MICHAEL KRIVAK,

Grievant,

v. Docket No. 01-HE-083

HIGHER EDUCATION INTERIM GOVERNING BOARD/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Michael Krivak, employed by West Virginia University (WVU or Respondent) at the Physical Plant, filed a level one grievance on February 16, 2001, in which he alleged:

[t]he JEC was ruled clearly wrong, arbitrary and capricious on the data line for the job title Materials Handler and was ordered to make adjustments to the data line of Materials Handler title effective from the date of January 1, 1994. If the adjusted data line for my job title became effective January 1, 1994, I think I should have been compensated at the rate my corrected data line indicated. Title 128 Series 62, WV Code 18-29 and WV Code 18B-9 have been violated.

For relief, Grievant requested "[t]he correct amount of back pay from the date my data line became effective in [sic] January 1, 1994. The amount I am requesting is 5% per pay grade (7 to 9) 10% based on my base salary, or entry rate of the new pay grade, whichever is greater, plus interest."

The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced his appeal to level four on March 9, 2001. A level four hearing was conducted on May 14, 2001, at which time Grievant appeared pro se, and Respondent was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decisionJune 28, 2001, upon receipt of Grievant's response to Respondent's proposed findings of fact and conclusions of law.

The essential facts of this grievance are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been continuously employed by WVU since September 1, 1988, and was classified as a Materials Handler from 1994 until October 2000.

2. Effective January 1, 1994, the governing board for institutions of higher education implemented a statewide system of classification and compensation for all classified employees, commonly referred to as the Mercer Plan.

3. Applying the criteria of the Mercer Plan, Grievant was classified, effective January 1994, as a Materials Handler, pay grade 7.

4. Grievant did not pursue a grievance challenging his initial Mercer classification or compensation through level four of the grievance procedure.

5. Other employees assigned as Materials Handlers pursued their classification grievance, and prevailed at level four. In Flenniken v. Bd. of Trustees/ W. Va. Univ., Docket No. 94-MBOT-1020 (July 19, 1996), the Grievance Board ordered Respondent to adjust the data line for the Materials Handler job title upwards, resulting in increase in compensation to pay grade 9. The Flenniken Grievants were awarded back pay to January 1, 1994.

6. The Flenniken grievance was consolidated with other Mercer appeals by the Circuit Court of Kanawha County, which upheld the level four decision in Bd. ofTrustees/W. Va. Univ. v. Jeffrey Jessen, Civil Action No. 95-AA-290 (Mar. 8, 2000). Respondent's appeal to the Supreme Court of Appeals was refused on October 5, 2000.

7. Upon completion of the litigation, the Job Evaluation Committee (JEC) met in November 2000, and amended the Materials Handler job title data line, consistent with the Flenniken decision, effective the month and year of the level four decision, July 1996.

8. Grievant's position was upgraded to Purchasing Assistant I, pay grade 10, effective October 16, 2000.

9. A change of pay grade due to the correction of an erroneous data line is neither a promotion nor an upgrade, and does not require the same percentage salary increase.

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); 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.

Grievant argues that data lines are assigned to classifications, not individuals; therefore, he is entitled to the same relief awarded to the Flenniken grievants, i.e., back pay from January 1994. Respondent asserts that it appropriately applied the mandates of both the level four Flenniken decision, and the Jessen Opinion Order issued by the Circuit Court, which directed that Grievants James Flenniken, Kermit Brewer, Edward Hriblan, and Dana Skidmore, be awarded back pay from January 1, 1994. Because Grievant was a non-grieving incumbent of the "Materials Handler" job title, Respondent determined that he was entitled to back pay from the date of the data line change in 1996. Respondent also argues that the present claim is untimely filed, and barred by the doctrine of res judicata.

If the current grievance is viewed as Grievant challenging the original determination of the JEC, it is not timely filed. The Rules of the West Virginia Board of Trustees, Series 62 (128 C.S.R. §§62-18-1, et seq. 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. . . 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. . . .

18.7. If an employee is dissatisfied with the determination of the job evaluation committee the employee may grieve his/her initial classification under this program, including the job or position description and assignment to pay grade or salary schedule, within thirty (30) work days from receipt of the notification set out in Section 18.5 of this rule, by filing a grievance pursuant to the procedures of W. Va. Code §18-29. Any employee not filing a grievance under the provisions of this rule within those thirty (30) work days, or not seeking a review timely pursuant to this rule, shall be deemed to be equitably and uniformly classified and compensated for the purposes of Article 9, Chapter 18B of

the state code and shall also be deemed to have expressly waived his/her right to grieve such initial classification, absent intervening and countervailing circumstances that effect that initial classification.

Under these provisions January 31, 1994, was the deadline set for employees to submit requested reviews, and the failure to pursue a review by the deadline was deemed to be acceptance of the JEC determinations. This grievance, initiated six years after the deadline, is not timely filed. (See footnote 1)

If the grievable event had been the amendment of the data line by the JEC in November 2000, the grievance filed in February 2001, remains untimely.

However, Grievant's focus appears to be directed to the holdings in Flenniken and Jessen. Indeed, he is correct that data lines are assigned to classifications, and not individuals. It is also accepted that the data line assigned to the Materials Handler classification in 1994 was inaccurate. Thus, Grievant's deduction that he completed the same work, and is entitled to the same compensation as the Flenniken grievants is understandable. However, the controlling factor is that the Flenniken grievants pursued their claim in 1994, and Grievant did not. The data line was not found to be inaccurate until July 1996, and was corrected effective that same date. The decision to compensate non-grieving employees from the date of the level four grievance decision was neither arbitrary and capricious nor discriminatory, since they did not contest their compensation in 1994, a legitimate reason for the difference in treatment.

Absent any evidence that Respondent's decision to award back pay to non-grieving Materials Handlers effective July 1996 was contrary to any statute, rule, regulation, policy, or that it was arbitrary and capricious, Grievant has failed to prove any entitlement to additional back pay.

A second matter raised by Grievant questions the method used by Respondent to calculate the back pay. Grievant argues that as a promotion or upgrade, he should receive a 5% per pay grade salary increase. Respondent denies that the revision was either a promotion or an upgrade.

Policy 62 states, in pertinent part:

13.1. Promotions result from an employee moving from his/her current position to a vacant or newly created position assigned to a different job title and higher pay grade and which requires a significantly greater degree of skill, effort and responsibility than that of the employee's current position.

14.1. Upgrades result from the process of job evaluation where a determination is made that a significantly higher level of skill, effort, and responsibility exists in the employee's current position. A new pay grade value shall then be established based on the application of the job evaluation plan and the calculation of a revised total point value for the position. Upon determination of the pay grade, job descriptions shall be reviewed of other titles having the same pay grade and whose duties, responsibilities and requirements closely match the work of the position as it is now described. The position shall then be slotted into the classification whose grade is consistent with the point value calculated and whose duties and requirements most appropriately characterize the position. . . .
14.2. When an employee occupies a position at the time that a position upgrade is to be placed into effect, the method of calculating the employee's base salary increase is the same as that specified for a promotion. . . .

Grievant's pay grade was amended not as the result of a promotion or an upgrade, but was the correction of an erroneous data line. Policy 62 addressed compensation changes as a result of the Mercer Plan as follows:
19.2. Any classified employee whose current base salary is below the equity step for his/her pay grade on January 1, 1994, will be increased to at least the equity step set out in this rule.

19.4. Any classified employee who is slotted into the appropriate pay grade for his/her job title and whose base salary is at least the equity step for that pay grade, shall be deemed to be equitably and uniformly compensated in relation to other classified employees within the pay grade for the purposes of Article 9, Chapter 18B of the state code.

In this instance, employees were not awarded standard percentage increases, but were individually reviewed to insure they were compensated at the equity step.

In addition to the foregoing findings of fact and discussion, the following formal conclusions of law are appropriate.

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); 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. 2. January 1, 1994, was the deadline for employees to request a review of JEC determinations regarding classification and compensation under the Mercer Plan. To the extent this grievance challenges the initial determination made by the JEC regarding the compensation of Materials Handlers, it is not timely filed.

3. Grievant has failed to prove that Respondent's decision to award back pay to non-grieving employees effective the date of the level four decision was contrary to law or arbitrary and capricious.

4. Grievant has failed to prove that he was entitled to a 5% per pay grade salary increase as a result of the Flenniken decision.

Accordingly, 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 tosuch 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: September 6, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

In his post-hearing submission, Grievant stated that he first filed a grievance in 1997 when he "finally received a job description that is dated 1997." Grievant attached a WVU Position Description dated January 24, 1997, which indicates that his position of Materials Handler had been reviewed, and that no change was warranted. This document supports the finding that Grievant had been classified as a Materials Handler in 1994. Subsequent to the review, Grievant filed a grievance stating that he performed duties of a Tool Crib Attendant, and requested a salary increase to pay grade 10, the pay grade assigned to that classification, or pay grade 11, to compensate him for performing the duties of Materials Handler and the additional duties of Tool Crib Attendant. The grievance was denied on the claimed duties of another classification, but it was noted that as a Materials Handler, Grievant was entitled to an increased pay grade as the result

of the Flenniken decision. Grievant filed a second complaint in 1998, alleging that he was misclassified and was performing the same duties as another person with a different job title. At level four, it was determined that Grievant was raising the same issues as those in the prior grievance, and the matter was dismissed.