grievance is GRANTED in part, and DENIED in part. Respondent is Ordered to provide the relief granted in the level two decision.**

**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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the GrievanceBoard. 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 22, 2003** _____

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**