LYNDA NELSON, et al.,

Grievants,

v. Docket No. 01-HE-064

HIGHER EDUCATION INTERIM GOVERNING BOARD/

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievants, twenty-eight individuals employed by West Virginia University (WVU or Respondent) at the Physical Plant, filed level one grievances in January 2001, asserting discrimination and an inconsistent application of policy and practice relating to their classification and/or compensation. The grievances were denied at levels one and two, and consideration was waived at level three by the Higher Education Policy Commission. (See footnote 1) **Appeals were forwarded to level four in February 2001. At level four the grievances were consolidated and placed in abeyance pending a review by the Job Evaluation Committee (JEC), the body charged with higher education job evaluation and classification decisions, of the Physical Plant Job Family. This review was concluded, and the Higher Education Policy Commission approved the JEC recommendations in December 2002, to become effective July 1, 2003. Evidentiary hearings were conducted at level four on December 5, 2003, and January 14, 2004. Grievants represented themselves, and WVU was represented by Samuel R. Spatafore, Assistant Attorney General. The matter became mature for decision on March 18, 2004, the due date for Grievants' response to the Brief filed by WVU.**

Background

On January 1, 1994, in compliance with a legislative mandate set forth in W. Va. Code 18B-9-4, "an equitable system of job classifications" was implemented for classified employees of the University System of West Virginia Board of Trustees ("BOT") and the Board of Directors of the State College System of West Virginia ("BOD"). William M. Mercer, Inc., a national human resources consulting firm which specializes in developing classification programs for higher education institutions and state governments was retained to develop the

classification system, commonly referred to as the Mercer system. Pursuant to legislative rule, known as "Series 62," employees were given until January 31, 1994, to request an internal review of their classification. Failure to seek the internal review barred the employees from filing a grievance seeking reclassification at that time. As a result of the new classification plan, approximately 545 grievances were advanced to level four of the grievance procedure. Many of the level four "Mercer" decisions were appealed to a Circuit Court for review; however, three of those decisions led to the present matter.

In Creel v. Board of Trustees/W. Va. University, Docket No. 94-MBOT-458 (Mar. 31, 1997), and Jones, et al. v. Board of Trustees/W. Va. University., Docket No. 94-MBOT-978 (Feb. 29, 1996), the Grievance Board ordered that Plumbers and Plasterer/Masons, respectively, should be increased to pay grade 13, and the compensation of Plumber - Leads should be increased to pay grade 15. In Flenniken, et al. Board of Trustees/W. Va. University, Docket No.94-MBOT-1020 (July 19, 1996), the Grievance Board ordered that the compensation of Materials Handlers should be increased from pay grade 7 to pay grade 9. The level four decisions were upheld by the Circuit Court of Kanawha County, and appeals of those decisions were refused by the Supreme Court of Appeals. (See footnote 2) At the conclusion of the appeal process, the JEC met in November 2000, and voted to increase the data line for all the Plumbers, Plasterer/Masons, and Materials Handlers, including those who had not filed a grievance, effective January 2001. Additionally, those individuals who filed grievances in 1994 were awarded back pay from the date of their initial classification. Employees classified as Materials Handlers who had not filed grievances in 1994, were awarded back pay given from the date of the level four decision; however, non-grieving Plumbers were not. Subsequently, a multitude of employees assigned to the Physicial Plant filed grievances based upon the decisions made by the JEC in November 2000. ___

Findings of Fact

1. Prior to the JEC review in 2001, Grievants Lynda Nelson, Clarence Lemley and Phillip Cale were classified as Electrician-Leads, pay grade 14. (See footnote 3) Grievant Robert Mares was classified as an Electrician, pay grade 12. Grievants Nelson, Cale and Lemley were upgraded as a result of the 2001 review, and now seek back pay to the date of filing.Grievant Mares, classified as an Electronics Technician, pay grade 13, since October 2001, was not

upgraded. He requests the same back pay **(See footnote 4)**

2. Grievant Richard Moran was an Electrician-Lead from 1994-1998, when he was promoted to Operations Manager, pay grade 18. Grievant did not file a grievance challenging his classification or compensation at any time he held the title of Electrician- Lead, but he is now requesting back pay from January 1994 to January 1998.

3. In January 1994, Grievants Val Reynolds, Kenneth Ferrell, Lisa Calvert, and Richard Kalsey, were classified as Electricians. In August 1998, they were given a working title of Telecommunication Electrician, a job title not recognized by the Mercer classification system. In April 2001, Grievants were reclassified as Electronics Technicians, but remained in pay grade 13. Grievants seek the classification of Telecommunication Analyst I, pay grade 17, with back pay from August 1998.

4. Grievants Harold White and Wyatt Sine have been classified as Plumber- Leads, pay grade 15, since 1994. Grievants Ray Kirk, Robert Fields, and Sherman Riffle have been classified as Plumbers since 1994. Grievant Tim Suder has been employed by WVU as a Plumber since March 1998. Grievants did not file a grievance challenging their classification in 1994, or since that time. Grievants are requesting back pay from 1994.

5. Rodney Hart, Franklin Lawrence, Frederick Blosser, Lonnie Mayle, Greg Neely, Fred Clark, and Thomas Nine were classified as Asbestos Abatement Workers, pay grade 12, on January 1, 1994. In 1996 the JEC advanced the Knowledge point factor for this job title to credit employees for required certification. The increase from 4.0 to 4.5increased Grievants' pay grade to 13. Following the 2001 review, Grievants remained in pay grade 13. They now request an upgrade to pay grade 14 or 15, with back pay from 1996. They additionally request compensation for the difference in pay grades 12 and 13, from 1994 through 1996.

6. Grievant Bryon Stafford was classified as Asbestos Abatement Worker- Lead, pay grade 14, effective January 1994. The JEC review in 1996 increased the Knowledge point factor from 4.0 to 4.5; however, this did not change the Lead pay grade, which remained at 14. GrievantStafford became a Trade Specialists-Lead II, pay grade 15, effective July 2003, and is seeking back pay from 1995.

7. Grievant Glen Friend was classified as Carpenter-Lead, pay grade 14, and Grievant Roger Johnson was classified as a Carpenter, pay grade 12, in 1994. Grievants seek an

upgrade to pay grades 15, pay grade 13, respectively, and back pay.

8. Grievant Tony Mayfield was classified as a General Trades Helper, pay grade 9, in 1994, and was reclassified as a Plasterer/Mason, pay grade 12, in 1999. All Plasterer/Masons were upgraded to pay grade 13, effective January 16, 2001, as a result of the Jones, decision. The parties to the grievance received back pay to 1994, while the non-party members of the classification did not. Grievant was not a party in the Jones grievance, and now seeks back pay to January 1994.

9. Grievant Michael Cupp has been employed by WVU since 1990. He held the classification of Maintenance Mechanic in 1994, and was reclassified as a Welder-Lead in 1996. Grievant did not file a grievance contesting either the Mechanic or Welder title and/or pay grades under the Mercer classification. As a result of the 2001 JEC review, his pay grade was increased to 15. He is now requesting back pay to 1996. 10. Grievant Marvin Teets, has been employed by WVU for approximately twenty years. On January 1, 1994, Grievant was placed in the classification of Sheet Metal Worker, pay grade 12. Grievant filed a grievance challenging this classification, but did not pursue it beyond level one. As a result of the 2001 review Grievant was upgraded to pay grade 13, and he now seeks back pay from 2001.

11. Grievants' duties have not changed significantly since January 2001.

12. With the exception of Electronics Technicians, all other Grievants herein were reclassified as Trades Specialists, pay grade 13, or Trades Specialists-Leads, pay grade 15, effective July 1, 2003.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. "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 Resources, Docket No. 92-HHR-486 (May 17, 1993). (See footnote 5)

Grievants argue that the actions of the JEC has resulted in discrimination and inequitable

compensation among the various skilled trades. Additionally, Grievantsclassified as Electronics Technicians claim they are misclassified. Respondent asserts that the claims are barred by res judicata, citing Orders issued by the Grievance Board on March 29, 2002, and September 30, 2002, which ruled that Grievants had failed to prove a prima facie case of discrimination.

Two intervening factors must be considered at this time. First, four Plumbers appealed the Grievance Board Orders to the Circuit Court of Kanawha County which reversed the rulings, finding that discrimination had been proven, and granting them back pay to the date the level four Creel decision was issued. (See footnote 6) **The second factor is a subsequent level four decision, Lambert, et al. v. Higher Education Interim Governing Board/Marshall University, Docket No. 01-HE-132 (Oct. 6, 2003), in which it was determined that because grievants were performing essentially the same duties when the grievance was filed as they were when they were placed in a new pay grade/classification on July 1, 2003, they demonstrated that their positions should have been in the higher pay grade on the date they filed their grievances. Thus, individuals who had filed grievances in 2001, and were upgraded in 2003, were awarded back pay to January 2001. Grievants herein will be reviewed in light of these events.**

Electricians **Grievants Nelson, Lemley, Cale, and Mares were seeking a higher pay grade and back pay. The increase in pay grade was effective July 1, 2003. Pursuant to Lambert, supra, Grievants are entitled to back pay from fifteen days prior to the dates their grievance was filed to July 1, 2003. Back pay for Grievants Lemley and Mares will be limited accordingly.**

Grievant Moran, who seeks back pay from 1994-1998 when he was classified as an Electrician, did not file a grievance in 1994, or at any time he held that title, and is precluded from any award of back pay at this time.

Electronics Technicians

Grievants Reynolds, Ferrell, Calvert, and Kalsey, seek a different classification of Telecommunication Analyst I, pay grade 17. To prove entitlement to a different classification, Grievants must show that the point factors were not allocated correctly, and with the proper credit, their point totals would place them in pay grade 17. Grievants did not challenge any specific point factors, but rather, generally compared their responsibilities to the Analyst I

classification. Absent any evidence to the contrary, it must be determined that the data line is correct, and Respondent's determination that Electronics Technician was the job title in pay grade 13 that best fit Grievants' positions is accepted.

Plumbers

Grievants White, Sine, Kirk, Fields, Riffle, and Suder, are requesting back pay from 1994. These individuals did not file a grievance in 1994, and are now entitled to back payfrom the date of the Creel decision, March 31, 1997, pursuant to the Order of the Circuit Court of Kanawha County.

Asbestos Abatement Workers

Grievants Hart, Lawrence, Blosser, Mayle, Neely, Clark, and Nine, were classified as Asbestos Abatement Workers, pay grade 12, on January 1, 1994. In 1996, their data line was increased to reflect the annual certification they must hold. The result of the increased score in the factor "Knowledge" increased their pay grade to 13. Grievants now seek back pay from 1994 through 1996, an additional upgrade to pay grade 14 or 15, and back pay from 1996 to the present.

Grievants did not file a grievance requesting back pay for the period of 1994-96 in 1996, and the claim is now untimely. Grievants claim for an upgrade is based upon the fact they assist other trade workers, and they believe they should be given more credit for the danger involved in their work. The fact that Grievants assist other employees in knocking down walls, moving furniture, and other matters, would not appear to increase the points in any factors. Grievants have been credited for their certification requirements, and they have been given the highest degrees for the factors of Working Conditions and Physical Demands. Grievants are clearly disappointed that they were once compensated at a higher level than other trades, and now are not, but they did not prove they are entitled to a higher pay grade under the Mercer system.

___Grievant Stafford was advanced to pay grade 15 as a result of the 2001 review, and is entitled to back pay from 15 days prior to the filing of his grievance, pursuant to Lambert. Grievant's request back pay prior to 2001 must be denied because a grievance for that period of time was not timely filed. Carpenters

Carpenters, were upgraded as a result of the JEC review, and Grievants Friend and

Johnson are entitled to back pay from 15 days prior to the filing of their grievances pursuant to Lambert. (See footnote 7)

Plasterer/Mason

Grievant Mayfield was upgraded to pay grade 13 in January 2001, but as a non- grieving member of the classification, he did not receive back pay. Pursuant to the Circuit Court Order in Nelson, he is entitled to back pay to the date he became a Plasterer/Mason in 1999.

Welder

Grievant Cupp was elevated to pay grade 15 as a result of the 2001 review, and he is entitled to back pay to 15 days prior to the filing of his grievance, pursuant to Lambert. Grievant's request for back pay from the time he was classified as a Lead in 1996, was not timely filed.

Sheet Metal Worker

Grievant Teets was upgraded to pay grade 13 as a result of the 2001 review, and he is entitled to back pay to 15 days prior to the filing of his grievance.

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, Grievants have the burden of proving their 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. Grievants who failed to request an internal review and file a grievance relating to their initial classification in 1994, are now precluded by legislative rule from filing a grievance challenging that initial classification or pay grade. Rush v. Bd. of Directors/W. Va. Institute of Technology, Docket No. 94-MBOD-963 (Dec. 21, 1995).

3. Misclassification is a continuing practice, and a grievance may be initiated at any time during which the misclassification continues. However, back pay is limited to 15 days preceding the filing of the grievance. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297,

465 S.E.2d 399 (1995).

4. Grievants who were performing essentially the same duties when this grievance was filed as they were when they placed in a higher pay grade on July 1, 2003, have demonstrated that their positions should have been in the higher pay grade on the date they filed their grievance. Lambert, et al. v. Higher Education Interim Governing Board/Marshall University, Docket No. 01-HE-132 (Oct. 6, 2003). Grievants are entitled to back pay to 15 days prior to the date they filed this grievance.

5. Grievants White, Sine, Kirk, Fields, Riffle, and Mayfield, are entitled to back pay from March 31, 1997. Grievant Suder is entitled to back pay to March 1998. Accordingly, the grievance is GRANTED regarding Grievants Nelson, Lemley, Cale, Mares, White, Sine, Kirk, Fields, Riffle, Suder, Stafford, Friend, Johnson, Mayfield, Cupp, and Teets. Respondent is Ordered to pay them back pay consistent with this decision. No interest is granted as none was requested. Grievances filed by Grievants Moran, Reynolds, Ferrell, Calvert, Kalsey, Hart, Lawrence, Blosser, Mayle, Neely, Clark, and Nine are DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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. 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:APRIL 6, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.At the time these grievances were filed all state institutions of higher learning were governed by the West Virginia Higher Education Interim Governing Board ("IGB"). On July 1, 2001, the IGB ceased to exist, and was

replaced by the Higher Education Policy Commission (HEPC) and a Board of Governors at each institution.

Footnote: 2

[2]Jones and Flenniken were consolidated by the Circuit Court under Board of Trustees/W. Va. Univ. v. Jessen, Civil Action No. 95-AA-290 (Mar. 8, 2000).

Footnote: 3

[3]Grievant Nelson's appeal form listed no representative. Although she attended the December 5, 2003, level four hearing and represented herself and her co-workers, she is also listed as a client of WVEA. Due to her participation in the hearing, Grievant Nelson is included in this decision.

Footnote: 4

[3]Grievant Lemley retired in March 2002, limiting his back pay to the date of his separation.

Footnote: 5

[3]Prior to July 1, 2001, grievances filed by higher education employees were processed under the grievance procedure statute for education employees contained in W. Va. Code §18-29-1 et seq.

Footnote: 6

4Nelson, et al. v. Interim Governing Board/West Virginia University, Civil Action No. 02-AA-140 (June 26, 2003).

Footnote: 7 ***Grievant Friend has retired, and Grievant Johnson was terminated from his employment with WVU, limiting their back pay to the date of separation.***