JOHN HARDESTY,

Grievant,

v. Docket No. 01-HE-439

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

John Hardesty ("Grievant"), employed by West Virginia University ("WVU") and assigned to the Physical Plant as a Lagger Lead, pay grade 14, filed a level one grievance on February 26, 2001, alleging a violation of W. Va. Code § 18B-9-1, when Plumber Leads were upgraded to pay grade 15. (See footnote 1) **For relief, Grievant requested an upgrade to pay grade 15, with all back pay and benefits. After being denied at the lower levels, this grievance was appealed to level four on July 12, 2001, and was placed in abeyance pending review of the Physical Plant job families by the Job Evaluation Committee ("JEC"). The Lagger Lead position was not upgraded, but was reslotted as Trades Specialist Lead I, pay grade 14, pursuant to the JEC review. A level four hearing was conducted on February 10, 2005, at which time Grievant was represented by Kathleen Abate, Esq., and WVU was represented by Assistant Attorney General Samuel R. Spatafore. After an extension requested by Ms. Abate, the grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before June 29, 2005.**

The following Findings of Fact are properly made from the record developed at levels two and four. Findings of Fact 1. The higher education system in West Virginia utilizes the "Mercer" classification plan. This name is derived from the name of the company which assisted higher education in developing the classification system, William M. Mercer, Inc., and is generally referred to as "the Plan." Under the Plan, positions are evaluated pursuant to a "point factor methodology" wherein point values are assigned to thirteen "job evaluation factors:" (1) Knowledge (KN); (2) Experience (EX); (3) Complexity and Problem Solving (CPS); (4) Freedom of Action (FA); (5) Scope and Effect (SE); (6) Breadth of Responsibility (BR); (7) Intrasystem Contacts/Level (IS/L) and Intrasystem Contacts/Nature

(IC/N0; (8) External Contacts/Level (ECL) and External Contacts/Nature(EC/N); (9) Direct Supervision Exercised/Number (DSE/N) and Direct Supervision Exercised/Level (DSE/L); (10) Indirect Supervision Exercised/Number (ISE/N) and Indirect Supervision Exercised/Level (ISE/L); (11) Physical Coordination (PC); (12) Working Conditions (WC); and (13) Physical Demands (PD). 131 C.S.R. 62 § 2.27 (1994).

2. Initially, the employee completes a Position Information Questionnaire (PIQ) answering a series of questions designed to elicit information describing their job duties and responsibilities, along with the minimum qualifications for their positions, "data lines" of particular degree levels for each point factor are determined and the employee is "slotted" into the job title which most closely fit his or her duties. The degree levels for each point factor in a job title are weighted and combined, creating a numerical point total, which in turn determines each job's pay grade. 3. Grievant was first employed by WVU as a Laborer in March 1989. He became a Lagger in December 1993, and was promoted to Asbestos Abatement Worker in 1997. Grievant was upgraded to Lagger Lead in November 1998, and held that position until he became a Plumber Lead in October 2002.

4. The Lagger Lead job title was placed in pay grade 14, based on 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; 3.0 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.

5. Plumber Lead was placed in pay grade 15, receiving the following degree levels in each of the thirteen point factors: 4.0 in Knowledge; 5.0 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; 2.0 in Intrasystems Contacts, Nature of Contact; 3.0 in Intrasystems Contacts, Level of Contact; 1.0 in External Contacts, Nature of Contact; 2.0 in External Contacts, Level of Contact; 3.0 in Direct

Supervision Exercised, Number; 3.0 in Direct Supervision Exercised, Level; 1.0 in Indirect Supervision Exercised, Number; 1.0 in IndirectSupervision Exercised, Level; 4.0 in Physical Coordination; 3.0 in Working Conditions; and 4.0 in Physical Demands.

6. Grievant completed a PIQ in September 1998 which led to the upgrade of his position to Lagger Lead. At this time his duties and the percentage of time they required were listed as: training and inspecting work of co-workers, determining which material was best for a job and measuring the material, installing and maintaining insulating material, and assisting with ordering material (40%); asbestos abatement activities (20%); prioritize and schedule work (10%); notify managers, maintenance and custodial personnel of impending jobs in their work areas (10%); employs broad knowledge of lagging and other trades in area of construction (10%); and provides information and documentation of asbestos related assignments (5%). The remaining 5% of Grievant's time was unaccounted for.

7. Grievant challenges the degree level in the following point factors: Experience; Intrasystem Contacts/Nature; External Contacts/Nature and Level; and Working Conditions.

(See footnote 2)

Discussion A. Burden of Proof and Standard of Review The burden of proof in misclassification grievances is on the grievant to prove by apreponderance of the evidence that he is not properly classified. 156 C.S.R. 1 § 4.21; 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 higher education grievant is not likely to meet his burden of proof merely by showing that the grievant's job duties better fit one job description than another, because the Mercer classification system does not use "whole job comparison". The Mercer 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. 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). 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 system must by statute be uniform across all higher education institutions; therefore, the point factor degree levels are not assigned to the individual, but to the job title. W. Va. Code § 18B-9-4; Burke, supra. Finally, whether a grievant is properly classified is almost entirely a factualdetermination. As such, the JEC's 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. The higher education employee challenging his classification thus will have to overcome a substantial obstacle to establish that he is misclassified. B. Application of the Point Factor Methodology Grievant argues that the degree levels in numerous point factors were incorrect, and that had the proper credit been given, he would have been placed in pay grade 15. WVU asserts that Grievant was properly classified and compensated.

The following table shows the differences between the degree levels assigned by the JEC to the job title of Lagger Lead, and the degree levels Grievant argues should have been awarded in the challenged point factors. (See footnote 3)

	EX	IC/N	EC/L	EC/N	WC
Lagger Lead	4.0	1.0	2.0	1.0	3.0
Grievant's Proposed Data Line	6.0	2.0	3.0	2.0	4.0

Experience

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

Grievant's job title received a degree level of 4.0, and Grievant argued he should have received a degree level of 6.0. A degree level of 4.0 is defined in the Plan as:

Over two years and up to three years of experience.

A degree level of 6.0 is defined in the Plan as:

Over four years and up to six years of experience.

Grievant argues that his 1998 PIQ indicated that he needed four years experience in lagging and three years experience in asbestos abatement, therefore he should receive the higher degree level. He also noted that Plumbers were granted a degree level of 5.0, and there is no indication that a Lagger Lead would need less experience.

Cynthia Curry, a member of the JEC, and Human Resources Director at WVU, testified that the degree level assigned was the minimum amount of experience required to complete the duties, and that the JEC could not require more than the minimum experience necessary because it artificially limits the applicant pool for a position. Ms. Curry further noted that the experience required in two areas are not determined to accrue consecutively.

While employees frequently view experience in multiple areas to entitle them to more years of credit, the JEC does not look for that level of expertise, and considers the years to be concurrent. Based on industry standards for the minimum amount of experience, the JEC determination regarding this degree level was not clearly wrong.Intrasystem Contacts

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

This point factor consists of two parts, Level of Actions and Nature of Actions. Grievant challenged only the degree level received in Nature of Actions.

Nature

Grievant argued he should have received a degree level of 2.0 rather than a 1.0 in Nature of Actions. A degree level of 1.0 is defined in the Plan as:

Routine information exchange and/or simple service activity; requires common courtesy; (e.g. furnishing or obtaining factual information, ordering supplies, describing simple procedures).

A degree level of 2.0 is defined in the Plan as:

Moderate tact and cooperation required; communication is largely of a noncontroversial nature and handled in accordance with standard practices and procedures (e.g., explaining simple policies and procedures, coordinating/scheduling complex meeting or conference arrangements.)

Grievant argues that he is entitled to a 2.0 degree level based upon his daily communications with faculty and staff to schedule work, explain procedures and resolveproblems. WVU asserts that 1.0 was correct because Grievant's communications are limited to sharing routine information, with no negotiating or problematic encounters.

Grievant's contact is limited to providing information, and any problems encountered may be referred to a supervisor who would them assume responsibility for the situation. Grievant is not responsible for explaining policies and procedures, scheduling, or any controversial issues. Grievant's contact requires that he act in a polite and courteous manner, and he is not required to exercise tact or deal with delicate situations requiring diplomacy to avoid offending an individual. Therefore, Grievant has failed to prove the 1.0 degree level was clearly wrong.

External 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.

This point factor consists of two parts, Level of Actions and Nature of Actions. Grievant challenged the degree level received in both Level and Nature of Actions.

Level

Grievant argued he should have received a degree level of 3.0 rather than a 2.0 in Level of Actions. A degree level of 2.0 is defined in the Plan as:

General public, visitors, and/or service representatives and vendors.

A degree level of 3.0 is defined in the Plan as:Students, parents, alumni, faculty of institutions outside the systems, sales engineers, higher-level product representatives,

recruiters, and/or prospective students.

Grievant asserts that he is required to speak with vendors, contractors, and product representatives, as well as students. Ms. Curry testified that any contact with students is incidental, not regular, recurring and essential to his position. She noted that his primary external contacts were with vendors, which falls squarely in level two.

Grievant makes no claim that he had contact with most of the categories included in level three, including, parents, alumni, faculty in other systems, recruiters, and prospective students. Furthermore, his communication with students was limited to answering questions, and was not required for him to complete his duties. The JEC determination that a degree level of 2.0 was appropriate was not clearly wrong.

Nature

Grievant argued he should have received a degree level of 2.0 rather than a 1.0 in Nature of Actions. A degree level of 1.0 is defined in the Plan as:

Routine information exchange and/or simple service activity; requires common courtesy: (e.g., furnishing or obtaining factual information, ordering supplies, describing simple procedures.)

A degree level of 2.0 is defined by the Plan as:

Moderate tact and cooperation required; communication is largely of a noncontroversial nature and handled in accordance with standard practices and procedures (e.g., explaining simple policies and procedures, coordinating/scheduling complex meeting or conference arrangements.)

Grievant asserts that his contact with vendors, contractors, and product representatives requires coordination and cooperation largely of a noncontroversial nature, handled within standard practices and procedures. Ms. Curry testified that only common courtesy was required for Grievant to complete his duties.

As Lagger Lead, Grievant's contact with external parties required that he act in a polite and courteous manner, and he was not required to exercise tact or deal with delicate situations requiring diplomacy to avoid offending an individual. The JEC determination that 1.0 was the appropriate degree level for this factor was not clearly wrong.

Working Conditions

This factor 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.

Grievant argued he should have received a degree level of 4.0 rather than a 3.0 in Working Conditions. A degree level of 3.0 is defined in the Plan 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.

A degree level of 4.0 is defined in the Plan as: Frequent or prolonged exposure to extreme levels of temperature, air pollution, noise, radiation, chemicals, contagious diseases, gases and substances, heights, and moving parts.

Grievant argues that he is entitled to the higher degree level because he works in asbestos abatement between 80-90% of his time, and that much of his work is performed in steam tunnels where the temperatures can climb to over 130 degrees. WVU asserts that Grievant does not work with chemicals, gases, or diseases. Ms. Curry noted that according to his PIQ, Grievant works with asbestos only 20% of his time. She further explained that a degree level of 4.0 would be given to positions such as a sanitation driver, who handles hazardous waste, or a pest controller who works with dangerous chemicals.

It is fair to say that Grievant is exposed to extreme levels of temperature; however, it does not appear that the conditions are as undesirable or dangerous as those who work with radiation, chemicals, or diseases. Because the degree level must be allocated in consideration of all the positions in the system, the determination by the JEC to award this position a 3.0 in Working Conditions was not clearly wrong.

C. Summary

Grievant did not prove by a preponderance of the evidence that he was incorrectly evaluated on any of the challenged the point factors, or that there was any violation of the statutory mandate that a uniform system of classification be maintained for the period of time in question, for the classification of Lagger Lead.

The following conclusions of law support the decision reached. 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 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 § 4.21.

3. The Job Evaluation Committee's interpretation and explanation of point factors 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. The JEC's decision that Grievant's position of Lagger Lead was to be compensated at pay grade 14, was not clearly wrong.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party isrequired by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JULY 28, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***A Lagger insulates steam lines, hot water lines, and air conditioning duct work.***

Footnote: 2

.Grievant had initially challenged the category of Knowledge; however, Respondent conceded at level two that he should have received a 4.5 rather than a 4.0 in that factor. This change did not alter his pay grade.

Footnote: 3

[3]To the extent that any of the degree levels requested at the level four hearing were inconsistent with those addressed by counsel in her proposed findings of fact and conclusions of law, those discussed at hearing will be considered. In any event, the outcome of the decision remains unchanged.