THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GEORGE G. BOYCE, et al.,
Grievants,

v. **DOCKET NO. 2008-0369-CONS**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Grievances were filed by 38 Grievants, all Trades Specialists, pay grade 13, on August 4, 2005, against their employer, West Virginia University. The grievances generally allege discrimination and favoritism by management when the Position Information Questionnaires for employees in the Preventive Maintenance shop were revised, allegedly exaggerating the duties of those employees, and resulting in those employees being placed in the Trades Specialist Lead classification, pay grade 14. The relief sought by Grievants is to likewise be placed in a higher pay grade, and to be awarded back pay plus interest.

The record does not reflect whether a conference was held at level one; however, level one decisions were issued by Grievants' supervisors, all on August 10, 2005, denying the grievances. Grievants appealed to level two, where the grievances were consolidated. A level two decision was issued on August 26, 2005, denying the grievance, and Grievants appealed to level three. It appears that a level three hearing was held on September 13 and 23, 2005, but the record does not reflect whether the hearing was completed, and no

decision was issued.[1] In September 2007, the parties agreed to transfer this grievance to level one of the new grievance procedure, which was effective July 1, 2007.[2] A hearing was held at level one on May 1, 2008,[3] and the grievance was denied at that level on May 22, 2008. Grievants appealed to level two on June 4, 2008, and a mediation session was held on October 24, 2008. An Order of Unsuccessful Mediation was entered on October 27, 2008, and 24 Grievants appealed to level three on October 29, 2008.[4] A level three hearing was held before the undersigned Administrative Law Judge on May 21, 2009, at the Grievance Board's Westover office. Grievants were represented by four of their fellow Grievants, George Boyce, Sherman Riffle, Richard Malone, and Fred Blosser, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. Respondent submitted Proposed Findings of Fact and Conclusions of Law, and this matter

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[1] The Grievance Board was not provided with a transcript of these proceedings, or any explanation for the failure to do so.

[2] In 2007, the Legislature, 2007 Acts ch. 207, 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). Because this grievance has been transferred to the new procedure, it is being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

[3] The recording of the level one hearing was inaudible and could not be transcribed and made a part of the record at level three. However, the parties stipulated at the level three hearing that all the exhibits marked at level one had been admitted into evidence, and those exhibits are a part of the record.

[4] Many of the original Grievants chose not to pursue this grievance. The remaining Grievants are George G. Boyce, Larry A. Baldwin, Frederick E. Blosser, II, James S. Bowser, Lisa Calvert Jeffords, Kenneth L. Ferrell, Daryl R. Frum, Rodney Scott Hart, Wayne Hart, Eugene B. Lewis, Thomas E. Livengood, Larry M. Maczko, Richard A. Malone, Robert Wayne Mares, Tony Mayfield, Loyd H. McCartney, William Louis Murphy, Alton G. Myers, Jr., Greg Anthony Neely, Thomas Edwin Nine, Val Reynolds, Sherman Riffle, Jr., William D. Smithmyer, and Tim Suder.

became mature for decision on June 22, 2009, upon receipt of Grievant's Exhibit 4. Grievants did not submit written argument.

Synopsis

Grievants argued that the position information questionnaires of fellow employees had been inflated and exaggerated, which resulted in those employees being placed in a classification in a higher pay grade than Grievants. Grievants believed this was favoritism and discrimination. The employees to whom Grievants compared themselves did not perform the same duties as Grievants, and therefore were not similarly situated to Grievants. Further, the relief sought, that Grievants be placed in the higher pay grade, could not be granted because Grievants failed to challenge any point factors assigned to their classification, and did not demonstrate they were misclassified.

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

Findings of Fact

1. Grievants are employed by West Virginia University ("WVU") as Trades Specialists, pay grade 13.

2. Grievants are skilled craftsmen who perform repair or construction work in their individual trades, including plumbing, carpentry, and electrical. Grievants have no supervisory responsibilities, and they do not work night shift.

3. The employees in the Preventive Maintenance ("PM") shop perform minor repair or preventive maintenance work in various trades, as needed, which requires only basic skills. They perform general laborer duties, they inspect the buildings in the Health

Sciences Center, and make decisions about whether problem situations they encounter need immediate attention, and they are responsible for monitoring the work of the Communications Operators. The PM employees working night shift work without supervision, and decide whether someone needs to be called out to correct the problems they encounter. These employees must work holidays.

4. In June of 2004, new Position Information Questionnaires ("PIQs") were prepared for the employees in the PM shop, listing the duties and responsibilities of these employees. A review of the PIQs resulted in a classification change for those employees from Trades Specialist, pay grade 13, to Trades Specialist Lead I, pay grade 14.

5. The Trades Specialist Lead I Job Title has higher degree levels than the Trades Specialist in the point factors Direct Supervision Exercised, Complexity and Problem Solving and Freedom of Action.

Discussion

Grievants seek as relief in this grievance that they be placed in a classification in a higher pay grade. In order to achieve this, Grievants must demonstrate they are not properly classified. The burden of proof in misclassification grievances is on the grievants to prove by a preponderance of the evidence that they are not properly classified. *Burke, et al., v. Bd. of Directors,* 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 his 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. The thirteen point factors and the degree levels under each point factor are defined in the Job Evaluation Plan (Grievants' Exhibit 4). Therefore, the focus in Mercer decisions issued by this Grievance Board is upon the point factors the grievant is challenging.[5] 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. *Burke, supra*. A higher education grievant may prevail by demonstrating the decision on her classification 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

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[5] 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*, Docket No. 94-MBOT-1059 (Oct. 26, 1995); and *Zara, et al., v. Bd. of Trustees,* Docket No. 94-MBOT-817 (Dec. 12, 1995).

and Generic Job Descriptions or PIQs 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 Mercer classification system 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 has to overcome a substantial obstacle to establish that he is misclassified.

Grievants were advised by the undersigned prior to the level three hearing of the need to identify the point factors they were challenging. Grievants declined to challenge any point factors. Grievants argued the PIQs of the employees in the PM shop had been inflated and exaggerated, pointing out that the work orders prove that the employees in the PM shop do not perform the duties listed on the PIQs, and that this was discriminatory, and that management had shown favoritism. This is insufficient to meet Grievants' burden of demonstrating that they are not properly classified.

Further, for purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants are not similarly situated to the employees in the PM shop, as their duties are not the same as those of the employees in the PM shop. *Flint v. Wood County Bd. of Educ.*, 207 W. Va. 251, 531 S.E.2d 76 (1999); *Farley, et al., v. W. Va. Parkways Development and Tourism Auth.*, Docket No. 00-PEDTA-015 (June 22, 2000). Each Grievant is a skilled craftsmen in his particular field, who performs repair or construction work in their trades. The employees in the PM shop perform minor repair or preventive maintenance work in various trades, as needed, which require only basic skills, they perform general laborer duties, they inspect the buildings in the Health Sciences Center, and make decisions about whether the problem situations they encounter need immediate attention, and the night shift employees decide whether someone needs to be called out to correct the problems they encounter. Finally, they are responsible for monitoring the work of the Communications Operators, while Grievants have no supervisory responsibilities. This latter responsibility no doubt resulted in these employees receiving a higher degree level than Grievants in the point factor Direct Supervision Exercised, and would be likely to also contribute to higher degree levels in Complexity and Problem Solving and Freedom of Action. Indeed, those are the only three point factors where the

degree levels differ between the Trades Specialist and the Trades Specialist Lead I, and these differences placed the Lead in a higher pay grade.

As to Grievants' argument that the PM shop employees do not perform the work listed on their PIQs, such as plumbing repairs and changing light bulbs, the PIQ placed into the record for one of the employees of the PM shop shows that this employee performs a variety of duties. Among those duties are general plumbing and electrical duties, and routine maintenance on air handling equipment. James Walden, Associate Director of Facilities, explained that it is the responsibility of the employees in the PM shop to stabilize problem situations, and they are responsible for walking through several buildings, particularly on the night shift, inspecting the buildings for problems which need attention. As a result, they may fix a problem, or just note the problem for repair, and move on with the inspection. While the PM shop employees often do leave the repair work for the Trades Specialist, this does not mean that they do not ever perform minor plumbing or electrical repairs, and as such, it would be appropriate to note this on the PIQ.

Ultimately, Grievants do not believe that it is fair that they are in a lower pay grade than the employees in the PM shop, when Grievants are much more skilled in the various trades than these other employees. Grievants certainly make a good point, and the undersigned must wonder whether the Trades Specialist Lead I's are properly classified, inasmuch as the lead work they perform is not in any of the trades. In fact, it would appear that the PM shop employees do not possess the advanced skills in any of the trades which would allow them to lead other Trades Specialists. However, the undersigned could not change Grievants' classifications or pay grades even if they were to demonstrate a co-worker was misclassified.

> "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. Dept. of Tax and Revenue*, 194 W. Va. 956, 460S.E.2d 702 (1995)." *Myers v. Dep't of Health and Human Resources*, Docket No. 00-HHR-392D (Mar. 30, 2001).
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> *Bender v. Dep't of Health and Human Res.*, Docket No. 00-HHR-305 (Apr. 26, 2001).

Stihler v. Div. of Nat'l Res., Docket No. 07-DNR-360D (Feb. 6, 2009). Grievants do not perform Lead work, nor did they otherwise demonstrate that they are not properly classified.

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 he is not properly classified. *Burke, et al., v. Bd. of Directors,* 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).

2. The Respondent's interpretation and explanation of the point factors and Generic Job Descriptions or PIQs 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,* Docket No. 94-MBOD-349 (Aug. 8, 1995).

3. In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievants are not similarly situated to the employees in the PM shop because their job duties are not the same. *Flint v. Wood County Bd. of Educ.*, 207 W. Va. 251, 531 S.E.2d 76 (1999); *Farley, et al., v. W. Va. Parkways Development and Tourism Auth.*, Docket No. 00-PEDTA-015 (June 22, 2000). Grievants did not prove their claims of discrimination or favoritism.

5. Grievants did not demonstrate that they are not properly classified.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 10, 2009