CARLA LAPELLE,

Grievant,

v. DOCKET NO. 94-MBOT-652

BOARD OF TRUSTEES/MARSHALL UNIVERSITY,

Respondent.

DECISION

Grievant Carla Lapelle grieves her classification as a Counselor II, at Pay Grade 17. She seeks creation of a new title, Counselor III/Health Education Programs Coordinator, and Pay Grade 20. Grievant was classified under the Job Evaluation Plan for State College and University Systems of West Virginia ("Plan"), which was developed by the Respondent's Job Evaluation Committee ("JEC") (See footnote 1) . The Plan employs a "point factor methodology" which evaluates each job title by analyzing specific characteristics termed "factors" (See footnote 2) , assigning a rating or "level" within each factor, and applying a weighted equation to the assigned levels to arrive at a numerical total. This total then determines the job title's pay grade.

A Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on October 31, 1996. This matter became mature for decision on December 16, 1996, following the receipt of timely post-hearing submissions from the parties.

Grievant specifically challenges the degree level ratings received in several point factors used to evaluate her position and assign it a Pay Grade under the Plan. The point factors challenged are: Experience; Complexity and Problem Solving; Scope and Effect/Nature; Breadth of Responsibility; and External Contacts.

The following Findings of Fact are properly made from the record developed at Level IV:

FINDINGS OF FACT

1 1. All classified employees were asked to complete a Position Information Questionnaire (“PIQ”) prior to the reclassification. PIQs are 17 page documents on which individual employees described the duties of their position, as well as certain minimum qualifications required to carry out their duties. Employees were also asked to rate various aspects of their position by comparison with definitions nearly identical to those set forth in the Plan. The PIQ was reviewed, commented upon, and signed by the employee's supervisor, and the supervisor's supervisor. Ms. Lapelle filled out a PIQ in 1991.

2 2. Ms. Lapelle is employed by Marshall University ("MU") as acounselor and health education programs coordinator, and has been employed performing essentially the same duties since 1986.

3 3. Grievant's job duties are essentially the same as they were on January 1, 1994, and include (with approximate percentages of time): providing psychotherapy and/or counseling for students with emotional, mental, developmental, and adjustment disturbances or disorders (40%); coordinating educational programs, including soliciting speakers; securing space, supplies and equipment; working with community organizations on joint programs; negotiating, training, evaluating and compiling data on programs and instructors; and developing and producing educational brochures, newsletters and pamphlets (25%); interacting with campus and community groups by participating in meetings, working with programmers to coordinate efforts on and off campus, exchanging information and providing assistance (5%); researching, preparing and making presentations of an educational nature(5%); program promotion, including attending meetings, classes and gatherings to promote programs, providing media interviews and distributing program literature (5%); instructing classes, including researching, preparing and delivering lectures; preparation and grading of assignments, tests and projects; and coordinating guest speakers (5%); acting as liaison between Student Health Services and Student Development by coordinating referrals from Student Health to the Counseling Center, Chairing the Wellness Advisory Board, developing and initiating means to increase awareness of services, assisting in the Family Planning Project, and consultingwith resident medical students (5%); supervising student and graduate assistants, interns, volunteers and peer educators and program development (5%); and maintaining qualifications and education including license maintenance, professional development activities, literature review and involvement in organizations (5%).

4 4. The psychotherapy and counseling services provided by Ms. Lapelle are primarily to stabilize and treat chronic mental disorders, bipolar disorders, eating disorders, psychotic disorders, post-

traumatic stress disorders, clinical depression and addictions. Crisis intervention is required on a regular basis, in situations such as suicide, attempted suicide, or rape. Ms. Lapelle may also work with and refer students to physicians outside MU, and may take part in involuntary commitment proceedings.

5 5. Ms. Lapelle develops and presents classes for credit, including classes on substance abuse prevention, AIDS awareness and AIDS prevention.

6 6. Ms. Lapelle teaches substantially more than other Counselor IIs. Most Counselor IIs present 3-4 programs per semester, while Ms. Lapelle presents 3-4 programs per week. In addition, graduate assistants assigned to Ms. Lapelle present another 5-7 programs per week.

7 7. Ms. Lapelle proposes amounts to be included in budget line items used for her projects and activities. Her supervisor approves her proposals, and Ms. Lapelle then conforms her activities and expenditures to match the line item budget. Purchase orders are signed by Ms. Lapelle's supervisor. Ms. Lapelle occasionally raises money for her projects through donations. Ms. Lapelle has no formal budgetary accountability.

8 8. Ms. Lapelle has a Masters degree in clinical psychology. As part of obtaining this degree, Ms. Lapelle performed a four- to six- hundred hour internship in MU's Psychology Clinic. She finished her Masters degree in 1982. For the following four years, she worked as a psychologist at the Cabell County Community Mental Health Center. She then started working in 1986 at MU in her current job. She has been a licensed psychologist since 1988.

9 9. Five to six non-redundant exposures to pathologies are needed in order for one to handle crisis situations adequately, and to act independently and efficiently as a clinician. Exposures in this number would be seen in four years of experience.

10 10. In "developing" programs, Ms. Lapelle informally gathers evidence of student behavior and knowledge through her own observations, reports from police and other authorities, and other sources. Ms. Lapelle performs "research" by discussing problems with persons on other campuses, in hospitals or in other locations, identifying what approaches have been tried, how they worked, and associated data. She decides what might increase student knowledge or change student behavior, and then develops programs and/or presentations to address the concerns.

11 11. The programs she has developed have been created as part of an overall plan which Ms. Lapelle formulated to promote wellness. Ms. Lapelle chairs a committee which authorized a

policyregarding the student center, and has helped formulate and change policies regarding smoking, students with AIDS, and athletic training standards which impact on eating disorders.

12 12. Grievant is not responsible or accountable for the counseling unit at MU.

13 13. The Counselor II generic job description does not address counseling and psychotherapy for students with psychological or emotional disorders which may require crisis intervention. Rather, it contemplates counseling of normal students regarding personal growth and vocational/educational planning. Jt. Ex. 5. Counselor II duties do not generally include presenting classes for credit. However, classes and programs promoting health and wellness, including those designed to prevent substance abuse, are of the general nature of programs contemplated in the Counselor II job description.

DISCUSSION

The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that he or she is not properly classified. 156 C.S.R. 1 §4.19; W. Va. Code § 18- 29-6. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant must identify the job he or she feels is being done. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991). The grievant must also identify which point factor degree levels are challenged. This is because the Mercer reclassification system is not based upon whole jobcomparisons. Rather, the Mercer system is largely a quantitative system in which the components of each job are analyzed separately. The components are then evaluated using the point factor methodology contained in the Plan. Burke, supra. A grievant may challenge any combination of point factor degree levels, so long as he or she clearly identifies the ones being challenged, and this challenge is consistent with the relief sought. See Zara v. Bd. Of Trustees, Docket No. 94-MBOT-817 (Dec. 12, 1995); and Jessen v. Bd. Of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995).

Some "best fit" analysis is involved in determining which degree level of a point factor should be assigned. However, this system must by statute be uniform across all higher education institutions. Therefore, the point factors are not assigned to the individual, but to the job. Burke, supra. In order to maintain the integrity of the overall classification scheme, the "best fit" must be determined in relation to other similar positions. The individual grievant's case must also be analyzed with reference to

where the position fits in the higher education classified employee hierarchy.

In this case, whether Ms. Lapelle is properly classified is almost entirely a factual determination. As such, the JEC's 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. Of course, no interpretation or construction of a term is necessary where the language is clear and unambiguous. See Watts v.Dept. Of Health & Human Resources, 465 S.E.2d 887 (W. Va. 1995). A Mercer grievant may prevail by demonstrating his or her reclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989). However, the grievant will have to overcome a substantial evidentiary obstacle in proving he or she was misclassified.

Ms. Lapelle challenged her ratings in several of the factors analyzed in assigning her title and pay grade. In addition, she challenged the applicability of the job described by the Generic Job Description (GJD) for Counselor II to her position's duties. Each point factor which is subject to dispute in this grievance will be addressed separately.

A. 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 Counselor II position was assigned level 3 in this factor. Level 3 is defined in the Plan as "[o]ver one year and up to two years of experience." Ms. Lapelle believes that her position's job duties require assignment of level 5 for Experience. Level 5 is defined as "[o]ver three years and up to four years of experience." Level 4 is defined by the Plan as "[o]ver two years and up to three years of experience."

Ms. Lapelle testified that a person in her position isrequired to diagnose, provide counseling or psychotherapy, and/or otherwise address a wide variety of pathologies, some of which are difficult to diagnose correctly and some of which are of crisis proportions. Ms. Lapelle stated that she must be able to decide independently how to handle crisis situations, as there is little if any clinical support immediately available from more expert sources.

One in this position must be able to act independently and efficiently in differing situations. The

person in this position must decide whether a student in crisis should be hospitalized (with or without the student's consent), and whether family should be contacted, for example. One must also be able to inform family members when a student has suffered physical loss, or has committed suicide. Ms. Lapelle testified that, in the professional literature which she reads, learning theorists generally have agreed that in four years of clinical experience one might see 5-6 non-redundant cases of crisis pathologies, and that such exposure is necessary for one to adequately handle such situations independently. She averred that at least three to four years of experience is required to desensitize one sufficiently to crisis situations, to be able to put aside one's shock and fear, and to instead be able to formulate action plans to address the crisis appropriately. She also pointed out that counseling students with the pathologies which she sees is not reflected by the Counselor II GJD, and that her position therefore does not properly belong in that title. Rather, Ms. Lapelle opined that the counseling coveredby the GJD is counseling of traditional, well-adjusted students.

Respondent's witness was Ms. Margaret Robinson Buttrick, Human Resources Administrator for the State College and University Systems, and Chair of the JEC since its inception. Ms. Buttrick stated that the Experience factor must be analyzed in conjunction with the Knowledge factor, as they are interactive. Credit for the same experience cannot be given under both factors. She opined that one would have some exposure to different situations during a "practicum" required in obtaining a Masters' degree (See footnote 3). Ms. Buttrick explained that the JEC had to decide what was most important for the Counselor II position: a Masters' degree and one or two years of experience, or a Bachelors' degree and five or six years of experience. She stated that the JEC had decided that the Counselor II job could adequately be performed by one who had obtained a Masters' degree, and who also had one year's experience, after reasonable on-the-job orientation training. In this evaluation and rating, she stated that the JEC gave credit for some experience under the Knowledge factor, as being part of the Masters' program internship.

Significantly, Ms. Buttrick did not rebut Ms. Lapelle's testimony that learning theorists have stated in professional publications that one must have five to six non-redundant exposures over the course of approximately four years' experience to be able to handle crisis pathologies independently and appropriately. Ms.Lapelle, who appeared pro se, was unable to cite to a specific publication or author by name. However, her credible and unrebutted testimony regarding the content of professional writings is sufficient to provide objective external support for her opinion that three to four years'

experience was necessary to perform this position's work. Thus, Ms. Lapelle's opinion regarding the amount of experience necessary for a new employee in her position is substantiated, unlike the opinions in other cases decided by this Board. See, e.g., Reedy v. Bd. of Directors, Docket No. 94-MBOD- 721 (Nov. 4, 1996); and Saulton v. Bd. of Directors, Docket No. 94- MBOD-800 (Dec. 5, 1996).

Further, Ms. Buttrick did not take issue with Ms. Lapelle's statement that others in the Counselor II job title counsel "traditional, well-adjusted students" while Ms. Lapelle counsels dysfunctional students with various psychological and emotional problems which require crisis intervention. Such a distinction in the job duties supports a distinction in the experience required to appropriately counsel students.

Ms. Buttrick stated that the experience gained in one's Masters degree internship might constitute experience credited under the Knowledge factor. Assuming arguendo that the JEC did so, a 400- to 600- hour internship only equates to three to six months of full time experience. Accordingly, one would still need three and one half years' experience to obtain the four years' experience which is needed according to professional literature. Or, more conservatively, one would still need two and one half years'experience to obtain the three to four years' experience needed, in Ms. Lapelle's opinion.

Although deference is given to the JEC's analysis and explanation of the point factors, such deference is misplaced where the JEC's decision is not supported by substantial evidence of record or is based upon an apparent mistake of fact. Here, the JEC apparently failed to consider relevant factors in arriving at its decision. As the GJD for the Counselor II title is, by its own language, directed toward counseling of traditional students without mention of severe psychological or emotional problems, it is likely that the JEC failed to consider the amount of experience minimally required to counsel a student in crisis. In addition, testimony indicated that the JEC unreasonably limited its options when assessing this factor in relation with the Knowledge factor. Ms. Buttrick testified that there were only two options: a Bachelors' degree and more experience, or a Masters degree and less experience. Such is not required by the Plan. No rationale or justification was suggested as to why the JEC would so limit its options in assessing this position. The JEC's rationale is not memorialized anywhere, and can only be explained by witnesses such as Ms. Buttrick. Where that witness' testimony contradicts the language of the Plan without adequate explanation, the rationale of the

JEC's decision must necessarily be suspect.

Here, Ms. Lapelle has shown that, more likely than not, the psychological and emotional dysfunction she confronts in performing a large part of her duties (40%) are such that three to four yearsof experience are needed to appropriately address them. The evidence that Ms. Lapelle's duties require greater experience than the JEC assigned was not rebutted. The JEC was clearly wrong in its rating of the Experience factor for Ms. Lapelle's position. Using the more conservative supported evidence, Ms. Lapelle's position is entitled to level 4, two to three years' experience, in this factor.

B. COMPLEXITY AND PROBLEM SOLVING:

The Plan defines Complexity and Problem Solving as:

> This factor measures the degree of problem-solving required, types of problems encountered, the difficulty involved in identifying problems and determining an appropriate course of action. Also considered is the extent to which guidelines, standards and precedents assist or limit the position's ability to solve problems.

The Counselor II position was assigned level 4 in this factor. Level 4 is defined in the Plan as:

> Problems encountered are complex and varied due to incomplete and/or conflicting data. General policies, procedures, principles, and theories of specific professional disciplines are available as guidelines; however, these guides may have gaps in specificity or lack complete applicability to work assignments. Employee must utilize analytical skills in order to interpret policies and procedures, research relevant information, and compare alternative solutions.

Ms. Lapelle seeks assignment of level 5, which is defined in the Plan as:

> Problems encountered involve unusual circumstances, variations in approach, and incomplete or conflicting data. Employees exercise considerable analytical, valuative and reasoning skill in researching information and developing new methods to perform work assignments or optimum solutions to problems. The development of new programs, procedures or methods are typical end resultsof the problem-solving process. Determination of the effectiveness of a policy or practice may be involved at this level.

Ms. Lapelle testified that she develops educational programs and evaluates them in the course of her work. She gave as examples her development of assertiveness training programs, and programs on other personal development subjects such as how to hold a conversation. She also stated that she did more than merely give presentations. She develops and coordinates programs and presentations with many different groups, both on and off campus. As another example, she noted her role in staging a "mock crash" of an automobile, coordinating among all groups to bring the presentation to the MU campus. Groups involved included MU's police department, Cabell County Emergency

Medical Technicians, the city of Huntington, and personnel from St. Mary's Hospital.

Ms. Buttrick testified that development of educational programs was not necessarily considered under this factor. Rather, the JEC was looking at whether people solved the types of problems which would change the work and discipline of, in this instance, all Counselor II's in the system. She stated that level 4 was considered the professional functioning level for the type of discipline involved in counseling. She noted that the difficulty of a task is not measured by this factor, but the difficulty of problems encountered in performing one's task. She also noted that a conceptual averaging of the types of problems encountered by all Counselor II's was used in assigning level 4 in Complexity and Problem Solving. As noted in Miller v. Bd. of Directors, Docket No. 94-MBOD-945 (Oct. 29, 1996), the difference between a Level 4 and a level 5 rating in this factor involves a subjective determination by the JEC, which is entitled to deference unless clearly wrong. The level 4 definition certainly applies to Ms. Lapelle's work. However, it is not clear that the level 5 definition applies. Ms. Buttrick's testimony that the JEC did not consider development of educational programs to be the "development of programs" referenced in level 5 is not clearly implausible in light of the language of the definitions. Grievant has failed to prove that the JEC was clearly wrong or arbitrary and capricious in assigning Ms. Lapelle's position a level 4 under Complexity and Problem Solving.

C. SCOPE AND EFFECT/NATURE:

According to the Plan:

> This factor measures the scope of responsibility of the position with regard to the overall mission of the institution, and/or the West Virginia higher education systems, as well as the magnitude of any potential error. Decisions regarding the nature of action should consider the levels within the systems that could be affected, as well as impact on the following points of institutional mission: instruction, instructional support, research, public relations, administration, support services, revenue generation, financial and/or asset control, and student advisement and development. In making these judgments, consider how far-reaching is the impact and of what importance to the institution and/or the higher education systems is the work product, service or assignment. Decisions regarding the impact of actions should take into account institutional scope and size as reflected by operating budget, student enrollment and institutional classification. Also, consideration should be given for the possibility that a unit, program or department within a large institution may be equivalent in size to multiple units, programs or departments within a smaller institution. In making these interpretations,assume that the incumbent would have normal knowledge, experience and judgment, and that errors are not due to sabotage, mischief or lack of reasonable attention and care.

This factor is analyzed in two parts, Nature of Action (Nature) and Impact of Actions. Ms. Lapelle

challenged only the rating her position received in Nature. The Counselor II title was assigned level 3, while Ms. Lapelle asserts her position should be assigned level 4.

Level 3 is defined as:

> Work provides guidance to an operation, program, function or service that affects many employees, students or individuals. Decisions and recommendations made involve non-routine situations within established protocol, guidelines, and/or policies. Errors could easily result in moderate costs and inconveniences within the affected area.

Level 4 of SE/NA is defined as:

> Work contributes to or ensures the effectiveness of operations or services having significant impact within the institution and involves application of policies and practices to complex or important matters. Errors could easily result in substantial costs, inconveniences, and disruption of services within the affected area.

Ms. Lapelle testified that her crisis management has an impact on all of MU or at least a class or dormitory hall when a student "acts out" inappropriately. She gave examples of crisis management she is called upon to confront, such as a student committing suicide in the presence of other students. In such an event, Ms. Lapelle provides both immediate and longer term counseling for the involved students, and also works with other MU faculty, advisors and staff in their dealings with the students.

Ms. Buttrick reiterated many of the reasonings given under thediscussion above of Complexity and Problem Solving. Additionally, she stated that Ms. Lapelle's mistakes could cause moderate cost and inconvenience to MU. She testified that the JEC determined that level 3 in this factor is the professional level of functioning, and that level 4 begins to get into the managerial level, where the person has overall authority over a budget and other subordinate personnel.

Again, the difference between the definitions at levels 3 and 4 involves a subjective determination regarding the interpretations of the definitions. Miller, supra. The interpretation of the rating levels given by Ms. Buttrick is not implausible or clearly wrong. The JEC appears to have considered all the applicable information in assigning level 3 in Scope and Effect/Nature to Ms. Lapelle's position. The Grievant has failed to carry her burden of proving that the JEC was clearly wrong, arbitrary or capricious.

D. BREADTH OF RESPONSIBILITY:

Ms. Lapelle argues she should have received a level 3, rather than a level 1 in this factor. It is well established that this factor only gives credit to those who have formal financial accountability for an area. See e.g., Riggs v. Bd. of Trustees, Docket No. 94-MBOT-711 (Apr. 29, 1996); and Mitchell v. Bd. of Directors, Docket No. 94-MBOD-348 (May 21, 1996). Although she does have some delegated discretion in handling the line item budget amounts assigned to her areas of responsibility, Ms. Lapelle has no formal budgetary accountability, in an institutional sense,nor is she formally accountable for a functional area. Her duties fall within the level 1 definition. See Burke, supra, and Floyd v. Bd. of Trustees, Docket No. 94-MBOT-932 (June 14, 1996).

D. EXTERNAL CONTACTS/LEVEL:

External Contacts is defined in the Plan as:

> This factor appraises the responsibility for working with or through other people outside the SCUSWV [State College and University Systems of West Virginia] to get results. Consider the purpose and level of contact encountered on a regular, recurring and essential basis during operations. Consider whether the contacts involve furnishing or obtaining information, influencing others or negotiation.

This factor is divided into two parts, Nature of Contacts and Level of Regular, Recurring and Essential Contacts ("Level"). Ms. Lapelle argues that she should have been assigned level 4 in the Level part of this factor, rather than level 3. Level 3 is defined as contacts with "[s]tudents, parents, alumni, faculty of institutions outside the systems, sales engineers, higher-level product representatives, recruiters and/or prospective students." Level 4 in Level of Contact is defined in the Plan as "[m]id-level representatives of government agencies, professional contacts with other colleges and universities outside the systems."

Ms. Lapelle testified that she routinely contacts the State Health Department for educational information and materials, that she contacts the Cabell County Sheriff, city police, personnel at city hospitals, engineers, the president of Mothers Against Drunk Driving, area bars, and others to get and give information and to recruit presenters. She also has contacts with area mental healthprofessionals and law enforcement officials regarding coordination of treatment.

Ms. Buttrick testified that none of the contacts mentioned by Ms. Lapelle are with "mid-level government representatives." The JEC considered manager-level and above to constitute "mid-level" positions within State agencies. Professional positions were not considered "mid-level," she explained. For example, the AIDS Coordinator in the Health Department and the traffic engineer in

the Mayor's office are professionals, not mid-level government representatives, she stated. Ms. Buttrick testified that the majority of Ms. Lapelle's contacts are with students, which fall squarely within the level 3 definition. While she admitted that Ms. Lapelle's contacts with faculty at hospitals and other institutions are necessary professional contacts, she stated that these contacts did not occur often enough and did not take up a large enough percentage of Grievant's time to be considered.

The evidence shows that Ms. Lapelle has essential contacts with other professionals, regarding topics such as an individual's treatment and/or general educational programs. Persons contacted include faculty, counselors, and physicians. However, the frequency of such contacts and, more importantly, total time spent in such contacts, is not clear. Thus, it cannot be determined that a significant amount of Ms. Lapelle's time is spent in making such contacts on a regular and recurring basis. Indeed, the contacts seem to occur on an "as needed" basis, rather than regularly.

Ms. Lapelle has not proven that the JEC was clearly wrong orarbitrary and capricious in not considering her professional contacts to be "regular, recurring and essential" such that she would be entitled to the level 4 rating. The rationale for not considering such contacts in rating this factor is sufficient to explain the JEC determination in a way that is not clearly wrong in view of the language used in the definition. The JEC cannot be found to have been clearly wrong in assigning level 3 in External Contacts/Level.

E. DIRECT SUPERVISION EXERCISED:

Ms. Lapelle did not challenge her rating in either part of this factor. However, Respondent argued that Ms. Lapelle's individual position had been overrated in this factor. This Board has previously ruled that the offsetting of an increase in points by a reduction in points in other factors is appropriate in deciding these grievances. See Miller, supra.

> This factor measures the job's degree of direct supervision exercised over others in terms of the level of subordinate jobs in the organization, the nature of the work performed, and the number supervised. Only the formal assignment of such responsibility should be considered; informal work relationships should not be considered. Supervision of student workers may be taken into account if they are essential to the daily operation of the unit. The number of subordinates should be reported in full-time equivalency (FTE) and not head count.

This factor is analyzed in two parts: Number of Direct Subordinates (Number) and Level of Supervision (Level). The Counselor II title was assigned level 2 in Number, which is defined as one

direct subordinate. The Counselor II title was assignedlevel 3.5 in Level, which is handwritten into the Plan and defined as supervision of one employee. Ms. Buttrick testified that this intermediate level was created for positions which supervised only one subordinate employee.

Respondent argued that Ms. Lapelle's individual position had been overrated in this factor, having received the benefit of conceptual averaging, when the JEC considered an overall rating of all positions designated as Counselor IIs. Ms. Buttrick testified that Ms. Lapelle herself did not supervise any regular employees, but only graduate assistants working part time. She testified that the graduate assistants might not have been considered to be essential student workers, and therefore might not have been counted, had the JEC individually evaluated Ms. Lapelle's position. However, she did not testify that the graduate assistants were not, in fact, essential based upon the evidence adduced at the hearing. Nor did she testify that graduate assistants were, in fact, considered "student workers" as that term is used in the Plan. She testified that one without regular employees would not receive the level 3.5 rating assigned this position in Level, as that rating was reserved for those who had direct supervision of one subordinate.

In analyzing the Number part of this factor, Ms. Lapelle's PIQ states that 2.5 FTE students are supervised. (Jt. Ex. 1.) The PIQ specifically requests that the responses be in full-time equivalency rather than head count, and Ms. Lapelle's response of one graduate assistant and 1.5 student assistants suggests that shedid not provide an answer in "head count." No challenge to this number was made by Respondent. Thus, Ms. Lapelle's individual position could be appropriately assigned a level 3 in Number, which is defined as two to three direct subordinates.

Analysis of the Level part of this factor is more difficult, as the definitions are more subjectively applied. No specific allegation was made that these positions were not essential. No testimony was given that "graduate assistants" are "student workers." However, even if one applies a conservative interpretation and assumes that graduate assistants were considered "student workers" under the Plan (See footnote 4), Ms. Lapelle's individual position could be appropriately assigned a level 2 in Level, as that definition pertains specifically and exclusively to student workers. By the process of elimination, it was calculated that the Counselor II position received 137 points in this factor (See footnote 5), while the individual rating results in 113 points. R. Ex. 2. The difference is 24 points. This is not an offset which changes the outcome of this case (See footnote 6), as Ms. Lapelle's position gets a total of2434 points even with the offset. As the outcome of this grievance is not altered, no

legal or factual conclusions will be made regarding this point factor. (See footnote 7)

SUMMARY

Ms. Lapelle has not shown that the JEC was clearly wrong in assigning ratings to her position under the factors Complexity and Problem Solving, Scope and Effect/Nature, Breadth of Responsibility, or External Contacts/Level. Ms. Lapelle has shown that the JEC was clearly wrong in assigning her position the level 3 rating in the Experience factor. By assigning her position the appropriate points for level 4 under Experience, she is entitled to an increase of 56 points. This equates to a Pay Grade 18.

COMPARISON OF GENERIC JOB DESCRIPTION

Ms. Lapelle's duties and responsibilities are substantially different from those reflected by the Counselor II GJD. That GJD shows counseling of typical students regarding educational and personal skills, rather than counseling of students with various psychological or emotional problems which regularly require crisis intervention. Consequently, it is found that the Counselor II job title, as it currently exists, is not a proper title for Ms.Lapelle. However, there is insufficient information to conclude whether or not the job duties which distinguish Ms. Lapelle's position also exist in other positions throughout the higher education system.

The JEC can best determine whether other positions also perform the counseling duties, including crisis intervention, which distinguish Ms. Lapelle's position from that currently described by the Counselor II GJD. Therefore, rather than ordering creation of a job title specific to Ms. Lapelle, it will be left to the discretion of the JEC whether to create a specific job title for Grievant, or to create a title, such as Counselor III, into which other persons with similar job duties will also be placed.

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 classifi cations for all classified employees in higher education.

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

3. Determinations of the Job Evaluation Committee("JEC") regarding application of the Plan's point factor methodology are essentially questions of fact. In that regard, the JEC's interpretation and explanation of the point factors and PIQs at issue will be given great weight unless clearly erroneous. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). Seegenerally, Tennant v. Marion Health Care Found., 459 S.E.2d 374 (W. Va. 1995).

4. The JEC's interpretation of the level 3 definition of the factor Scope and Effect/Nature, as constituting professional level functioning, is not clearly erroneous. Similarly, the JEC's interpretation of the level 4 definition as beginning the managerial levels of functioning is not clearly erroneous.

5. The JEC's interpretation of the level 4 definition of the factor Complexity and Problem Solving, as constituting professional level functioning, is not clearly erroneous.

6. Subjective determinations of the JEC regarding application of the 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, or to be clearly wrong if there is no substantial evidence in the record supporting the finding or if review of the evidence makes it clear that a mistake has been made. Burke, supra. See Frymier- Halloran v. Paige, 458 S.E.2d 780, 788 (W. Va. 1995); Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989).

7. The JEC's assignment of degree levels to the point factors Complexity and Problem Solving, Scope and Effect/Nature, Breadth of Responsibility, and External Contacts for Ms. Lapelle's position is neither clearly wrong nor arbitrary and capricious.

8. The JEC's assignment of level 3 to the point factorExperience is clearly wrong. By assigning the appropriate number of points for level 4 in this factor, Ms. Lapelle's position is entitled to an increase of 56 points. The resulting point total, 2458, places Ms. Lapelle's position in Pay Grade 18.

Accordingly, this Grievance is **GRANTED IN PART**. The Respondent Board of Trustees is hereby **ORDERED** to allocate Grievant to Pay Grade 18, retroactive to January 1, 1994, and to pay her the difference, if any, between the salary she would have received had she been properly allocated to Pay Grade 18 and the salary which she received while she was improperly allocated to Pay Grade 17.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court

of Cabell 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. 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.

JENNIFER J. MEEKS

Administrative Law Judge

Dated: January 28, 1997

Footnote: 1

The reader is referred to Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995) for a discussion of the background of this mass reclassification project, the procedural history of the grievances arising from the reclassification, and the definitions of some terms of art specific to the Plan.

Footnote: 2

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

Footnote: 3

The context of Ms. Buttrick's testimony indicates that "practicum" and "internship" are synonymous for purposes of this point factor analysis.

Footnote: 4

The undersigned does not find that graduate assistants are "student workers," as that term is used in the Plan. This assumption is made for the purposes of analyzing Respondent's contention regarding this point factor.

Footnote: 5

The calculation by which this figure was determined is attached hereto.

Footnote: 6

Ms. Buttrick stated that Ms. Lapelle's position may have been assigned higher ratings than warranted in other factors. However, the only factor she specifically discussed was Direct Supervision Exercised. As no specific allegations, argument or evidence was submitted regarding any other factors in which Ms. Lapelle may have received more points than appropriate, no other factors have been reviewed and no other such determinations havebeen made.

Footnote: 7

Respondent bears the burden of proof for point factor challenges which it makes independently of those raised by the grievant in these cases. Respondent has not carried its burden of proof in this instance, given the speculative nature of Ms. Buttrick's testimony.