**THOMAS J. HUSSION,**

**Grievant,**

**v.** **Docket No. 01-HE-382**

**INTERIM GOVERNING BOARD/**

**WEST VIRGINIA UNIVERSITY,**

**Respondent.**

**D E C I S I O N**

Grievant, Thomas J. Hussion, employed by West Virginia University (WVU or Respondent) as a Plumber-Lead, filed a level one grievance on January 16, 2001, in which he stated, "Changed position from plumber to lead-plumber in March 1998 - did not receive lead pay upgrade from March 16, 1998 to January 16, 2001." Grievant seeks back pay for the period of time in question. The record does not include a level one decision; however, following an evidentiary hearing, the matter was denied at level two on May 10, 2001. Grievant advanced his appeal to level four on June 6, 2001, and a supplementary hearing was conducted on November 26, 2001. Grievant appeared pro se, and Respondent was represented by Samuel R. Spatafore, Esq., Assistant Attorney General. The grievance became mature for decision on January 2, 2002, upon receipt of Grievant's written post-hearing submission.

The facts of this matter are not disputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by WVU since 1986, and pursuant to implementation of the Mercer classification system, was classified as a Plumber, pay grade 12, effective January 1, 1994.

2. Grievant, along with two other Plumbers, and a Plumber-Lead, challengedtheir classification under the consolidated matter of Creel v. Bd. of Trustees/W. Va. Univ., Docket No. 94-MBOT-458 (Mar. 31, 1997).

3. The Creel grievance was granted at level four of the grievance process, and Grievant was specifically awarded reclassification at pay grade 13, with back pay to January 1, 1994.

4. Respondent appealed the Creel decision to the Circuit Court of Kanawha County, which

upheld the Grievance Board decision by Order dated March 8, 2000.

5. Respondent appealed the Circuit Court decision to the West Virginia Supreme Court of Appeals, but the appeal was refused by the Court on October 5, 2000.

6. The Job Evaluation Committee (JEC) met in November 2000 and changed the data lines of Plumber and Plumber-Lead, which resulted in advanced pay grades of 13 and 15, respectively for all employees in those classifications. The named Creel grievants, with the exception of Grievant Hussion, were additionally awarded back pay from January 1, 1994, through January 16, 2001.

7. Grievant's back pay was limited to January 1, 1994, through March 15, 1998, when he was promoted to Plumber-Lead, with an increase in compensation from pay grade 12 to pay grade 14, then the pay grade for Lead Plumbers.

8. Respondent did not provide Grievant back pay from March 16, 1998, through January 16, 2001.

9. Respondent did not raise the issue of timeliness at or before the level two hearing.

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. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts that he followed the correct procedure when he filed the 1994 grievance, and should not be penalized for being promoted during the litigation period. Respondent argues that the Creel decision made specific awards to specific individuals, and it has complied with that decision. Because Grievant was not a Plumber-Lead at the time Creel was processed at level four, Respondent concludes that any award based on that classification is not required consistent with a prior decision in the matter of Krivak v. Higher Ed., Interim Governing Bd., Docket No. 01-HE-083 (Sept. 6, 2001). Respondent further argues that the matter was not timely filed, given the promotion

occurred in 1998.

While logical in a certain sense, Respondent's argument is flawed in this particular matter. It is accurate that Grievant was granted an increase in pay grade in Creel, as a Plumber, the classification title he held at that time. However, Grievant applied for and received a promotion to Plumber-Lead, and there is no reasonable basis upon which to exclude his award when Plumber-Lead was also addressed in Creel. While Grievant wasnot a Plumber-Lead at the time, he had protected his rights by filing the grievance in 1994, and when the JEC accepted the change in pay grade for Plumber and Plumber-Lead, Grievant's award should have been prorated to reflect the time he held each classification. Thus, Respondent's decision to award Grievant back pay as a Plumber from January 1, 1994 through March 15, 1998, was correct. However, Grievant is further entitled to back pay as Plumber-Lead from March 16, 1998 through January 16, 200l.

Respondent's reliance upon the decision issued in Krivak is misplaced since there was no evidence that Mr. Krivak had protected his rights through the grievance procedure in 1994. As a non-grieving employee, Mr. Krivak did not establish a right to back pay effective January 1, 1994.

Further, there is no evidence to support Respondent's concern that to grant Grievant back pay after his promotion will open the flood gates to other employees. It seems highly unlikely that more than a few, if any, other employees would be similarly situated to Grievant.

Finally, Respondent's claim that Grievant did not timely file this matter cannot be considered at level four. W. Va. Code § 18-29-3 requires that “any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.” A review of the level two transcript and decision establishes that the issue of timeliness was not raised at that level, and is barred at this time.

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 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. W. Va. Code § 18-29-5(b) provides that Administrative Law Judges may award grievants fair and equitable relief, and exercise other powers as provides for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article.

3. Because Grievant protected his interest by filing a grievance in 1994, and should not suffer the loss of back pay which he would have received but for his promotion, he is entitled to back pay as a Plumber - Lead from March 16, 1998, to January 16, 2001, as a matter of equity.

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to compensate Grievant consistent for back pay as Plumber-Lead from March 16, 1998, through January 16, 2002.

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: January 31, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE