DANIEL FROST,

Grievant,

v. DOCKET NO. 01-HE-095

HIGHER EDUCATION INTERIM GOVERNING BOARD/BLUEFIELD STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Daniel Frost, is a Trades Worker, pay grade 12, at Bluefield State College ("BSC"). This grievance has changed as it has progressed through the levels of the grievance procedure. The statement of grievance on the grievance form reads:

> I feel my current job classification is incorrect. The job duties and responsibilities combined with the skills and training needed to perform these duties justify a reclassification at a higher paygrade. A painter is classified at a paygrade 11. A carpenter is classified at a paygrade 12. An electrician is classified at a paygrade 12. A plumber is classified at a paygrade 12. A drywall technician/plasterer is classified at a paygrade 12. A trades worker is classified at paygrade 12, and is required to perform Mechanical Operations, Electrical Repair, Plumbing, Painting, Carpentry, Safety Inspections, and HVAC duties which require special certification due to the handling of Freon. I am able to perform these duties because of my skills and training. I do not feel however that I am being compensated at the appropriate level.

He sought as relief "that the job classification for a trades worker be re-evaluated, and that the pay grade be increased or the job duties and responsibilities be lower to match the pay grade level." At the Level II hearing, Grievant stated he was seeking to be placed in a pay grade 14, or placed in the Trades Worker Lead classification at a pay grade 14, or have the Job Evaluation Committee ("JEC") reevaluate the Trades Worker classification. After the Level II decision was issued, the JEC decided to reevaluate the Trades Worker classification as Grievant had requested. This review of the duties and responsibilities of all Trades Workers employed by state higher education institutions is expected to take until May 2002 to complete. Grievant asked to continue with his grievance at Level IV, declining to pursue any claim that the Trades Worker classification should be in a higher pay grade

due to the JEC review of the classification, and arguing instead that he should be classified as a Trades Worker Lead. He amended the relief sought to include a claim for back pay for three years, and Respondent was allowed to raise a timeliness defense to the request for back pay. (See footnote 1)

This grievance is not a typical higher education Mercer classification grievance. In this case, BSC's Director of Human Resources, and JEC member, Elizabeth Belcher, reviewed Grievant's Position Information Questionnaire ("PIQ"), which describes Grievant's duties and responsibilities in detail, and rated Grievant's duties in each of the 13 point factors of the Mercer classification system. Ms. Belcher agreed with Grievant that his duties and responsibilities were such that the Mercer point factor methodology placed him in a pay grade 14, and Respondent does not dispute this. However, when Ms. Belcher reviewed the classifications available to her for slotting Grievant, she determined that his duties were those of a Trades Worker, and there were no other classifications which fitGrievant's duties. She determined he could not be placed in the Trades Worker Lead classification because his PIQ did not indicate that he acted as a lead worker on a regular and recurring basis. She testified that the duties of a Trades Worker and those of a Trades Worker Lead are the same, with the difference in the two classifications being that a Lead is responsible for assigning work to one or more employees. She testified, however, that she would have credited him with supervision of temporary employees, had those employees been listed on his PIQ. Ms. Belcher stated that she does not have the authority to create new classifications, or to place an existing classification in another pay grade. She took the only action available to her to correct what she believed to be a problem: she asked the JEC to review the Trades Worker classification, because she believed it was not in the proper pay grade.

Thus, the question here is not what ratings Grievant's duties and responsibilities should be assigned using the point factor methodology, but whether he leads other employees, and whether he can be placed in the Trades Worker Lead classification if he does not lead other employees. The issue of whether the duties and responsibilities of an employee classified as a Trades Worker are such that that classification should be in a higher pay grade is not before the undersigned and will not be addressed.

The following Findings of Fact are properly made from the record developed at Levels II and IV.

Findings of Fact.

1. Grievant is employed as a Trades Worker, pay grade 12, at BSC. He has been an employee of BSC since September 5, 1995. He was hired as a Painter, pay grade 11. After his employment at BSC began, Grievant was assigned duties other than painting, such as carpentry and plumbing. His PIQ was revised to reflect that he was performing these other duties, and he was promoted to a Trades Worker, pay grade 12, on January 1, 1997. 2. Grievant is a licensed Master Electrician, licensed Master Plumber, licensed certified HVAC Tech, and a certified Welder. He has also been self-employed as a general contractor since 1985.

3. After becoming employed at BSC, Grievant earned a Regents Bachelors Degree, and he is currently pursuing a Masters Degree in Adult Technical Education. Effective September 1, 2001, Grievant was promoted to the position of Project Coordinator for Veteran's Upward Bound, pay grade 14.

4. When Grievant was first classified as a Trades Worker, he was to assist Joe Thomason, the Trades Worker Lead at BSC. Grievant no longer assists Mr. Thomason, unless he is working on a project which requires two people. Mr. Thomason likewise helps Grievant if he is working on a project which requires two people.

5. Grievant's duties include performing plumbing repairs, drywall, painting, carpentry, and hanging wallpaper.

6. Grievant's supervisor is Clyde Harrison, Director of the Physical Plant at BSC. Mr. Harrison assigns Grievant tasks. As Grievant is performing his assigned tasks, he occasionally finds something else which needs to be repaired. He reports this, and then makes the repair without further direction.

7. Before Grievant begins a project, he must assess the project, determine what the alternatives are, and decide the best way to approach the project. Unless Grievant needs help with a project, he works on his own. Mr. Harrison may check the project after it is completed, but he does not tell Grievant how to complete the project, nor does he watch Grievant work.

8. Grievant prepares lists of materials needed for plumbing, carpentry, drywall, and painting projects, and he purchases the materials needed, except for drywall materials. Grievant maintains the plumbing and painting materials inventory. He reports his purchases to Mr. Harrison. He obtains Mr. Harrison's approval for tool purchases of$400.00 dollars or more, purchases over $2,500.00 per

month, and more expensive items. Drywall project materials are generally purchased from a work order submitted to Mr. Thomason, because it is usually a remodeling project, not repairs. Grievant deals with vendors.

9. Mr. Thomason coordinates the larger jobs. He has the authority to set up jobs and change people from different jobs. Grievant does not have this authority.

10. BSC employs temporary workers in roads and grounds, primarily to mow grass, shovel snow, and perform other grounds maintenance work. Seven are employed from March through October. If funding is available, three temporary workers are employed the remainder of the year. Funding for the temporary workers must be approved every six months. Two or three of these workers have been employed at BSC for two years or more. The temporary workers are supervised by the Electrician Lead at BSC. If Grievant needs assistance, he tells Mr. Harrison, and Mr. Harrison assigns a temporary worker to help Grievant. Grievant will make sure the materials needed for the project are on hand, tell the worker what he is to do, and supervise the activity. These temporary workers are not skilled laborers, and do not always perform the same work as Grievant. They often move furniture for Grievant, and they may paint. Grievant does not move furniture himself. They do not assist Grievant everyday, and normally, only one temporary worker assists Grievant when he needs help with a project.

11. For four months during the summer of 1998, Grievant trained Richard King to paint, and directed his work.

12. Grievant's PIQ states that he is responsible for assigning tasks and monitoring the work of others, “[a]t times although not regularly.” He listed no employees to whom he assigned tasks, or whose work he monitored.

13. Mr. Thomason was in charge of Student Center renovations at BSC during the summer of 1998. Mr. Thomason's wife died and he was off work for a week or more. During this time, Grievant stepped in for Mr. Thomason, although Mr. Harrison was technically in charge of the project, and he checked on the project everyday. For some period of time during a renovation project, one or two temporary workers sanded sheetrock and moved game tables at Grievant's direction.

14. The Trades Worker Job Title point total is 1723, consisting of the following degree levels in each of the thirteen point factors (See footnote 2) : 4.0 in Knowledge; 3.0 in Experience; 2.5 in Complexity and Problem Solving; 2.5 in Freedom of Action; 1.0 in Scope and Effect, Impact of

Actions; 2.0 in Scope and Effect, Nature of Actions; 1.0 in Breadth of Responsibility; 1.0 in Intrasystems Contacts, Nature of Contact; 2.0 in Intrasystems Contacts, Level of Contact; 1.0 in External Contacts, Nature of Contact; 2.0 in External Contacts, Level of Contact; 1.0 in Direct Supervision Exercised, Number; 1.0 in Direct Supervision Exercised, Level; 1.0 in Indirect Supervision Exercised, Number; 1.0 in Indirect Supervision Exercised, Level; 4.0 in Physical Coordination; 3.0 in Working Conditions; and 4.0 in Physical Demands.

15. The Trades Worker Lead Job Title point total is 1956, consisting of the following degree levels in each of the thirteen point factors: 4.0 in Knowledge; 4.0 in Experience; 3.0 in Complexity and Problem Solving; 3.0 in Freedom of Action; 1.0 in Scope and Effect, Impact of Actions; 2.0 in Scope and Effect, Nature of Actions; 1.0 in Breadth of Responsibility; 1.0 in Intrasystems Contacts, Nature of Contact; 2.0 in Intrasystems Contacts, Level of Contact; 1.0 in External Contacts, Nature of Contact; 2.0 in External Contacts, Level of Contact; 4.0 in Direct Supervision Exercised, Number; 3.0 in Direct Supervision Exercised, Level; 1.0 in Indirect Supervision Exercised, Number; 1.0 in Indirect Supervision Exercised, Level; 4.0 in Physical Coordination; 3.0 in Working Conditions; and 4.0 in Physical Demands. 16. The point score range for a pay grade 12 is from 1655 through 1755 points.

17. The point score range for a pay grade 14 is from 1866 through 1984 points.

18. Lead supervision of other employees performing the same work is a characteristic of a Trades Worker Lead. An employee does not have to lead other employees in order to be classified as a Trades Worker Lead.

Discussion

The burden of proof in misclassification grievances 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; W. Va. Code § 18-29-6. Burke, et al., v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant asserting misclassification must identify the job he feels he 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 his burden of proof in a higher education misclassification grievance merely by showing that the grievant's job duties better fit one job description than another,

because the classification system does not use "whole job comparison". The higher education classification system is largely a "quantitative" system, in which the components of each job are evaluated using the point factor methodology. Therefore, the focus is upon the point factors the grievant is challenging. (See footnote 3) While some "best fit" analysis of 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. In addition, this systemmust 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 higher education grievant may prevail by demonstrating his classification was determined in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehabilitation, Div. of Rehabilitation Services, 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 and Generic Job Descriptions or PIQ's at issue will be given great weight unless clearly erroneous. See Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995); Burke, supra. However, no interpretation or construction of a term used in the Job Evaluation Plan (which provides the definitions of point factors and degree levels) is necessary where the language is clear and unambiguous. Watts v. Dep't of Health and Human Res., 195 W. Va. 430, 465 S.E.2d 887 (1995). The higher education employee challenging his classification thus will have to overcome a substantial obstacle to establish that he is misclassified.

Grievant argued his duties were those of a Trades Worker Lead. He relied upon the differences in the data line for the Trades Worker and the Trades Worker Lead to support his argument, asserting that his duties should be assigned the same degree levels as are assigned to the Trades Worker Lead. No testimony was presented to dispute that Grievant's duties and responsibilities were such that he should be in a classification at a pay grade 14. The question is whether the Trades Worker Lead is the proper classification for Grievant.

In addition to the testimony of Ms. Belcher noted previously, Glenna Racer, Compensation Analyst at Marshall University, and JEC member, testified that an employee cannot be classified as a Trades Worker Lead unless that person directs the work of otheremployees. She defined lead supervision as supervision of other employees, usually performing the same work as the supervisor,

making sure tools and materials are available, making sure the employee is on task, and that the task has been completed. Ms. Racer stated it is obvious from comparing the degree levels assigned to the Trades Worker and the Trades Worker Lead Job Titles in the 13 point factors, that supervision is an essential duty of the Trades Worker Lead.

Ms. Racer stated that the job evaluation plan does not credit an employee with any type of supervisory authority related to temporary workers, although she disagrees with this. She explained, however, that temporary employees are easier to terminate, and they are not evaluated. She stated a temporary employee can work a maximum of 1,039 hours during a nine month period, and at Marshall University, when an employee reaches 1,039 hours, he is no longer employed. She pointed out that temporary workers are, by definition, not essential, noting they are employed only for a short period of time. She stated if a temporary worker is essential, a position needs to be created.

Ms. Racer testified that a benchmark PIQ is a PIQ selected by the JEC as representative of the job. Grievant placed into evidence what the parties agreed was a benchmark PIQ for an employee classified as a Trades Worker Lead. That PIQ shows no supervision of any type. (See footnote 4) There is no Generic Job Description for this classification.

Respondent argued that this benchmark PIQ should be disregarded, because “the purpose of the PIQ is to gather information, not to allow the employee to choose his or her title, pay grade or data line; it is the role of the JEC, and not of the employee or his or her supervisors, to determine the appropriate application of the Job Evaluation Plan to the information contained in the PIQ.” The undersigned fails to see how this argument isapplicable to the facts presented here. While there are certain sections of the PIQ which call for the employee's opinion about where his duties fall in applying the point factor methodology, which may not be consistent with the JEC's interpretation of the point factors, when an employee and his supervisor say the employee does not supervise other employees in any manner, this is not an opinion, but is factual information. This conclusion is supported by Ms. Belcher's testimony that she did not give Grievant any credit for supervision because he did not list on his PIQ that he supervised anyone.

Respondent also pointed to the definition of “lead” found in the Job Evaluation Plan, under Direct Supervision Exercised - Level of Supervision at (c). This is the level of supervision assigned to the Trades Worker Lead Job Title. This level of supervision is defined as “[l]ead control over non-exempt employees performing the same work as this job. Lead responsibility includes training, assigning

tasks, checking the work of others, and insuring supplies and tools are provided at the work site." The Job Evaluation Plan states that the point factor Direct Supervision Exercised:

> 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 operations of the unit. The number of subordinates should be reported in full-time equivalency (FTE) and not head count.

Grievant has not demonstrated that he has lead responsibility. This Grievance Board has determined that the definition of the Direct Supervision Exercised point factor "precludes an employee from receiving any supervisory credit for supervision of temporary workers, when it refers to supervision over 'subordinate jobs in the organization.' Hardee, [, et al., v. Bd. of Directors, Docket No. 94-MBOD-373 (Jan. 10, 1997)]." Black v. Bd. of Trustees, Docket No. 94-MBOT-423 (Jan. 31, 1997). A temporary employee is not an employee of the organization, and he does not occupy a position within the organization. This is true even though the temporary workers at BSC have been employed for anextended period of time. They still do not occupy positions, there is no permanent funding for these jobs, and they may be let go at any time.

Further, the same worker is not always assigned to work with Grievant when he needs help, and Grievant does not receive assistance on a regular basis. While there have been short periods of time when Grievant directed the work of particular temporary workers, such as Richard King, these instances are few and far between. Grievant has failed to prove that any employees are formally assigned to him, as is required by this point factor. Black, supra. See, Hardee supra. Compare Jones, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-978 (Feb. 29, 1996).

The next question is whether Grievant may be slotted in the Trades Worker Lead Job Title, even though he does not supervise or lead other employees. While it certainly would make sense that a Trades Worker Lead would have to have responsibility for leading other employees, and this is consistent with the definition of lead responsibility in the Job Evaluation Plan, the benchmark PIQ demonstrates that it is not necessary for an employee to have lead responsibility in order to be classified as a Trades Worker Lead. Although this may seem odd, it is important to remember that the key to the Mercer classification plan is to evaluate the employee's duties using the point factor methodology to determine the appropriate pay grade. The Job Title is a secondary consideration. It is

certainly possible that there would have been employees other than Grievant, who, based upon their particular duties, fell within a pay grade 14, even though they did not supervise other employees in any manner, yet the JEC chose not to create a separate classification for them and placed them in the Trades Worker Lead Job Title. Grievant has demonstrated that his position should have been slotted by Ms. Belcher in the Trades Worker Lead Job Title.

Grievant requested back pay for the three years he believes he has worked at a pay grade 14 level. Respondent raised a timeliness defense to this back pay claim as soon asit became aware of it when the relief requested was amended at Level IV, as is allowed by W. Va. Code § 18-29-3(k). Although W. Va. Code § 18-29-3(a) requires timeliness to be raised at or before the Level II hearing, that provision is not applicable here, where the claim for back pay was not made known at that time.

Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues. However,

> [a]s with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance.

Syl. Pt. 5, Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). W. Va. Code § 18-29-4. Stollings v. Div. of Envtl. Protection, Docket No. 97-DEP- 411 (June 8, 1998). The grievance was timely as to the claim of working out of classification, as it was a continuing violation; however, as a timeliness defense has been raised, back pay is limited to fifteen days preceding the filing of the grievance, (See footnote 5) absent some excuse. Grievant provided no excuse for his failure to file this grievance prior to January 2001.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The higher education governing body is required to establish and maintain an equitable system of job classifications 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 § 4.17. The grievant asserting misclassification must identify the job he feels he is performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttalor analysis. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991).

3. The Job Evaluation Committee's interpretation and explanation of point factors and Generic Job Descriptions or PIQ's at issue will be given great weight unless clearly wrong, where the proper classification of a grievant is almost entirely a factual determination. See Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995); Burke, et al., v. Bd. of Directors, Fairmont State College, Docket No. 94- MBOD-349 (Aug. 8, 1995).

4. Grievant has demonstrated that his position should have been slotted by Ms. Belcher in the Trades Worker Lead Job Title.

5. Misclassification is a continuing practice, and as such, a grievance may be initiated at any time during the time the misclassification continues. However,

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Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant back pay for the period from December 15, 2000, through August 31, 2001, in the amount of the difference in the pay he would have earned had he been classified as a Trades Worker Lead, pay grade 14, and the pay he actually earned in a pay grade 12, and to correct its records to reflect that Grievant was classified as a Trades Worker Lead for this period of time.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: November 13, 2001

Footnote: 1

This grievance was filed on or about January 9, 2001. Grievant's supervisor responded on January 9, 2001, that he was without authority to grant the relief requested, and Grievant appealed to Level II on January 16, 2001. A Level II hearing was held on February 28, 2001. The grievance evaluator concluded that Respondent did not have the authority to grant the relief requested, and recommended that the grievance be denied. This recommendation was accepted by Dr. Robert E. Moore, President, on March 8, 2001. Grievant waived Level III, appealing to Level IV on March 15, 2001. Two days of hearing were held at Level IV, on August 14 and September 6, 2001. Grievant was represented by Derrick W. Lefler, Esquire, and Respondent was represented by Beth Ann Rauer, Esquire, and Connie A. Bowling, Esquire, at the Level IV hearing. Post-hearing written argument was submitted on behalf of Respondent by Paula L. Wilson, Esquire. This grievance became mature for decision upon receipt of Grievant's written argument on October 17, 2001.

Footnote: 2

The 13 point factors are set forth in 128 C.S.R. 62 § 2.27, and 131 C.S.R. 62 § 2.27.

Footnote: 3

A grievant may challenge any combination of point factor degree levels, so long as he clearly identifies the point factor degree levels he 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

While both Ms. Racer and Ms. Belcher questioned whether this was in fact a Trades Worker Lead benchmark PIQ, it was stipulated by the parties that it was a benchmark, and it will be accepted as such.

Footnote: 5

Effective July 1, 2001, higher education grievances are to be processed under the state grievance procedure, W. Va. Code §§ 29-6A-1 et seq., rather than the education grievance procedure, W. Va. Code §§ 18-29-1 et seq. The state grievance procedure provides that an employee must file his grievance within ten days of learning of the event, while the education grievance procedure allows an employee fifteen days.