GILBERT FLORES, JR.,

Grievant,

v. DOCKET NO. 94-MBOD-366

BOARD OF DIRECTORS/WEST VIRGINIA STATE COLLEGE,

Respondent.

DECISION

Grievant Gilbert Flores, Jr. challenges his classification as a Director of Public Safety II ("Director") at Pay Grade 19 under the "Mercer" reclassification. (See footnote 1) He seeks classification at a higher Pay Grade. Grievant was classified under the Job Evaluation Plan ("Plan") for the State College and University Systems of West Virginia, which was developed by the Respondent's Job Evaluation Committee ("JEC"). 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 "degree level" within each factor, and applying a weighted equation to the assigned levels to arrive at a numerical total, which determines the job title's Pay Grade. A Level IV hearing was conducted on February 4 and 28, 1997. This matter became mature for decision on March 14, 1997, the due date for proposed findings of fact and conclusions of law.

In this grievance, the degree level ratings received in the following point factors are specifically challenged: Knowledge, Experience, Scope and Effect/Nature of Actions, Breadth of Responsibility, Intrasystems Contacts, External Contacts/Level of Contacts, Direct Supervision Exercised, Indirect Supervision Exercised, Physical Coordination, Working Conditions, and Physical Demands. (See footnote 3)

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

FINDINGS OF FACT

1 1. Prior to the reclassification, all higher education classified employees were asked to complete a Position Information Questionnaire (PIQ) in which employees described their job duties and responsibilities and other aspects of their jobs by answering a series of questions designed to elicit

this information. Grievant filled out a PIQ in 1991. Jt. Ex. 2.

2 2. Grievant is the Director of the Public Safety Department (PSD) at West Virginia State College (WVSC).

3 3. Grievant's essential job duties (and approximate percentages of time spent in each) are: management of the PSD (35%); coordination of information and activities with other personnel on- and off-campus, including local, state and federal law enforcement offices (20-25%); performance of routine administrative duties including drafting and finalizing rules, regulations, policies and correspondence, compiling crime statistics, fielding inquiries, and completing various reports (15-20%); special project work, including training, discipline and termination of officers (5%); working as an officer, including performing investigations and crisis response (5%); and other miscellaneous duties (5-10%).

4 4. Grievant's supervisor is Dr. Cassandra Whyte, Assistant Vice President of Administrative Affairs. Dr. Whyte, in turn, is supervised by Dr. James Brimhall, the Vice President of Administrative Affairs.

5 5. Grievant directly supervises two shift supervisors (Captains), a secretary, contract employees and student workers. Seven officers are supervised through the Captains, although Grievant gives direct orders to and works directly with all officers from time to time. Grievant hires, trains, assigns work to, disciplines and fires his subordinates. His employees have different functions, but are not in specialized units.

6 6. Grievant must know how to use various pieces of equipment, such as cameras, so that he can oversee the officers' proper use of equipment. Grievant does not use equipment himself on a regular basis, except on occasion when he is working as an officer.

7 7. The majority of Grievant's time is spent in an office environment. Grievant is outdoors when he is working as an officer, and sometimes when he is performing supervisory duties.

8 8. The PSD is considered a separate department within WVSC for budgetary and organizational purposes. Grievant controls two budgets, one for WVSC's Identification System and one for Parking. The Parking budget covers all parts of the department other than those dealing with issuance, tracking and handling of identification cards and passes. Grievant sets up procedures and policies for collecting monies and accounting for the funds in these accounts. Grievant determines how the monies will be expended, and develops anticipated expenditures for following years. Grievant's proposed budgets include schedules and plans for salaries, equipment purchases, maintenance and

repair, and other such items, and include anticipated increases in expenses.

9 9. Grievant develops yearly objectives, plans and goals for the PSD, based upon WVSC's mission, and assesses whether the goals have been met each year. Grievant also provides input for WVSC's five-year plan.

10 10. Grievant decides how to handle law enforcement problems. Problems may be handled on- or off-campus, through administrative, civil or criminal proceedings. Grievant determines whether and how to enlist support from or refer cases to local, state or federal law enforcement authorities.

11 11. Grievant contacts the Vice President of Student Affairs, who is not in his chain of command, on a daily basis about law enforcement issues and security plans, including advising him on the legality of actions which the Vice President proposes to take. Grievant also has contact with other Vice Presidents, Directors, Chairs, faculty and other staff, when they call Grievant to report problems. However, many of these problems could be reported to officers on duty. Grievant has regular contact with attorneys from the Central Office to get legal advice, as well.

12 12. Grievant has contacts with outside law enforcement authorities at least weekly regarding crimes, service of process, and investigations. The contacts Grievant makes are with the highest level official in each agency, and include prosecutors and assistant prosecutors, magistrates, police chiefs, the Commander of the drug unit, and the Commandant of the state police. Occasionally, Grievant has contact with federal law enforcement personnel such as those from Alcohol, Tobacco and Firearms or the Secret Service. Grievant personally contacts outside law enforcement when sensitive subjects are involved, and allows his officers to make the contacts when information exchange is involved. Often Grievant's contacts with law enforcement, and with WVSC students, involve crimes. He has daily contact with students. He has at least monthly meetings with the Kanawha/Putnam Emergency Preparedness Council regarding emergency plans and organized drills. He has contacts with corporate safety officials, as well.

13 13. Grievant and his officers are required to have graduated from the State Police Academy. A PSD officer must be certified to carry a weapon. Grievant is also certified to carry a weapon.

DISCUSSION

I. BURDEN OF PROOF AND STANDARD OF REVIEW:

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 Plan's reclassification system is not based upon whole job comparisons, but is largely a "quantitative" system, in which the components of each job are evaluated separately by applying the point factor methodology contained in the Plan. Therefore, the focus in these grievances is upon the point factors the grievant is challenging. 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 position, but to the job title. Burke, supra.

In this case, whether Grievant is properly classified is almost entirely a factual determination. As such, the JEC's interpretation and explanation of the point factors at issue must 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 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). Generally, action is arbitrary and capricious if it did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96- DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment

for that of the JEC. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W.Va. 1982).

In order to determine if Grievant was misclassified, the point factors and ratings disputed must be discussed separately in detail.

II. POINT FACTOR ANALYSIS:

A. KNOWLEDGE:

The Job Evaluation Plan ("the Plan") defines Knowledge as:

> This factor measures the minimum level of education equivalency and/or training typically required for an incumbent to reach acceptable occupational competence on the job. The factor considers the technical, theoretical, and/or mechanical skills required, and the complexity and diversity of the required skills. (See footnote 4)

The Director job title received a level 5.5 rating in Knowledge, which is between the defined levels of 5 and 6. Grievant argued that his job duties merit a level 6 rating. Level 5 is defined as "[j]ob requires broad trade knowledge or specific technical or business knowledge received from a formal registered apprentice or vocational training program or obtained through an associate's degree of over 18 months and up to 3 years beyond high school." Margaret Robinson Buttrick, Human Resources Administrator for the State College and University Systems, and Chair of the JEC since its inception, testified that the additional half-level of credit in this factor was given because one in Grievant's job title must have attended the State Police Academy and must be licensed to carry a weapon.

Level 6 is defined as "[j]ob requires a thorough knowledge of a professional discipline or technical specialty as would normally be acquired through a relevant baccalaureate education program. Knowledge of principles, concepts, and methodology of a highly technical, professional, or administrative occupation is indicative of this level."

Grievant "strongly recommended" a Baccalaureate Degree, because one must know federal and state laws, law is an ever- changing area, and interpretation is required. One can take a criminal justice curriculum and get four years' worth of knowledge, Grievant stated. It would then take 3-5 more years' experience to be proficient in law enforcement, and longer to advance into command ranks, he added.

Ms. Buttrick explained that the Knowledge factor and the Experience factor must be considered together, and that credit given under one factor is not to be credited again under the other. She explained that an Associate's Degree was considered the minimum requirement in addition to

graduation from the Academy and the three to four years of experience required under the next factor.

Grievant did not explain why a Baccalaureate Degree would be essential, in addition to graduation from the State Police Academy and several years' experience. It is assumed that knowledge of law enforcement theory and practice is obtained in Academy courses, sufficient to prepare one for an entry-level law enforcement position. The experience requirement, measured under the next factor, presumably ensures appropriate application and practice of the theories to prepare one for a supervisory position. Grievant couched his argument in terms of a "strong recommendation," which is not a minimum requirement, but a suggestion or preference. Grievant's opinion or preference is not sufficient to prove the JEC was clearly wrong in arriving at its determination. See Aronhalt v. Bd. Of Trustees, Docket No. 94-MBOT-1013 (May 2, 1996). The JEC was not clearly wrong in assigning the level 5.5 rating in the Knowledge factor.

B. 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 Director job title received a level 5 rating in Experience, which is defined as "[o]ver three years and up to four years of experience." Grievant asserts that his job duties merit a level 8 rating, which is defined as "[m]ore than eight years of experience."

Grievant argued that, based upon his thirty years' experience, the law enforcement field is extremely slow in advancing individuals to supervisory level positions, and that one would not obtain positions equivalent to the Director position in less than eight years. In order to command and lead other officers, he asserted one must have the personal experience to know how to handle a broad range of situations, and how to make the correct decision in an instant. One must have 3-5 years of high level management experience, in addition to 5-8 years of general law enforcement experience, to competently perform the Director job duties, he opined.

Ms. Buttrick stated that with an Associate's Degree and graduation from the Academy, three to four years' experience is sufficient preparation to take this position. She added that the public security system within the West Virginia higher education system is not a "rank system," like city, county and state law enforcement systems. She asserted that advancement is based on time in a rank system,

while advancement is based upon changes in duties in the higher education system. Therefore, she stated, Grievant's testimony about how long it takes to move up through the ranks in other law enforcement systems is irrelevant.

Where a subjective determination is involved, as here, this Board is hesitant to second guess the JEC's action in the absence of compelling evidence. Had Grievant provided objective, verifiable evidence of minimum experience requirements for similar positions in other law enforcement agencies or of job duties in rank systems, his arguments may well have prevailed. However, he did not provide such evidence. As the classification Plan is clearly based on the specific duties and responsibilities of each job title, such information is essential to make the comparison Grievant proposes. Moreover, Grievant did not rebut Ms. Buttrick's testimony that WVSC's PSD is not a "rank" law enforcement agency. While I am inclined to believe that greater experience is necessary to make the decisions required in a leadership position of this sort, I am not allowed to substitute my opinion, or even Mr. Flores' informed opinion, for that of the JEC. See Braniff v. Bd. Of Trustees, Docket No. 94-MBOT-865 (Sept. 30, 1996).

C. SCOPE AND EFFECT/NATURE OF ACTIONS:

> 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, Impact of Actions (Impact) and Nature of Actions (Nature). Grievant challenged the rating in Nature.

The Director job title received a level 4 rating in Nature, while Grievant asserts that his job duties merit a level 5 rating. Level 4 is defined as "[w]ork 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."

Level 5 is defined as:

> Work involves planning, developing, and operating a major program or service having a broad impact within the institution by solving critical operational problems or developing and/or implementing new procedures and concepts. Work also involves extensive and consequential support, development, or recommendation of major objectives, policies, programs or practices. Errors could easily result in major costs, problems and disruptions within the affected area.

Grievant explained that he is responsible for developing objectives and goals for PSD, which he described as a major program. Ms. Buttrick testified that public safety is not a major program or service having "broad" impact on the educational mission of the institution. She indicated that level 3 begins professional level positions, and level 4 begins management levels. R. Ex. A, pp. 23-25. She also explained her written statement that level 5 was reserved for "directors and high level administrators," by stating that "director" level positions are different at different institutions, and that neither the title nor the levels in the hierarchy are determinative. Grievant does not perform long-range strategic planning, as would be required for a level 5 rating, she said.

While it appears that Grievant's position is a relatively high level administrative position, Ms. Buttrick's testimony is persuasive, and accords with prior decisions. For example, in Jessen supra, it was found that level 4 in Nature was consistently awarded only to higher level management positions where a manager is responsible for an entire unit or department, and for insuring that the objectives of that department are accomplished. Grievant's duties meet this description.

In another decision, Perkins v. Bd. of Trustees, Docket No. 94-MBOT-474 (Mar. 12, 1997), it was found that level 3 was appropriate where the biology department lab manager position directly impacted students, but not the whole operation of the department. There, the operation or service involved directly impacted and affected many students, but not the whole institution. While Grievant's position here is obviously of broader institutional impact than the position in Perkins, the theory behind the decision applies. Grievant's position impacts public safety and law enforcement throughout the institution. However, it is still a support function, albeit important, and only indirectly impacts the educational mission of the institution and the higher education system.

The JEC's rationale for its choice has been explained in a manner which is not in conflict with the Plan. Grievant has not proven that the JEC's level 4 rating in Scope and Effect/Nature was clearly wrong, arbitrary or capricious.

D. BREADTH OF RESPONSIBILITY:

The factor Breadth of Responsibility is defined as:

> This factor describes the variety of specific functional areas in which the job may have formal and ongoing accountability. In reviewing this factor, consider the level of in-depth knowledge required as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations. [Examples of some functional areas within the following divisions would include: (1) Student Services--Housing, Admissions, Financial Aid, Counseling; (2) Business and Finance--Purchasing, Auditing, Grants and Contracts, Bursar.]

The Director job title received a level 2 rating, while Grievant asserts that his job duties merit a level 5 rating. Level 2 is defined as "[i]n-depth knowledge of and accountability for one functional area as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations." Level 5 is defined as "[i]n-depth knowledge of and accountability for four or more functional areas as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations."

The evidence on this point was somewhat confusing. Grievant asserted that there are numerous "functional areas" for which he is accountable, including parking and traffic control; pass and ID; law enforcement; personnel safety; security and loss prevention; and budget. Grievant and Dr. Brimhall testified credibly that Grievant has formal financial accountability for PSD, a department, and for two distinct budgets within that department. Ms. Buttrick essentially stated that any PSD will always have a single budget with more than one account. In other words, the functional area is Public Safety. The parties did not agree on how one distinguishes a "budget" from an "account" for purposes of this factor analysis.

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). Burke, supra recognized that positions with a “Manager” or “Director” in the title received level 2 and 3 ratings, and only positions in the top administrative levels of Associate Dean, Assistant Vice-President and Dean received level 4 and 5 ratings.

Clearly, PSD is a department. While it is not clear in the definitions of the Plan, it seems that a department constitutes at least one functional area, and might encompass more than one functional area. However, each program or administrative duty does not necessarily constitute a "functional area." See Beardsley v. Bd. of Trustees, Docket No. 94-MBOT-929 (Mar. 18, 1997) and Barber v.

Board of Trustees, Docket No. 94-MBOT-872 (Oct. 31, 1996). The question is whether the various areas of responsibility, or the two budgetary areas (Identification systems and Parking) constitute independent "functional areas." On this point, the JEC's interpretation, giving credit for departmental accountability, must receive deference. Grievant is properly credited for one functional area, Public Safety.

E. INTRASYSTEMS CONTACTS:

Intrasystems Contacts is defined as a factor which:

> appraises the responsibility for working with or through other people within the [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, explaining policies or discussing controversial issues. This factor considers only those contacts outside the job's immediate work area.

This factor is analyzed in a matrix having two parts, Nature of Contacts (Nature) and Level of Regular, Recurring and Essential Contacts (Level), both of which are challenged by Grievant.

1. NATURE OF CONTACTS:

The Director job title received a level 2 rating, while Grievant asserts that his job duties merit a level 3 rating. (See footnote 5)

Ms. Buttrick essentially conceded that Grievant's contacts merit a level 3 rating, as they involve discussions with WVSC administrators about handling infractions such as drug or weapons violations, and implementing policy and police actions. She equated such contacts with those made by counsellors. Grievant has shown that his contacts merit a level 3 rating in Nature.

2. LEVEL OF REGULAR, RECURRING AND ESSENTIAL CONTACTS:

The Director job title received a level 4 rating in level, while Grievant asserts his job duties merit a level 6 rating. Level 4 is defined as "Deans or Directors in an institution or Assistant Directors in the Systems' Central Office." Level 5 in Level is defined in the Plan as "Associate/Assistant Vice Presidents or Systems' Central Office Directors that report to the Senior Administrator." Level 6 in Level is defined as "Vice Presidents or Systems' Central Office Senior Administrator."

Grievant's contacts, as specified in Finding Number 11 above, show that a level 6 rating is merited. Ms. Buttrick suggested that many of these contacts could occur at levels below Vice President, and that therefore they are not essential. While this may be true in some instances, Grievant testified credibly that he must contact the Vice President of Student Affairs whenever events

involving students come up, and that those contacts are on nearly a daily basis. On that information alone, Grievant has regular, recurring and essential contacts with a Vice President who is not within his chain of command, and thus merits a level 6 rating. Grievant has prevailed on this factor. An individualized rating at level 3 in Nature and level 6 in Level would result in a net increase of 96 points.

F. EXTERNAL CONTACTS/LEVEL OF CONTACTS:

> This factor appraises the responsibility for working with or through other people outside the SCUSWV 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.

Like Intrasystems Contacts, this factor is analyzed in a matrix having two parts, Nature and Level. Grievant challenged ratings in Level.

The Director job title received a level 3 rating in Level, while Grievant asserts his job duties merit a level 4 or level 5 rating. Level 3 in Level is defined in the Plan as "[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 is defined in the Plan as "[m]id-level representatives of government agencies, professional contacts with other colleges and universities outside the systems."
Level 5 is defined as "[s]ubstantially prominent persons (e.g., community leaders, business and industry leaders) and officials of government agencies, financial agencies, and other important constituents."

Grievant has contacts as specified in Finding Number 12, above. He was not precise about the frequency of his contacts with each individual person or entity identified. However, he testified that he contacts outside law enforcement in some fashion on at least a weekly basis, and that his personal contacts are with the highest level person in each entity. Dr. Brimhall testified that he personally knew that Grievant made such contacts "more than weekly" on average. Of course, which person or entity Grievant contacts is dependent on the nature of cases or activities going forward at any particular time.

Ms. Buttrick testified that Grievant's most frequent external contacts are with students, and that therefore he is appropriately rated at level 3. She stated that he had shown no contacts with "mid-level government representatives" or professionals at other institutions. However, she did not explain

why Grievant's contacts with other high level law enforcement personnel such as Chiefs and Commandants of law enforcement agencies would not be considered "mid-level" or above. I am persuaded that such contacts are "mid- level" at least. However, Grievant has not established clearly that the individuals he contacts on a regular, recurring and essential basis necessarily meet the level 5 definition of "substantially prominent persons...and officials..."

Grievant's testimony about his contacts, and the frequency and necessity thereof was supported by statements in his PIQ regarding the function of his position and his duties and responsibilities. While his evidence was perhaps not as precise as might be optimal, Grievant's pro se presentation is sufficient to show, more likely than not, that the contacts he has at level 4 are regular, recurring, and essential. Individually rating Grievant's position on this point factor at level 4 in Level results in an increase of 40 points.

G. DIRECT SUPERVISION EXERCISED:

> 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 a matrix having two parts, Number of Direct Subordinates (Number) and Level of Supervision (Level), both of which were challenged.

1. NUMBER OF DIRECT SUBORDINATES:

The Director job title received a level 5 rating, while Grievant asserts his job duties merit a level 6 rating. Level 5 is 7-10 direct subordinates, while level 6 is 11 or more direct subordinates.

Ms. Buttrick explained that averaging among all Directors of Public Safety II, the number rating assigned was correct. She also noted that Grievant supervises some subordinates indirectly, and that those subordinates are not counted under Direct Supervision, since they are counted under Indirect Supervision, the next factor considered.

Grievant indirectly supervises his first-line officers, and is given credit for their supervision under the next factor. He cannot also count them as direct subordinates for purposes of analysis under Direct Supervision Exercised. His supervision of contract employees is not considered under this factor, as the definition has made clear by limiting itself to measurement of jobs "in the organization". Grievant did not assert that the students he supervises are essential employees, and it is clear that,

unless essential, they are not counted, either. He directly supervises a Secretary and two shift supervisors, or three FTE employees. A level 4 rating is merited by analysis of Grievant's individual position, rather than the level 5 rating he obtained through averaging.

2. LEVEL OF SUPERVISION:

The Director job title received a level 5 rating in Level, while Grievant asserts his job duties merit a level 8 rating. Level 5 is defined as "[d]irect supervision over exempt employees (and non-exempt employees, if applicable). Responsible for results in terms of costs, methods, and personnel. In a position to hire/fire or strongly recommend such personnel actions."

Level 6 of Level of Supervision is defined as "[m]anages the operation of a unit, including general supervision over first-line supervisors (and non-supervisors, if applicable)."

Level 7 is defined as "[d]irects and coordinates the work of at least two or more units performing different functions within the same department. The work of these units is coordinated through subordinate managers who exercise full supervision over each unit. This position reports to the head of the department."

Level 8 is defined as "[d]irects and coordinates the work of all units within the same department. Total responsibility for the operations of the department. This position reports to the head of the division and all managers typically report to this position for operational coordination."

Grievant himself stated that his department is not split into different units with different functions. Ms. Buttrick conceded that, individually, Grievant's job duties merit a level 6 rating. I agree. An individualized level 4 rating in Number and level 6 rating in Level would result in a net increase of 36 points.

H. INDIRECT SUPERVISION EXERCISED:

Indirect Supervision Exercised is defined in the Plan as:

> This factor measures the job's responsibility for the <u>indirect</u> supervision of subordinates. Only the <u>formal</u> assignment of such responsibility to a job should be considered; informal work relationships should not be considered. Indirect supervision takes into account the number of subordinates under the position's line of authority but who do not directly report to it. The number of subordinates should be reported in full-time equivalents (FTEs).

Like Direct Supervision Exercised, this factor is analyzed in a matrix having two parts, Level of Supervision (Level) and Number of Indirect Subordinates (Number). Grievant challenged ratings in both parts.

1. NUMBER OF INDIRECT SUBORDINATES:

The Director job title received a level 1 rating in Number, while Grievant asserts his job duties merit a level 3 rating. Level 1 is no indirect subordinates, while level 3 is 4-8 indirect subordinates.

Clearly, Grievant's first-line supervisors supervise seven officers. As Ms. Buttrick explained, contract employees are not counted under this factor, as they are not higher education employees. Seven indirectly supervised subordinates equates to a level 3 rating, which Ms. Buttrick conceded was correct for Grievant individually.

2. LEVEL OF SUPERVISION:

The Director job title received a level 1 rating in Level, while Grievant asserts his job duties merit a level 2 rating, at least. Level 1 is defined as "[n]o indirect supervisory responsibility; has formal authority over lead and/or non- supervisory personnel only." Level 2 is defined as "[d]irects and coordinates the work of a unit or department, including direct supervision over first-line supervisors and indirect supervision over non-supervisors who are under the position's line of authority." Ms. Buttrick conceded that Grievant's individual job duties merit a level 2 rating in Level. An individual rating at level 3 of Number and level 2 in Level results in a net increase of 28 points.

I. PHYSICAL COORDINATION:

"This factor assesses the amount of psychomotor skill involved in performing the job. Consider the complexity of body movements, speed/timing of movements, precision of movements, and need for close visual attention regularly required by the job in performing the work."

The Director job title received a level 4 rating in Physical Coordination, while Respondent asserts that Grievant's job duties merit only a level 1 rating if individually evaluated. (See footnote 6) Level 1 in Physical Coordination is defined as "[w]ork requires normal level of ability common in almost every job, such as writing, sorting, filing/reviewing text materials, and/or occasional use of office equipment without any demand for speed." Level 2 is "[w]ork requires simple hand/eye operations and some accuracy and regularity of motions, such as set-up and operation of basic instruments or equipment, and/or the occasional use of standard hand or power tools with minimal speed requirements." Level 3 is defined as "[w]ork requires some speed and accuracy of hand/eye coordination in the use of somewhat complicated instruments, equipment or hand or power tools requiring some speed and adeptness." Level 4 is defined as "[w]ork requires skill and accuracy or other manual actions involving rapid physical motions and closely coordinated performance on or with office equipment; or a high

degree of manual skill and exactness in the use of hand instruments or equipment."

Ms. Buttrick explained that this factor was intended to recognize the special skills of labor-intensive positions. R. Ex. A, p. 31-32. The skill and precision required to perform regular, recurring and essential job duties are considered. Grievant was hired to manage the PSD, she stated, not to be a police officer, and therefore his individual position merits a level 1 rating.

Here, Grievant essentially admitted that Respondent's argument was correct, when he stated that one could perform the job of Director even if one could not use equipment such as cameras and guns. Although Grievant performs officer duties 5-15% of his time, the essential duties for which he was hired are administrative and supervisory. The evidence indicates that many of Grievant's duties are devoted to written or oral communication, rather than use of special equipment. If individually rated, Grievant would appropriately receive a level 1 rating in this factor, which would result in a net decrease of 101 points.

J. WORKING CONDITIONS AND PHYSICAL DEMANDS:

These two factors are defined jointly in the Plan in a matrix which:

> considers the physical demands of the job as measured by the exertion placed on the skeletal, muscular and cardiovascular systems of the incumbent. It also takes into account the quality of the physical working conditions in which the job is normally performed such as lighting adequacy, temperature extremes and variations, noise pollution, exposure to fumes, chemicals, radiation, contagious diseases, heights and/or other related hazardous conditions.

1. WORKING CONDITIONS:

The Director job title received a level 3 rating in Working Conditions, while Respondent asserts Grievant's job duties merit a level 1 rating. Level 1 is defined as "[n]o major sources of discomfort, i.e., standard work environment with possible minor inconveniences due to occasional noise, crowded working conditions and/or minor heating, cooling or ventilation problems." Level 2 of Working Conditions is defined as:

> Occasional minor discomforts from exposure to less-than- optimal temperature and air conditions. May involve dealing with modestly unpleasant situations, as with occasional exposure to dust, fumes, outside weather conditions, and/or <u>near-continuous</u> use of a video display terminal.

Level 3 of Working Conditions is defined as:

> Routine discomforts from exposure to moderate levels of heat, cold, moisture/wetness, noise and air pollution. May involve routine exposure to light chemical substances

> such as cleaning solutions or occasional exposure to hazardous conditions such as radiation, chemicals, diseased laboratory animals, contagious diseases, heights, and moving parts.

As was the case with Physical Coordination, above, these factors also "were established to give credit to labor-intensive positions." R. Ex. A, p. 32. The job environment is measured by Working Conditions.

By Grievant's admission, his is primarily an office environment, with a small percentage of time spent outdoors as either a supervisor or a working officer. Giving him the benefit of the doubt as to how often he works outside, Grievant has "occasional exposure to...outside weather conditions." Grievant's position would merit a level 2 rating in Working Conditions, if individually rated.

2. PHYSICAL DEMANDS:

The Director job title received a level 3 rating in Physical Demands, while Respondent asserts Grievant's job duties merit only a level 1 rating. Level 1 is defined as "[j]ob is physically comfortable; individual is normally seated and has discretion about walking, standing, etc. May occasionally lift very lightweight objects."

Level 2 is defined as "[l]ight physical effort required involving stooping and bending; individual has limited discretion about walking, standing, etc.; occasional lifting of lightweight objects (up to 25 pounds.)"

Level 3 is defined as "[m]oderate physical effort required involving long periods of standing, walking on rough surfaces, bending and/or stooping; periodic lifting of moderately heavy items (over 25 and up to 50 pounds.)"

Again, the fact that Grievant's job is performed primarily in an office environment, and is of an administrative nature, shows that his individually-rated position merits a lower level rating than the job title received. Again, giving Grievant benefit of the doubt as to how often he works as an officer on a beat, Grievant's job duties merit at most a level 2 rating in Physical Demands. A larger percentage of his time would be required before he would have "long periods" of standing or walking in relation to his entire work year, as he only works as an officer 15% of his time, at most. Individualized ratings at level 2 in Working Conditions and level 2 in Physical Demands would result in a net decrease of 28 points.

III. SUMMARY:

Grievant failed to prove he should have received a higher rating in the factors Knowledge,

Experience, Scope and Effect/Nature, or Breadth of Responsibility. His position, if individually rated, merits different ratings in the factors Intrasystems Contacts, External Contacts, Direct Supervision Exercised, Indirect Supervision Exercised, Physical Coordination, Working Conditions and Physical Demands. Individual ratings in these factors results in a net increase of 71 points, for a total of 2709 points for Grievant's position. This is not sufficient to place Grievant's position in a Pay Grade different from the Pay Grade 19 assigned to the Director job title. Because the point factor ratings are assigned to the job title and not to individual employees, and the point factor analysis does not result in a change in Pay Grade here, Grievant has not proven the ratings assigned to the Director job title were clearly wrong, or that he was misclassified. See Brown v. Bd. of Trustees, Docket No. 94-MBOT-973 (Feb. 26, 1997); Jordan v. Bd. of Trustees, Docket No. 94- MBOT-983 (Nov. 25, 1996); Riggs v. Bd. of Trustees, Docket No. 94- MBOT-711 (Apr. 29, 1996).

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 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 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). See generally, Tennant v. Marion Health Care Found., 194 W.Va. 97, 459 S.E.2d 374 (1995).

4. Subjective determinations of the JEC regarding application of the Plan's point factor methodology are entitled to deference when being reviewed by this Grievance Board. Miller v. Bd. of Directors, Docket No. 94-MBOD-495 (Oct. 29, 1996).

5. The JEC's subjective 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, 193 W.Va. 687, 458 S.E.2d 780 (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). 6. While a searching inquiry into the facts is required, an administrative law judge may not simply substitute her judgment for that of the JEC. See generally, Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982).

7. The JEC's assignment of the Director of Public Safety II job title to Grievant's position, and its assignment of rating levels to the point factors for that job title are not clearly wrong, arbitrary or capricious.

Accordingly, this Grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County. 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 appropri ate court.

Dated: May 30, 1997

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

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

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.

Footnote: 3 Challenges to ratings given in the factors Complexity and Problem Solving, Freedom of Action, Scope and Effect/Impact of Actions, and External Contacts/Nature of Contacts were abandoned by Grievant in his post-hearing submission, and will not be addressed. Respondent, rather than Grievant, challenges the ratings in the factors Physical Coordination, Working Conditions, and Physical Demands, as applied to Grievant's individual job duties. Ratings are assigned to job titles, not individuals, under the Plan. The job title ratings are essentially averages for all persons holding the title. Therefore, if Grievant is individually rated, Respondent asserts that any increased points must be offset by reducing points for any factors where his individual job duties merit a lower rating than was given to the job title. This

approach has been accepted in prior Grievance Board decisions. See Gregg v. Bd. of Trustees, Docket No. 94-MBOT-863 (Dec. 18, 1996); Black v. Bd. of Directors, Docket No. 94-MBOD-967 (Apr. 17, 1997).

Footnote: 4This and all subsequent definitions are taken from the Job Evaluation Plan, Jt. Ex. 6, with emphasis in the original, unless otherwise noted.

Footnote: 5 Grievant argued at the hearing for a level 4 rating, but abandoned that argument in his post-hearing submission, presumably because Respondent's witness conceded that a level 3 rating was appropriate for Grievant's individual duties.

Footnote: 6 Respondent does not challenge the ratings for the Director job title, or Grievant's assignment to that job title and pay grade. Rather, Respondent asserts that if Grievant were to be individually rated, all factors must be reevaluated, including those where his individual duties and responsibilities merit a lower rating than the job title received.