MARY MARGARET LOPEZ,

Grievant,

v. **Docket No. 94-MBOT-422**

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

Grievant, Mary Margaret Lopez, alleges that she was misclassified in the "Mercer" reclassification system. (See footnote 1) Effective January 1, 1994, Grievant was classified as an Academic Program Associate at Pay Grade 13, and alleges she should have been classified as an Academic Advisor at Pay Grade 15. In addition to contesting the job title she was given, Grievant has also challenged specific point factors (See footnote 2) used in the Mercer system. Grievant requests that, if this grievance is granted, her new classification be effective January 1, 1994, with back pay to that date. A level four hearing was held in this Board's office in Morgantown, West Virginia, on November 8, 1996. This matter became mature for decision upon submission of the parties' fact/law proposals, on January 10, 1997.

The following findings of fact are made from the record developed at level four.

Findings of Fact

1. Grievant has been employed by West Virginia University (WVU) for forty-five years. She has been performing her current duties since 1975, and her Mercer classification title was Academic Program Associate at Pay Grade 13, effective January 1, 1994. She is assigned to the Center for Student Advising and Records in the College of Human Resources and Education.

2. In 1991, all higher education classified employees, including Grievant, were asked to

complete a Position Information Questionnaire (PIQ) prior to the Mercer reclassification. Employees were to describe their job duties and responsibilities, along with the minimum qualifications for their positions, on the PIQ by answering a series of questions designed to elicit this information. Grievant completed a PIQ in 1991.

3. During the job evaluation process, whereby the Mercer classification system was applied to each individual higher education employee, “data lines” of particular degree levels for each point factor were developed for each job title in the system. Employees with similar duties were grouped together in a job title for purposes of developing this data line. The final step of the classification process was the “slotting” of each employee into the job title which most closely fit his or her duties.

4. The degree levels for each point factor in a job title were used to arrive at a numerical total, which determined each job's Pay Grade. 5. Generic job descriptions were developed for the various job titles within the higher education system in 1994 after the implementation of the reclassification system. These descriptions were compiled by looking at the common duties and responsibilities of all incumbents in each job title as reflected on the PIQs. Generic job descriptions were not used in the classification process; they were not meant to serve as position descriptions and are merely a compilation of the common duties performed by persons in the particular job title.

6. Grievant's job duties are divided into two major areas. First, she processes teacher certification renewals, which requires review of the application to determine if it meets State Department of Education guidelines, verification that the applicant has taken the appropriate continuing education courses, and then sending the form back to the applicant's local board of education. The second area of Grievant's responsibilities involves providing counseling services to teachers and graduate students seeking certification, renewal credits, and credits for obtaining pay raises in the public school system (known as “salary increments”). This involves advising such individuals as to the appropriate courses to take and assisting them in their academic planning.

7. Grievant was classified on January 1, 1994, based upon a revised PIQ she submitted on March 8, 1993, at the direction of her new supervisor, Dr. Katherine Lovell. Grievant signed the revised PIQ under protest, because it reflected that she only provided information to students seeking certification, rather than advising them.

8. Dr. Lovell subsequently decided to support Grievant's appeal of her Mercer classification, stating that Grievant provides counseling services and that the title Academic Adviser is more

reflective of her work. 9. The Academic Program Associate job title received a total of 1840 points, placing it within Pay Grade 13.

10. The job title of Academic Advisor received a total of 2098 points, placing it in Pay Grade 15.

11. The point score range for Pay Grade 13 is from 1756 points to 1865 points; for Pay Grade 14, from 1866 points to 1984 points; for Pay Grade 15, from 1985 points to 2113 points.

Discussion

A. Burden of Proof

The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that she is not properly classified. 156 C.S.R. 1 § 4.17; W.Va. Code § 18-29-6. Burke v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant asserting misclassification must identify the job she feels she is performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttal or analysis. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991).

A grievant is not likely to meet her burden of proof in a Mercer grievance merely by showing that the grievant's job duties better fit one job description than another, because the Mercer classification system does not use “whole job comparison.” It is largely a “quantitative” system, in which the components of each job are evaluated separately by applying the point factor methodology contained in the Job Evaluation Plan (hereinafter “Plan”). Therefore, the focus in Mercer grievances for this Board is upon the point factors the grievant is challenging. (See footnote 3) While some "best fit" analysisof the definitions of the degree levels is involved in determining which degree level of a point factor should be assigned, where the position fits in the higher education classified employee hierarchy must also be evaluated. The system must by statute be uniform across all higher education institutions; therefore, the point factor degree levels are not assigned to the individual, but to the job title. W. Va. Code §18B-9-4; Burke, supra. A Mercer grievant may prevail by demonstrating her reclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehabilitation, Div. of Rehabilitation Services and W. Va. Civil Serv. Comm'n., Docket No. VR-88-006 (Mar. 28, 1989).

Finally, whether a grievant is properly classified is almost entirely a factual determination. As such,

the Job Evaluation Committee's ("JEC") interpretation and explanation of the point factors at issue will be given great weight unless clearly erroneous. See Tennant v. Marion Health Care Found., 459 S.E.2d 374 (W. Va. 1995); Burke, supra. However, no interpretation or construction of a term used in the Plan (which provides the definitions of point factors and degree levels) is necessary where the language is clear and unambiguous. Watts v. Dept. of Health and Human Resources, 465 S.E.2d 887 (W. Va. 1995). The higher education employee challenging her classification thus will have to overcome a substantial obstacle to establish that she is misclassified. (See footnote 4)

In accordance with the foregoing discussion, a grievant must show that she was slotted into the wrong job title, that the point factor degree levels assigned to her job title are incorrect, or that she is entitled to an individual data line because of the unique nature of her position. In order todetermine if Grievant was misclassified, the point factors and degree levels disputed must be discussed separately in detail.

B. Application of the Point Factor Methodology

Grievant has challenged two point factors in which she alleges she was incorrectly evaluated. The degree level Grievant's job title received and the level to which she believes she is entitled will be discussed and compared.

1. Experience

The Plan defines Experience as follows:

> This factor measures the amount of prior directly related experience required before entering the job. Previous experience or training should not be credited under this factor if credited under Knowledge.

The Academic Program Associate job title received a 1.0 for Experience, which is defined in the Plan as “[n]o experience or up to six months of experience.” Grievant alleges she is entitled to a 3.0, the level the Academic Advisor title received, which is “[o]ver one year and up to two years of experience.”

Grievant testified that her familiarity with certification and degree program requirements was only obtained through work experience, and that she could not provide advice to students if she had only six months of experience. At level four, there did not appear to be any dispute between Grievant and her supervisor that, in order to perform her job, she must be familiar with course requirements and content, teacher certification requirements, and certificate renewal regulations and procedures.

Respondent presented the testimony of LuAnn Moore, Senior Compensation Analyst for WVU

and alternate JEC member. In spite of Grievant's testimony, Ms. Moore still believed that thelevel 1.0 given to her was appropriate. She stated that, although Grievant has 45 years of experience and extensive knowledge obtained through that experience, the Plan measures the minimum level necessary for someone entering a position, which would be none to six months. She also noted that there is a “learning curve” for any new employee while they become acquainted with the procedures and requirements of their new position.

Ms. Moore made it quite clear that her opinions were based upon Grievant's revised 1993 PIQ. She also stated that she had personally been informed by Joan Applegate, Dean of the College of Human Resources and Education, that Grievant was no longer performing advising functions as of March, 1993. When questioned regarding Grievant's testimony that she was, indeed, advising students, Ms. Moore said this would not change her mind, because Grievant and her supervisor had the responsibility of providing this information to the JEC, which they had not. Accordingly, Respondent's witness also did not address the experience level which would be needed for someone in Grievant's position if her testimony were taken as true.

Ms. Moore's testimony is not credible. A grievant testifying under oath cannot simply be ignored by Respondent's witness; there is absolutely no basis for Ms. Moore's allegation that Grievant had to provide information about her job duties to the JEC rather than offering it within the context of her level four grievance. Grievant has provided significant evidence that she does perform advising functions as part of her everyday job duties, and she explained that her 1991 PIQ is the accurate reflection of her responsibilities. Grievant's evidence is further supported by Dr. Lovell's statement (See footnote 5) on her appeal form, which stated:

> Ms. Lopez provides counsel to individuals pursuing academic coursework leading to additional certification, completion of certification, and/or completion of credits needed for pay raises in public schools. She also provides information and counsel to the employers of such individuals. In view of these responsibilities, I believe that the title “Academic Adviser” is more reflective of the work she does. I support her appeal.

In addition, Dean Applegate also supported the appeal, stating “I have no basis against which to determine the adequacy of the appeal. Therefore, I support the appeal.” This comports with Grievant's testimony that the dean has no idea what she does.

When a grievant presents evidence proving that she performs duties at a higher level than that for which she was given credit, which is not addressed or refuted by Respondent, she is entitled to the

higher degree level. Creel v. Bd. of Trustees, Docket No. 94-MBOT-458 (March 31, 1997). Accordingly, Grievant has proven by a preponderance of the evidence that over a year of experience is necessary to perform her duties, so she is entitled to a 3.0 degree level for Experience. This will add 112 points to the 1840 points she received under her initial classification.

2. Freedom of Action

The Plan defines Freedom of Action as:

> This factor measures the degree to which the position is structured as is determined by the types of control placed on work assignments. Controls are exercised in the way assignments are made, how instructions are given to the employee, how work assignments are checked, and how priorities, deadlines and objectives are set. Controls are exercised through established precedents, policies, procedures, laws and regulations which tend to limit the employee's freedom of action.

Grievant's job title received a degree level of 3.0, and she seeks the 3.5 level given to the Academic Advisor title. Half levels were awarded when positions were performing significant portions of duties in both levels. Resp. Ex. 1.

The definitions in the Plan show that at a degree level of 3.0:

> Tasks are moderately structured with incumbent working from objectives set by the supervisor. At this level, the employee organizes and carries out most of the work assignments in accordance with standard practices, policies, instructions or previous training. The employee deals with some unusual situations independently.

The definitions in the Plan show that at a degree level of 4.0:

> Tasks are minimally structured with incumbent working from broad goals set by the supervisor and established institutional policies. The employee and supervisor work together to establish objectives, deadlines and projects. The employee, having developed expertise in the line of work, is responsible for planning and carrying out the assignment; resolving most of the conflicts which arise; and coordinating the work with others. The employee keeps the supervisor informed of progress and potentially controversial matters. Completed work is checked only to determine feasibility, compatibility with other work, or effectiveness in meeting the objectives of the unit.

Grievant began her testimony on this point factor by stating that no one reviews or checks her work, including her supervisor, and never has since she began performing her current duties in 1975. However, the level of supervision exercised over the employee is not the key issue for measuring this point factor, rather it is the external controls placed upon her freedom to make decisions. See Kretzmer v. Bd. of Directors, Docket No. 94-MBOD-751 (Feb. 6, 1997); Barber v. Bd. of Trustees, Docket No. 94-MBOT-872 (Oct. 31, 1996). Although Grievant works independently on a daily basis, she verifies and completes certification renewals in compliance with specific state guidelines and

regulations. With regard to advising students, Grievant testified that she must deal with situations where a student/teacher has not taken the appropriate courses to comply with state requirements. However, her PIQ reflects that such situations may be discussed with a supervisor.

Ms. Moore testified that Grievant's duties fall squarely within the level 3.0 definition. She must follow specific guidelines in order to complete certification renewals and occasionally deals with unusual situations. The evidence establishes that Ms. Lopez's responsibilities are fairly structured. She has not shown that she and her supervisor work together to establish objectives, etc., as set forth in the level 4.0 definition. Accordingly, the JEC's decision evaluating Grievant at the 3.0 degree level was not clearly wrong or arbitrary and capricious.

C. Summary

Grievant has not proven that she should have been classified as an Academic Advisor. However, she did establish that she is entitled to a higher degree level than her job title was given for the point factor Experience. Raising her degree level to 3.0, with the corresponding increase of 112 points, gives Grievant's position a total of 1952 points. This places Grievant within Pay Grade 14.

Conclusions of Law

1. The governing boards are required by W.Va. Code § 18B-9-4 to establish and maintain an equitable system of job classification for all classified employees in the higher education system.

2. The burden of proof in a misclassification grievance is on the grievant to prove by a preponderance of the evidence that she is not properly classified. 156 C.S.R. 1 § 4.19.

3. Determinations of the Job Evaluation Committee ("JEC") regarding application of the Mercer Plan's point factor methodology are essentially questions of fact. In that regard, the JEC's interpretation and explanation of the point factors at issue will be given great weight unless clearly erroneous. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). See generally, Tennant v. Marion Health Care Found., 459 S.E.2d 374 (W.Va. 1995). 4. Subjective determinations of the JEC regarding application of the Mercer Plan's point factor methodology to an employee or group of employees are entitled to deference when being reviewed by this Grievance Board. Such determinations may nonetheless be found to be arbitrary and capricious if not supported by a rational basis; they may also be clearly wrong if there is no substantial evidence in the record supporting the finding or if review of the evidence reveals that a mistake has been made. Burke,

supra. See Frymier-Halloran v. Page, 458 S.E.2d 780, 788 (W.Va. 1995).

5. Grievant did not prove that she should have been classified as an Academic Advisor.

6. Neither Grievant nor the Academic Program Associate job title were incorrectly evaluated with regard to the point factor Freedom of Action.

7. When a grievant presents evidence proving that she performs duties at a higher level than that for which she was given credit, which is not addressed or refuted by Respondent, she is entitled to the higher degree level. Creel v. Bd. of Trustees, Docket No. 94-MBOT-458 (March 31, 1997).

8. The JEC was clearly wrong in assigning Grievant a 1.0 degree level for the Experience point factor. She is entitled to a 3.0 degree level, raising her position to a Pay Grade 14.

Accordingly, this Grievance is **GRANTED**, and Respondent is Ordered to place Grievant within an appropriate job title in Pay Grade 14, with corresponding back pay and prejudgment interest pursuant to W.Va. Code § 56-6-31, effective January 1, 1994.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance occurred, 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: April 11, 1997 _____ **V.**

DENISE MANNING

Administrative Law Judge

Footnote: 1

The reader is referred to Burke v. Bd. of Directors, Fairmont State College, Docket No. 94- MBOD-349 (Aug. 8, 1995), for a discussion of the background of the Mercer reclassification project, the procedural history of the Mercer grievances, and the definitions of various terms of art specific to the Mercer reclassification.

Footnote: 2

The thirteen point factors are set forth in 128 C.S.R. 62 § 2.27 and 131 C.S.R. 62 § 2.27. Burke, supra.

Footnote: 3

A grievant may challenge any combination of point factor degree levels, so long as she clearly identifies the point factor degree levels she is challenging, and this challenge is consistent with the relief sought. See Jessen, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-1059 (Oct.26, 1995); and Zara, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-817 (Dec. 12, 1995).

Footnote: 4

This discussion is not intended to address challenges to the way the Mercer system as a whole is set up, that is, challenges to the methodology.

Footnote: 5

Dr. Lovell did not testify in the level four hearing.