MICHAEL KRIVAK,

Grievant,

v. Docket No. 97-BOT-378/393

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, employed by the Board of Trustees (Respondent) at West Virginia University (WVU), filed two grievances on June 20, 1997. In the first, he alleged "I am doing the same job as a co-worker, but I am three (3) pay grades lower. The relief I am seeking is an upgrade to pay grade 10 and retroactive pay from the time we started working together." In the second complaint, Grievant alleged "when the tool crib and warehouse were combined, we essentially took over all tool crib duties. Since the tool crib no longer exists and we perform the duties once done by tool crib attendants who are a pay grade 10, I request to be upgraded to a pay grade ll for doing the combined and additional duties." (See footnote 1)

After the grievances were denied at levels one and two; Grievant advanced them to level four on August 15 and August 21, 1997, respectively. The grievances were consolidated for hearing held on February 25, 1998, and the matter became mature for decision on May 15, 1998, the final date for filing post-hearing submissions.

Discussion

Currently classified as a Materials Handler, pay grade 7, Grievant asserts that his grievances are separate and distinct, with the first involving equal pay for equal work, and the second involving the Mercer reclassification. Grievant argues that Respondent failed to rule on the complaint nowidentified as Docket No. 97-BOT-393, that Grievant has been assigned the duties of both Tool Crib Attendant and Materials Handler, and claims to prevail by default. The basis for this claim is that both claims were assigned to hearing evaluator JoAnn Evans, and a hearing conducted at level two on July 7, 1997. Ms. Evans submitted her report to Vice President Scott Kelley, who determined that certain relevant information was not made a part of the hearing, and ordered the matter be reheard.

Ms. Debra Fusco conducted a subsequent hearing on July 25, 1997. Her report did not indicate that Grievant had filed two specific grievances, but stated that “grievant now brings forth before this hearing the issue of the accuracy of the current paygrade assigned to his job title. The grievant believes the paygrade 7 assigned to his current job title Materials Handler no longer is reflective of his current duties and responsibilities because a Tool Crib Attendant, paygrade 10, now works in the same area and performs the same work as the Grievant.” Based upon Ms. Fusco's report, Vice President Kelley denied the grievance by letter dated July 31, 1997.

A subsequent letter, dated August 7, 1997, was issued by Vice President Kelley:

to clarify the Level II grievance decision to you dated July 15, 1997, and the grievance decision to you dated July 31, 1997. The earlier decision dated July 15, 1997, was 'that the matter be reheard' to gather additional information relevant to both grievances that was not part of the hearing.

The decision issued July 31, 1997, was to deny both your grievances. The reason for this action is that both grievances are based on the same set of facts and are inextricably linked.

Upon appeal to level four, the grievances were consolidated by ALJ Manning who determined that “the basis of both grievances is the same factual situation . . . [and Grievant] is merely asking for alternative relief.” Grievant argues that the consolidation was in violation of W.Va. Code §18-29-3(e) because it was not “by agreement of all parties”, and continues to assert that he must prevail by default.

Although the procedure at level two was unusual in this case, the record does not support Grievant's claim of default. In any event, the Grievance Board has previously ruled that it is not empowered to enforce a default which may have occurred at the lower grievance levels. Rather, it is permitted only to hear the limited claim of the employer specified by statute. Sergent v. Mason County Bd. of Educ., Docket No. 97-26-336 (Oct. 23, 1997); Lake v. Cabell County Bd. of Educ., Docket No. 96-06-256 (May 13, 1997); Smith v. Bd. of Directors, Docket No. 93-BOD-051 (Feb. 17, 1993). Because the employer did not request a hearing at level four, the statute does not allow action to be taken here. Should Grievant choose to pursue this issue, enforcement must be sought from the appropriate Circuit Court through a mandamus action, as allowed by W. Va. Code §18-29- 9.

Grievant's assertion that consolidation at level four was in violation of W. Va. Code §18-29- 3(e) is flawed. That provision states in its entirety, “[g]rievances may be consolidated at any level by

agreement of all parties." It does not state that consolidation may not occur without agreement by the parties. Specifically, W. Va. Code §18-29-5(b) provides, "[h]earing examiners are hereby authorized and shall have the power to consolidate grievances . . . ." The two grievances are so interrelated that consolidation is virtually required.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. DocketNo. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Grievant claims that a co-worker, Daryl Wilson, is a Materials Handler compensated at pay grade 10. Teresa Crawford, Supervisor of Classification and Compensation at WVU, testified that the Physical Plant merged the Tool Crib Area and the Warehouse Unit as part of a reorganization, and that Grievant's co-worker, Mr. Wilson, is a Tool Crib Attendant properly compensated at pay grade 10. Ms. Crawford indicated that Mr. Wilson's position had been reviewed, and that downgrading it to Materials Handler had been considered, but that after additional duties were assigned, he retained the higher classification.

Grievant's second argument is that because he performs the duties of Materials Handler, and has assumed the duties of Tool Crib Attendant, he is entitled to a higher pay grade. The basis of this argument is a level four decision, Flenniken, et al, v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-1020 (July 19, 1996). In this case, ALJ Gould determined that the Mercer classification plan contained errors in the data line for the Materials Handler job title, and ordered that degree levels be increased in a number of point factors, which ultimately increased the pay grade for the position. Grievant argues that he is entitled to the enhanced degree levels, and he elevates them even further to account for the dual duties which he allegedly performs. The changes made by Flenniken, and those proposed by Grievant, are as follows: (See footnote 2)

KN EX CPS SE/IA SE/NA FA

Mercer degree levels 3.0 1.0 1.5 1.0 1.0 1.5Flenniken degree levels 3.0 2.0 2.0 2.0 2.0 2.0

Grievant's degree levels 4.0 3.0 3.0 3.0 2.0 2.5

Ms. Crawford stated that the duties performed by Grievant are no different than those performed by other Materials Handlers. Respondent also notes that Flenniken has been appealed, and argues

that any resulting change in pay grade to the job title would affect only those Grievants associated with the original Mercer grievance. Respondent concludes that Grievant is properly classified as a Materials Handler, pay grade 7.

The Mercer classification system is based on degree levels awarded to a position in thirteen point factors. The total number of points is determinative of the pay grade for the job title. Each position is reviewed independently, and comparison with other employees or positions is not controlling of an individual's job title or pay grade. The Mercer system also does not provide for multi-classified positions, or for “stacking” positions to expand degree levels. Grievant did not argue that he was misclassified, or offer any evidence to support the assignment of the degree levels which he proposes. Therefore, Grievant will be entitled to the revised data line and higher pay grade awarded to Materials Handlers in Flenniken; however, he has failed to prove that he is entitled to a higher degree level by virtue of comparing himself to another employee, or by establishing that he is entitled to higher degree levels in a number of point factors. (See footnote 3)

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. At all times pertinent to this decision Grievant has been employed by the Board of Trustees at West Virginia University, classified as a Materials Handler at pay grade 7.

2. As part of a reorganization at the WVU Physical Plant, the Tool Crib Area was merged with the Warehouse Unit. At least one of Grievant's co-workers is classified as a Tool Crib Attendant, pay grade 10.

3. Following two hearings at level two, both issues raised by Grievant were denied by WVU Vice President Scott Kelley.

4. Respondent did not request a hearing at level four following Grievant's claim of default at level two.

5. A level four decision in a related matter held that the position of Materials Handler was improperly evaluated during the Mercer reclassification project, and, when given appropriate credit in the point factors, the pay grade for that job classification was raised from pay grade 7 to pay grade 9.

Conclusions of Law

1. The Grievance Board is not empowered to enforce a default which may have occurred at the

lower grievance levels. Rather, it is permitted only to hear the limited claim of the employer specified by statute. Sergent v. Mason County Bd. of Educ., Docket No. 97-26-336 (Oct. 23, 1997); Lake v. Cabell County Bd. of Educ., Docket No. 96-06-256 (May 13, 1997); Smith v. Bd. of Directors, Docket No. 93-BOD-051 (Feb. 17, 1993). Because the employer did not request a hearing at level four, no action will be taken here. Should Grievant choose to pursue this issue, enforcement must be sought from the appropriate Circuit Court through a mandamus action, as allowed by W. Va. Code §18-29-9. 2. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6.

3. Grievant has failed to prove by a preponderance of the evidence that he performs the same duties, and is therefore entitled to the same pay grade, as a co-worker classified as a Tool Crib Attendant, pay grade 10.

4. Grievant has failed to prove by a preponderance of the evidence that he is entitled to elevated degree levels in any point factors because he performs the duties of Materials Handler and Tool Crib Attendant.

5. Grievant has proven that he is entitled to a change in compensation, from pay grade 7 to pay grade 9, as the result of a decision in a related matter.

Accordingly, the grievance is **GRANTED** to the extent that Grievant's compensation should be increased from paygrade 7 to paygrade 9. The remainder of the 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: July 7, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant appeared pro se at level four; Respondent was represented by Assistant Attorney General Samuel R. Spatafore.

Footnote: 2

The following headings are shorthand for the point factors addressed: KN is Knowledge; EX is Experience; CPS is Complexity & Problem Solving; FA is Freedom of Action; SE/ IA is Scope and Effect/Impact of Actions, SE/NA is Scope and Effect/Nature of Actions; and FA is Freedom of Action.

Footnote: 3

As previously noted Flenniken has been appealed. If the level four decision in that matter has been stayed pending review, Grievant's relief will be delayed until a final decision is rendered in that matter.