RICK MOORE,

Grievant,

v. **Docket No. 04-HEPC-061**

HIGHER EDUCATION POLICY COMMISSION/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Rick Moore ("Grievant"), employed by West Virginia University ("WVU") as a Maintenance Worker, filed a level one grievance on September 25, 2003, in which he alleged that he did not receive an increase in compensation from the date he assumed the duties of his new position. For relief, Grievant requested back pay and benefits from July 1, 2003, through September 15, 2003. Grievant's immediate supervisor lacked authority to grant the grievance at level one. The grievance was denied at level two, and was partially granted at level three when back pay was granted from August 1, 2003, to compensate for the routing time it took his Position Information Questionnaire (PIQ) to reach Human Resources and be reviewed. Grievant filed a level four appeal on February 13, 2004. Grievant's representative, Mary Snelson of the West Virginia Education Association, and WVU counsel, Assistant Attorney General Kristi A. McWhirter, agreed to submit the matter for decision based upon the record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before April 8, 2004.

The following facts have been derived from a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by WVU for thirteen years. Prior to July 2003 Grievant held the job title of General Trades Worker, pay grade 9. 2. Upon to the retirement of his supervisor, effective July 1, 2003, Grievant's duties changed significantly. Specifically, under the new supervisor, Grievant's custodial duties decreased and his equipment repair duties increased.

3. Grievant completed and signed a revised PIQ on July 10, 2003. Bill Johnson, Grievant's immediate supervisor, and Baron Smith, Grievant's second level supervisor, signed the PIQ on July 11, 2003.

4. The PIQ was then approved by the Interim Physical Plant Director on July 15, 2003, the Associate Vice-President for Facilities and Services on July 21, 2003, and the Vice-President for Administration, Finance and Human Resources, on August 14, 2003.

5. Derek Jackson, Human Resources Classification and Compensation Manager reviewed the PIQ on August 25, 2003. Grievant was notified by memorandum dated August 26, 2003, that his position was being reclassified as Maintenance Worker, pay grade 11, effective September 1, 2003.

6. Grievant filed this complaint on September 25, 2003, seeking back pay to July 1, 2003. The grievance was denied at levels one and two; however, at level three back pay was awarded to August 1, 2003, to compensate for the routing time it took the PIQ to reach Human Resources, and be approved.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears 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); See W. Va. Code § 29-6A-6. Grievant is seeking back pay from the date he began the duties of MaintenanceWorker, July 1, 2003, to August 1, 2003, the date to which he was awarded back pay at level three.

Grievant argues that he is entitled to the back pay from July 1, 2003, because he was in fact performing the duties of a Maintenance Worker for that period of time. WVU denies that Grievant is entitled to any further back pay because procedures for position upgrades were followed.

Respondent's Administrative Rule addressing Personnel Administration, codified at 133 C.S.R. 8 (Series 8), at §10.1, provides that the review of a position shall be completed in a timely manner. Specifically, it states “[w]ithin thirty (30) days from the date of request for review of a job, the department of human resources shall report to the requestor, in writing, whether the reclassification has been denied or approved.” In this case, the relief granted at level three would bring WVU into compliance with the thirty-day guideline. However, the rule does not address whether back pay is to be awarded.

While WVU properly followed the procedure required to change Grievant's classification, there is no basis upon which back pay should be denied. The date Grievant assumed the duties of Maintenance Worker is undisputed. Clearly, WVU benefitted from Grievant's enhanced level of duties and responsiblilities, and Grievant is entitled to full compensation as a matter of equity.

Compensation from July 1, 2003, would also be consistent with rulings of the West Virginia Supreme Court of Appeals in a series of cases beginning with "AFSCME I", AFSCME v. Civil Service Commission, 324 S.E.2d 363 (W. Va. 1984), in which it recognized that "work performed 'out of classification' was compensable." In the second case, "AFSCME II", AFSCME v. Civil Service Commission,341 S.E.2d 693 (W. Va. 1985), "settled the back pay question . . ." by recognizing that full back pay was a remedy for working employees out of classification.

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 bears 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); See W. Va. Code § 29-6A-6.

2. Grievant is entitled to back pay from July 1, 2003, to August 1, 2003, during which period of time he was performing the duties of Maintenance Worker, pay grade 11.

Accordingly, the grievance is **GRANTED**, and WVU Ordered to pay Grievant the difference in salary between pay grades 9 and 11, and benefits, for the month of July 2003.

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: MAY 7, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE