KEITH E. JENKINS,

Grievant,

v. Docket No. 01-HE-438

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Keith E. Jenkins ("Grievant"), employed by West Virginia University ("WVU") as a Maintenance Mechanic, filed a level one grievance on February 27, 2001, challenging his pay grade, in light of an increase given to another classification of trades worker. For relief, Grievant requested an increase from pay grade 12 to pay grade 13. The grievance was denied at levels one and two. Appeal was made to level four on July 19, 2001. The grievance was placed in abeyance pending a review of the Physical Plant job family by the Job Evaluation Committee ("JEC"), which was ultimately implemented in July 2003. A level four hearing was conducted on January 20, 2005, at which time Grievant was represented by Kathleen Abate, Esq., of Cohen, Abate & Cohen, and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before February 22, 2005.

The following facts have been derived from a preponderance of the evidence made part of the record at level two and level four.

Findings of Fact

1. Grievant has been employed by WVU at the Physical Plant at all times pertinent to this grievance. 2. In February 2001, Grievant was classified as a Maintenance Mechanic, pay grade 12. At that time Grievant filed a grievance alleging that he was entitled to an increase in paygrade commensurate to that granted to plumbers who had been upgraded to pay grade 13.

3. The grievance was denied at level one. Following an evidentiary hearing at level two, the grievance was denied by decision dated July 10, 2001, and appeal was made to level four on July 12, 2001. At level four, this grievance, along with nearly two hundred others, was placed in abeyance to allow a review of the physical plant job family by the Job Evaluation Committee (JEC). This review

was initially to be completed by the end of 2001, but was not finalized until a year later. The changes recommended by the JEC were implemented on July 1, 2003.

4. Grievant was promoted to Maintenance Mechanic Lead, pay grade 14, on December 1, 2001. He did not file a second grievance challenging his pay grade as a lead worker.

5. Effective July 1, 2003, Grievant was reclassified as a Trades Specialist Lead II, pay grade 15.

6. Subsequent to earlier litigation on the issue of back pay for those employees who received upgrades in 2003, Grievant was offered a settlement proposal which would compensate him from the date he filed the grievance through December 1, 2001, when his position changed to lead. Grievant declined the offer.

Discussion

Because Grievant was promoted during the pendency of this grievance, the issue raised is whether he is entitled to back pay for the period of time he was a lead worker. Asthis 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 (2004); 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 would accept 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). Grievant filed a “Motion To Amend” his grievance under cover letter dated January 6, 2005. Specifically, Grievant requested that his complaint be enlarged to include back pay while classified as a Trades Specialist Lead II, from December 1, 2002, to July 1, 2003. WVU opposes the Motion, arguing that Grievant was required to file another grievance within fifteen days of his change in classification on December 1, 2001.

This case differs from others previously reviewed in which the employees did not file a grievance at all. See Garcia, et al.v. W. Va. Univ., Docket No. 04-HE-229 (Oct. 28, 2004) and Summers v. W. Va. Univ., Docket No. 04-HE-267 (Nov. 16, 2004). Grievant had appropriately filed this grievance in 2001. He was not promoted until after the grievance had been placed in abeyance at level four.

While Grievant could have filed another grievance, it would have addressed the same issue and the same general classification of Maintenance Mechanic, with the only variable factor being his assignment as a lead worker. When this grievance was reactivated, he made the Grievance Board aware of thechanges which had occurred between the level two and level four hearings, and requested that he be allowed to amend the relief requested.

W. Va. Code § 18-29-3(k) provides that "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." Under the circumstances of this case, Grievant's request to amend the relief sought is reasonable, and will be permitted.

The issue of back pay for those employees who were ultimately upgraded as a result of the JEC review was resolved in Lambert et al., v. West Virginia Interim Governing Board/Marshall University, Docket No. 01-HE-132 (Oct. 6, 2003), which held that employees who were performing essentially the same duties when their grievances were filed as they were when they were placed in a different pay grade and new classification on July 1, 2003, have demonstrated that their positions should have been in the higher pay grade on the date they filed their grievance, and are entitled to back pay. Consistent with the holding in Lambert, Grievant is entitled to the difference in pay between Maintenance Mechanic Lead, pay grade 14, and Trades Specialist Lead II, pay grade 15, from December 1, 2001 to July 1, 2003. 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. Grievant's amended request for relief to cover a change in his assignment while the grievance was in abeyance, is granted consistent with W. Va. Code § 18-29-3(k), which provides that "[a]ny change in the relief sought by the grievant shall be consentedto by all parties or may be granted at level four within the discretion of the hearing examiner."

2. 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 (2004); 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 would accept 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).

3. Because Grievant has proven that he timely filed a grievance challenging his pay grade in 2001, and that he was performing essentially the same lead duties prior to being placed in a different pay grade and new classification on July 1, 2003, he has demonstrated that both his Maintenance Mechanic and Maintenance Mechanic Lead positions should have been in the higher pay grades on the date he filed his grievance, and is entitled to back pay.

Accordingly, the grievance is **GRANTED**, and WVU Ordered to compensate Grievant for the difference in pay grades 14 and 15 for the time period December 1, 2001, to July 1, 2003.

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 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: MARCH 29, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE