MICHAEL SUMMERS,

Grievant,

v. **Docket No. 04-HE-267**

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Michael Summers ("Grievant"), employed by West Virginia University ("WVU" or "Respondent") as a Trades Specialist, filed a level one grievance on May 24, 2004, in which he alleged discrimination occurred when he was not offered a monetary settlement extended to other employees. For relief, Grievant requested the opportunity to accept the settlement offered to other employees, plus interest, or the opportunity to refuse and pursue other options. After the grievance was denied at all lower levels, it was advanced to level four on July 12, 2004. A level four hearing was conducted on October 5, 2004, at which time Grievant represented himself, and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision upon receipt of Respondent's proposed findings of fact and conclusions of law on November 3, 2004. Grievant elected not to file post hearing proposals.

The following facts are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been employed by WVU for approximately seven and one-half years. Originally classified as a Sheet Metal Worker, pay grade 12, Grievant, along with more than two hundred other employees, filed a grievance in January 2001, alleging that he was misclassified. These grievances arose after a level four grievance decisiondetermined that Plumbers and Masons were misclassified. By agreement of the parties, the grievances were held in abeyance at level four pending a review of the Physical Plant job families by the JEC.

2. Grievant's 2001 grievance was denied at levels one and two. Grievant did not advance the grievance to level four.

3. The JEC review was finally implemented in July 2003. Many employees, including Grievant,

were reclassified with a higher pay grade.

4 Generally, those employees who had pursued their grievances to level four, and had been upgraded as a result of the review, were granted back pay to 2001.

5. Respondent offered many employees a settlement of $1200.00 to resolve the pending grievances.

6. Grievant was not offered the settlement because he had not appealed to level four.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). "The preponderance standard generally requires proof that a reasonable person wouldaccept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

At level four, Grievant testified that he had not appealed the level two decision in the 2001 grievance based upon his “impression that everything was on hold at that point.” He explained that he was simply waiting to see what the JEC review would produce. After learning that another employee had received a settlement from his 2001 grievance, and that he would not receive such an offer, Grievant filed the present grievance arguing discrimination. WVU asserts that all employees who appealed to level four were treated the same, and Grievant abandoned his grievance after receiving the level two decision..

By his own admission, Grievant abandoned his grievance by failing to appeal the level two decision. Because he was no longer pursuing his claim, Grievant was not entitled to a settlement offer.

Conclusions of Law

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

2. An employee who abandons his grievance is not entitled to a settlement offer made to those employees who continued to pursue their grievances.

Accordingly, the grievance is **DENIED.** Any 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 § 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: NOVEMBER 16, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE