THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

THOMASINE WEBER,

Grievant,

v.

DOCKET NO. 07-HE-159

WEST VIRGINIA UNIVERSITY,

Respondent.

DECISION

This grievance was filed by Grievant, Thomasine Weber, on April 28, 2006, against her employer, West Virginia University, claiming she was misclassified. The relief sought by Grievant is “[p]roper classification with back pay.”

The grievance was denied at level one on May 3, 2006, because Grievant's supervisor was without authority to grant the relief requested. Grievant appealed the level one decision to level two on May 9, 2006. A conference was held on May 25, 2006. The level two decision, issued on July 3, 2006, states that “the issue of your misclassification has been resolved,” but that the grievance evaluator had no authority to grant back pay. Grievant appealed to level three on July 6, 2006.

Grievant's position was reclassified effective August 1, 2006, to Trades Specialist I, pay grade 13. After the reclassification, Grievant continued to pursue this grievance, contending she had been misclassified for quite some time, and she sought back pay from April 2006 through July 31, 2006. A level three hearing was held on March 30, 2007, and a decision denying the grievance at that level was issued on April 27, 2007. Grievant appealed to level four on May 9, 2007. Alevel four hearing was held before the undersigned Administrative Law Judge on January 16, 2008, at the Grievance Board's Westover office. (See footnote 1) Grievant was represented by Diane Parker, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of Respondent's written argument on February 19, 2008. Grievant did not submit written argument.

Synopsis

The higher education classification system is a point factor methodology, not whole job comparison. Grievant did not challenge any point factors. Her argument was that she obviously was misclassified prior to August 1, 2006, when her position was reclassified to Trades Specialist I, pay grade 13, because her duties were the same as they were when she was classified as a Painter, pay grade 12, and she was entitled to back pay from the time she filed her grievance in April 2006, until her position was reclassified August 1, 2006. She also argued she had been working side by side with other Painters who were in a higher pay grade, and since she was painting too, she should have always been in a higher pay grade. However, the evidence was that effective August 1, 2006, Grievant did, in fact, assume new masonry duties, and it was the addition of these duties which resultedin the reclassification. Further, Grievant was never working alongside other Painters who were in a higher pay grade than she. Painting is also one of the duties of a Trades Specialist. As a Trades Specialist I, Grievant will continue to do painting as required, but she will have other non-painting duties as well. In addition, "'[t]he remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she performs, is not to similarly misclassify the grievant. *Akers v. W. Va. Dep't of Tax and Revenue*, 194 W. Va. 956, 460 S.E.2d 702 (1995).' *Myers v. Dep't of Health and Human Resources,* Docket No. 00-HHR-392D (Mar. 30, 2001)." *Nelson, et al., v. Bureau of Emp. Programs*, Docket No. 01-BEP-061D (Sept. 20, 2001).

The following Findings of Fact are properly made from the record developed at levels three and

four.

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU"). At the time this grievance was filed, Grievant was classified as a Painter, pay grade 12.

2. Grievant worked as a Painter in the housing department at WVU. Sometime during 2006, housing and the facilities department merged. Baron Smith, Associate Director of Operations, wanted the laborers in the merged department to be a flexible workforce, because the department had many different buildings and outdoor areas to maintain, with differing requirements.

3. Prior to August 1, 2006, Grievant's job duties were painting, plastering, replacing and refinishing drywall, and installing baseboards. She also supervised student workers. 4. Grievant's supervisor prepared a new Position Information Questionnaire ("PIQ") for Grievant, and submitted it to WVU's classification and compensation section for evaluation. The new PIQ was signed by Grievant and her supervisor on July 5, 2006.

5. Grievant's new PIQ lists masonry work as 20% of her duties. Grievant did not perform these masonry duties prior August 1, 2006. The plastering Grievant did as a Painter involved preparing walls for painting. This was not masonry work.

6. The addition of the masonry duties resulted in higher degree levels in one or more point factors for Grievant's position. When Grievant's new PIQ was evaluated by WVU's classification and compensation section, it was determined that the total points for her position had changed, so that her position was in the point score range for a pay grade 13, and that she should be placed in the Trades Specialist I Job Title.

7. Effective August 1, 2006, Grievant was reclassified to a Trades Specialist I, pay grade 13. Grievant has performed the masonry duties listed on her new PIQ since being reclassified.

Discussion

The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that she is not properly classified. *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 she feels she is performing. Otherwise the complaint becomes so vague as to defy an

adequate rebuttal or analysis. *Elkins v. Southern W. Va. Community College*, Docket No. 90-BOD-124 (Mar. 4, 1991). A grievant is not likely to meet her burden of proof in a higher education classification grievance merely by showing that the grievant's job duties better fit one job description than another, because the Mercer classification system used by higher education 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 a point factor methodology. Therefore, the focus in Mercer decisions issued by this Grievance Board is upon the point factors the grievant is challenging. (See footnote 2) 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*. A higher education grievant may prevail by demonstrating her reclassification was made in an arbitrary and capricious manner. *See Kyle v. W. Va. State Bd. of Rehabilitation, Div. of Rehabilitation Services,* Docket No. VR-88-006 (Mar. 28, 1989).

Finally, whether a grievant is properly classified is almost entirely a factual determination. As such, Respondent's interpretation and explanation of the point factors and Generic Job Descriptions or PIQ's at issue will be given great weight unless clearlyerroneous. *See Tennant v. Marion Health Care Found.*, 459 S.E.2d 374 (W. Va. 1995); *Burke, supra*. However, no interpretation or construction of a term used in the Mercer classification system is necessary where the language is clear and unambiguous. *Watts v. Dep't of Health and Human Res.*, 465 S.E.2d 887 (W. Va. 1995). The higher education employee challenging her classification has to overcome a substantial obstacle to establish that she is misclassified.

Grievant did not challenge any point factors. Her argument was that she obviously was misclassified prior to August 1, 2006, because her duties were the same as they had been prior to that date. She also argued she had been working side by side with other Painters who were in a higher pay grade, and since she was painting too, she should have always been in a higher pay grade. The testimony does not support these arguments, and as stated above, this is not how the Mercer classification system works.

The new PIQ for Grievant, which was used to reclassify her as a Trades Specialist I, lists masonry

work as one of her duties. Grievant testified on cross-examination at level four that she did *not* perform masonry duties prior to the reclassification to a Trades Specialist I, but she has performed these duties since being reclassified, so her duties are not the same as they were. Respondent's witnesses testified that the key to Grievant's reclassification was the addition of these duties, as the masonry duties resulted in a higher degree level in one or more point factors, which increased the total points for her position enough to push her into the next higher pay grade.

Further, Grievant was never working alongside other Painters who were in a higher pay grade than she. Painting is also one of the duties of a Trades Specialist. Grievant may have been working alongside a Trades Specialist who happened to be painting, buteither that employee had other duties which he or she performed frequently enough that he or she was properly in the higher pay grade classification of Trades Specialist, or the person she was working with was misclassified. Regardless of the circumstances, the burden remains upon Grievant to demonstrate that her own duties were such that *she* should have been in a different classification. "'The remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she performs, is not to similarly misclassify the grievant. *Akers v. W. Va. Dep't of Tax and Revenue*, 194 W. Va. 956, 460 S.E.2d 702 (1995).' *Myers v. Dep't of Health and Human Resources,* Docket No. 00-HHR-392D (Mar. 30, 2001)." *Nelson, et al., v. Bureau of Emp. Programs*, Docket No. 01-BEP-061D (Sept. 20, 2001). Grievant did not demonstrate that the duties she was performing prior to August 1, 2006, were such that she was entitled to a higher degree level in any point factor, which is what has been required of higher education employees for many years now. The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof in a misclassification grievance is on the grievant to prove by a preponderance of the evidence that she is not properly classified. *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 she feels she is performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttal or analysis. *Elkins v. Southern W. Va. Community College*, Docket No. 90-BOD-124 (Mar. 4, 1991). 2. The Respondent's interpretation and explanation of the Generic Job Description and 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.,* 459 S.E.2d 374 (W. Va. 1995); *Burke, et al., v. Bd. of Directors, Fairmont State College*, Docket No. 94-MBOD-349 (Aug. 8, 1995).

3. The Respondent's decision that Grievant was a Painter, Pay Grade 12, prior to August 1, 2006, is not clearly wrong or arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (repealed, *See Footnote 1, supra)*. Neither the West Public 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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BRENDA L. GOULD

Administrative Law Judge

Date: May 16, 2008

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. Any references which may appear later in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

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

factor degree levels she is challenging, and this challenge is consistent with the relief sought. See Jessen, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-1059 (Oct. 26, 1995); and Zara, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-817 (Dec. 12, 1995).