WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARLYNN J. BURCHAM,
Grievant,

v. **Docket No. 2010-0873-MU**

MARSHALL UNIVERSITY,
Respondent.

D E C I S I O N

Grievant, Carlynn J. Burcham, filed a grievance against Marshall University ("Marshall"), Respondent, on December 17, 2009, protesting the classification of the position she holds. Grievant is employed as a Purchasing Agent. Grievant disagrees with this designation and desires to be upgraded to the position of Contract Specialist. Grievant seeks reclassification and back pay with interest, back to the date of the original review.

A level one conference commenced on January 7, 2010. Subsequent to review of Grievant's Position Information Questionnaire ("PIQ") by the Job Evaluation Committee ("JEC") the grievance was denied at that level on March 10, 2010. Grievant appealed to level two on March 22, 2010, and a mediation session was held on May 4, 2010. Grievant appealed to level three on May 13, 2010. A level three hearing was held before the undersigned Administrative Law Judge on August 25, 2010, in the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by its appointed legal counsel, Jendonnae L. Houdyschell, Senior Assistant Attorney General.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about September 24, 2010. Both parties submitted fact/law proposals.

Synopsis

Grievant is employed in a position designated as a Purchasing Agent, pay grade 16. Grievant seeks to have the position recognized as a Contract Specialist, pay grade 18. The factors used to determine the classification of a higher education position via the West Virginia Higher Education Job Classification System (formerly known as *Mercer* classification), were reviewed and assessed by the authority charged with and empowered to make such classification decisions, with regard to Grievant's employment.

The Job Evaluation Committee evaluates a job title by analyzing specific characteristics termed "factors," assigning a rating or "degree level" to 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. In accordance with the applicable "point factor methodology" used by the Higher Education Job Classification System, it was demonstrated that Grievant's position was properly designated as a pay grade 16, Purchasing Agent. It was not established that the decision process was clearly wrong, or arbitrary and capricious. Nor was it established that the determination reached was done in an arbitrary or capricious manner. Thus, based upon the evidence, applicable conceptual definitions and testimony presented, it is clear that Grievant is and has been appropriately classified. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. These Findings of Fact are made based upon a preponderance of the relevant evidence contained in the record developed.

Findings of Fact

1. Grievant is an employee at Marshall University. Grievant currently performs duties in a position classified as a Purchasing Agent, pay grade 16.

2. Grievant works on the “operations side” of the Purchasing Office and among other duties, is responsible for contracts relating to construction projects.

3. In January 1994, the West Virginia Higher Education System implemented a new job classification system, known as the *Mercer* reclassification project. This later became known as the West Virginia Higher Education Job Classification System or the *Mercer* classification system.

4. Under the West Virginia Higher Education Job Classification System, the Job Evaluation Committee (“JEC”) is the body charged with job evaluation and classification decisions and with implementing the legislative mandate of an equitable and uniform system of job classification throughout higher education. 133 C.S.R. 8 §11 *et seq.*

5. The composition of the JEC is a cross selection of human resource administrators and representatives of classified employees from all over the State of WV. The JEC, as a group, is responsible for maintaining the titles and classifications of the position titles of the Higher Education Classification System. *Id*.

6. When reviewing and/or evaluating a position’s classification, the JEC employs a "point factor methodology" which evaluates each job title by analyzing specific characteristics termed "factors," assigning a rating or "degree level" to 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. The thirteen point factors and the degree levels under each point factor are defined in the Job Evaluation Plan.[1]

7. Under the West Virginia Higher Education Job Classification System, a significant amount of the data utilized for job evaluation and classification decisions is based upon the information provided on a Position Information Questionnaire ("PIQ").

8. The PIQ is a detailed description of an employee's job and duties performed.

9. Grievant prepared a PIQ for review in June 2009. Both her first-level and second-level supervisors signed Grievant's PIQ routing sheet in July of 2009. Gr. Ex. 2.

10. Grievant's first-level Supervisor is Charles H. Racer. As such, Supervisor Racer signed Grievant's PIQ routing sheet on July 22, 2009.

11. By memorandum dated September 9, 2009, Dennis Meadow, Chief Procurement Officer, Office of Purchasing, (Grievant's second-level supervisor) submitted additional information and clarification regarding Grievant's PIQ. This document was addressed to Anita Lockridge, Vice President of Administration and Finance. Gr. Ex. 3.

12. On or about October 23, 2009, formal classification review documentation was submitted, initiating a review of Grievant's position. Gr. Ex. 2.

13. On December 17, 2009, Grievant filed the instant grievance wherein she requested to be reclassified as a "Contract Specialist."

14. There are established equity levels for identified pay grades assigned to higher education classified positions. *See* Job Evaluation Plan, Gr. Ex. 4. Also, *see* "Classified Staff Minimum Equity Step and Entry Rates" at 133 C.S.R. 8 §12.2 (2001). The minimum salary for pay grade 16 is $21,348. The minimum salary for pay grade 18 is $24,372.

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[1] A complete copy of the Job Evaluation Plan for Colleges and University Systems of West Virginia as revised June 1993 is Grievant's Exhibit 4.

15. The point score range for pay grade 16, as specified by the Job Evaluation Plan ("JEP"), revised 5/93, is 2114-2254. Gr. Ex. 4.

16. The point score range for pay grade 17, as specified by the JEP, is 2255-2407. Gr. Ex. 4.

17. The point score range for pay grade 18, as specified by the JEP, is 2408-2573. Gr. Ex. 4.

18. During the Level 1 conference held on January 7, 2010, it was agreed that Grievant would submit her PIQ to the JEC for review.

19. Eight of the JEC members evaluated and voted on Grievant's position via a conference call on February 4, 2010. [2]

20. Grievant's position point total, as reviewed and evaluated by the JEC, was 2174. Gr. Ex. 5b.

21. The JEC determined that the position Grievant presently holds was properly classified as pay grade 16, a "Purchasing Agent." Gr. Ex. 6.

22. Upon notification of the JEC's decision, Respondent, by letter dated March 10, 2010, issued its level one decision denying the instant grievance.

23. Grievant disagrees with the JEC's assessment of her job classification. Grievant challenges a number of the scores that the JEC assigned to the duties performed by a person in the position currently in discussion.[3]

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[2] Generally, evaluation of a position entails review of the material received in the classification review process; e.g., position's duties, employee's PIQ, supervisor's notations, minimum qualification requirements, etc. Level 3 Testimony, JEC Member, Patricia Clay.

[3] Grievant identified and challenged the points her position was assessed in the factors of: Complexity and Problem Solving; Freedom of Action; Scope and Effect; Intrasystem Contacts – Level; External Contacts; and Direct Supervision. *See* Overview Chart and Discussed *infra.*

Discussion

I. BURDEN OF PROOF AND STANDARD OF REVIEW:

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). Grievant seeks as relief in this grievance that she be placed in a classification in a higher pay grade. In order to achieve this, Grievant must demonstrate she is 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 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 classification system used by higher education does not use "whole job comparison." The relevant classification system is largely a "quantitative" system. The Job Evaluation Committee employs a "point factor methodology" which evaluates each job title by analyzing specific characteristics termed "factors," assigning a rating or "degree level" to 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. The point factor degree levels are not assigned to the individual, but to

the job title. *Burke, et. al., v. Bd of Directors, Fairmont State College*, Docket No. 94-MBOD-349 (Aug. 8, 1995). The thirteen point factors and the degree levels under each point factor are defined in the Job Evaluation Plan. Gr. Ex. 4.

The focus in grievances challenging classification determinations under this system is upon the point factors which the grievant is challenging. [4] 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. Accordingly, JEC/Respondent's interpretation and explanation of the point factors and Generic Job Descriptions or Position Information Questionnaires at issue, will be given great weight unless clearly erroneous. *See Gregg v. Board of Trustees,* Docket No. 94-MBOT-863 (Dec. 18, 1996); *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 459 S.E.2d 374 (1995); *Burke, supra*; *See also Snider v. W. Va. Bureau of Environment*, Docket No. 95-DEP-306 (Sept. 29, 1995). 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 her classification has to overcome a substantial obstacle to establish that she is misclassified.

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

In this grievance, Grievant seeks a different job title, asserting that the JEC significantly undervalued the duties of her position through its application of the point factor methodology. Grievant identified and challenged the points her position was assessed in the factors of: Complexity and Problem Solving; Freedom of Action; Scope and Effect; Intrasystem Contacts – Level; External Contacts; and Direct Supervision.[5] Grievant disagrees with the JEC's determinations. Grievant contends that her position's complexity was undervalued when the JEC rated the identified factors using the point factor methodology. In order to determine if the position in discussion is misclassified, the disputed point factors and ratings will be discussed separately in detail.

Grievant's burden is to prove by a preponderance of the evidence that the JEC's decision regarding her classification was clearly wrong or was made in an arbitrary and capricious manner. "Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. *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)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without

[5] *See* Overview Chart, *infra*. Any ratings which were not specifically contested or argued against are considered abandoned and will not be discussed.

consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

II. POINT FACTOR ANALYSIS

The following chart supplies an overview of the factors, scores, benchmarks and concepts in discussion. Grievant avers that the points attributed to identified factors do not accurately reflect the complexity of duties performed by the position currently identified as a pay grade 16, Purchasing Agent.

FACTORS			Purchasing Agent	Contract Specialist	Gr # **JEC**	Gr's # Proposed
	sub-category		Benchmark	Benchmark	Feb 9,2010	
1. Knowledge		(KN)	6	6	6	uncontested
2. Experience		(EX)	4	5	4	uncontested
3. Complexity and Problem Solving		(CPS)	4	4	**3.5**	5
4. Freedom of Action		(FA)	3.5	4	**3**	Disagree
5. Scope and Effect	**Impact**	SE IA	5	7	**4**	28
	Level	SE NA	3	3	**4**	
6. Breadth of Responsibility		(BR)	1	1	**1**	uncontested
7. Intrasystem Contacts	Nature	IC NC	2	3	**2**	Higher
	Level	IC LVL	2	4	**4**	
8. External Contacts	Nature	EC NC	2	3	**2**	# Not Quantified
	Level	EC LVL	2	3	**3**	
9. Direct Supervision	Number	**DSE NUM**	1	3	**1**	# Not quantified
	Level	**DSE LVL**	1	4	**1**	

10. Indirect Supervision	Number		ISE NUM	1	1	1	uncontested
	Level		ISE LVL	1	1	1	
11. Physical Coordination			(PC)	1	1	2	uncontested
12. Working Contacts			(WC)	2	1	2	uncontested
13. Physical Demand			(PD)	1	1	1	uncontested
Total				2163	2541	2174	???
PAY GRADE				16	18	16	18

Grievant identified and challenged the points the position was assessed in the factors of: Complexity and Problem Solving; Freedom of Action; Scope and Effect; Intrasystem Contacts – Level; External Contacts; and Direct Supervision, (identified above as factors 3,4,5,7,8 and 9). Each contested area will be discussed individually. Grievant contends she should be classified as a Contract Specialist, pay grade 18.

A. Complexity and Problem Solving (Factor 3)

> This factor measures the degree of problem-solving required, types of problems encountered, the difficulty involved in identifying problems and determining an appropriate course of action. Also considered is the extent to which guidelines, standards, and precedents assist or limit the position's ability to solve problems.

(Job Evaluation Plan, Gr. Ex. 4. – Factor 3; Complexity and Problem Solving). Grievant received a degree level "3.5" from the JEC for Complexity and Problem Solving. Grievant contends that she should have received a "5." The Job Evaluation Plan defines the Complexity and Problem Solving point level "3" as:

> Problems encountered can be somewhat complex and finding solutions to problems may require some resourcefulness and originality, but guides, methods and precedents are usually available. Diversified guidelines and procedures must be applied to some work assignments. Employee must exercise judgment to locate and select the most appropriate guidelines,

> references, and procedures for application, and adapt standard methods to fit variations in existing conditions.

The Job Evaluation Plan further defines the Complexity and Problem Solving at the point level "4" as follows:

> Problems encountered are complex and varied due to incomplete and/or conflicting data. General policies, procedures, principles, and theories of specific professional disciplines are available as guidelines; however, these guides may have gaps in specificity or lack complete applicability to work assignments. Employee must utilize analytical skills in order to interpret policies and procedures, research relevant information, and compare alternative solutions.

The Job Evaluation Plan defines the Complexity and Problem Solving at point level "5" as:

> Problems encountered involve unusual circumstances, variations in approach, and incomplete or conflicting data. Employees exercise considerable analytical, valuative and reasoning skill in researching information and developing new methods to perform work assignments or optimum solutions to problems. The development of new programs, procedures or methods are typical end results of the problem-solving process. Determination of the effectiveness of a policy or practice may be involved at this level.

Grievant disagrees with the JEC assessment. Grievant testified and submitted argument that she is of the opinion that level 5 more accurately reflects her duties in that she must have "reasoning skills and understanding of rules and regulations associated with Federal Government, State of West Virginia, Marshall University," "Higher Education" and other applicable constraints. Grievant highlighted that she must be able to understand which rules and regulations apply to individual contracting situations and must be able to relate the rules and regulations to agency heads, contractors, and community officials. Further, she noted that she was a member of the American Institute of Architects (AIA)

committee that reviewed and developed the 2007 AIA construction documents with respect to how they should conform to West Virginia State law. Gr. Ex. 1.

Ms. Patricia Clay, Member of the JEC testified that it is important to understand what complexity and problem solving evaluates. She testified that, "[i]t is not the complexity of task . . . [rather complexity and problem solving] measures the degree of problem solving, the types of problems that are presented to the employee or in the job and the difficulty involved in identifying the problems and the solutions. Most of the time, if the job is very regulated, they have a lower level of complexity and problem solving score." As a member of the JEC, Ms. Clay added insight into the rationale for the committee's actions. Ms. Clay further testified that "the JEC believed that a 3.5 was appropriate and not a 5 because the duty statement supported the description of the problem solving that is described in 3 and 4.[6] When you read level 5, 'problems encountered involve unusual circumstances, variations in approach, incomplete, conflicting data . . . considerable analytical, [e]valuative and reasoning skills [are exercised by the employee] in researching information and developing new methods to perform work assignments or optimum solutions to problems.' We did not see that in this PIQ. What we saw was a great deal of processing: we saw rules and regulations." Thus, the JEC was of the opinion that when evaluating this classification the fact that there are so many rules and regulations governing purchasing and contracts, limits the level that this position can get on this particular factor.

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[6] Grievant received a 3.5 on complexity. A point of contention initially noted by Grievant was the fact that there is no definition for "3.5." It is not clear if Grievant abandoned this argument. Nevertheless, the undersigned was satisfied with Respondent's explanation for crediting Grievant with a half point increase, a 3.5 rather than a 3 but not the equivalence of a 4. The JEC elected to acknowledge a half level point given the PIQ description of the position.

Grievant did not establish that the JEC's evaluation of her position at a point level of "3.5", as opposed to a "5" was arbitrary or capricious. Further, it is not demonstrated that the 3.5 assessment was a clearly wrong determination. Half-levels are not defined in the Plan; however, the JEC may assign a half-level for duties which are not within the higher level but are more complex than the lower level. It is established that the JEC credited the position with performing a number of perplexed duties and attempted to recognize the knottiness of the position, by awarding a half a level point value to the recognized complexity.

B. Freedom of Action (Factor 4)

> This factor measures the degree to which the position is structured as is determined by the types of control placed on work assignments. Controls are exercised in the way assignments are made, how instructions are given to the employee, how work assignments are checked, and how priorities, deadlines and objectives are set. Controls are exercised through established precedents, policies, procedures, laws and regulations which tend to limit the employee's freedom of action.

(Job Evaluation Plan Gr. Ex. 4. – Factor 4: Freedom of Action). Grievant received a degree level "3 " from the JEC for Freedom of Action. Grievant disagrees with this assessment, she contends that she should have received a "5". The Job Evaluation Plan defines the Freedom of Action point level "3" as follows:

> Tasks are moderately structured with incumbent working from objectives set by the supervisor. At this level, the employee organizes and carries out most of the work assignments in accordance with standard practices, policies, instructions or previous training. The employee deals with some unusual situations independently.

The Job Evaluation Plan further defines the Freedom of Action point level "5" as follows:

> Virtually all tasks are unstructured; assignments are in terms of setting objectives within strategic planning goals. At this level, the employee has responsibility for planning, designing and carrying out programs, projects and studies; employee sets goals and objectives for a major unit, program, or department. Approval from higher supervision may be necessary only in terms of financial impact and availability of funds, but little reference to detail is discussed with the next level supervisor. Work review concerns matters such as fulfillment of goals and objectives.

Grievant testified that the "3" recognized by the JEC was inappropriate because she works with and oversees the bidding of large construction projects with little supervision. Further, Grievant avers she helps to develop contracts that are used not only by Respondent, but also by other state agencies. Grievant is desirous of a "5" for these works.

As to the reason why a level "5" would not be appropriate for Grievant's position, Ms. Clay testified, "[w]hen you consider the methodology, Freedom of Action only has five levels. And, when you consider all the jobs in Higher Education . . . in the higher education system in West Virginia the highest level a classified employee could possibly receive is a five. . . . A level 5 is typically given for those jobs that are high-level supervisors that are still in the classification system; the top-level administrators who are in that policy making or in that non-classified tier of organization." The JEC evaluated this position at level 3. Grievant's position does not exhibit the independent degree of authority attributable to a level "5" position.

In review of Grievant's PIQ relevant to Freedom of Action, Ms. Clay highlighted that there is not a great deal of freedom in this particular job, '[r]eview of construction contracts, purchase orders[,] change orders and [o]pen [e]nd [c]ontracts'. . . . Review of this material, disseminating this information at the bid conferences, making sure that the bonds and all

the documents and forms that are required are there, is an oversight process. But, it doesn't allow the employee a lot of freedom in deciding what can be done . . . . What's needed and what's necessary is regulated." Ms. Clay further testified that " a higher level of freedom would be someone who creates their own work." Grievant has failed to prove that the JEC's allocation of a degree level "3" for Freedom of Action was clearly wrong or arbitrary and capricious. Respondent established a rational basis for its evaluation, the position organizes and carries out most of the work assignments in accordance with standard practices, policies, instructions or previous training.

C. Scope and Effect (Factor 5)

This factor is split into two separate components for scoring purposes; impact and level. Scope and Effect is a matrix factor that allows the JEC or the Plan to consider the differences in sizes of organizations. A position is scored on "Impact of Actions" and by "Nature of Actions." This is abbreviated on the data line as "SE:IA" and "SE:NA," respectively and is reflected separately. The Job Evaluation Plan provides;

> 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 system, 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. . . .

(Job Evaluation Plan, Gr. Ex. 4., Factor 5: Scope and Effect). The JEC evaluated

Grievant's position at "4" for both "Impact" and "Nature of Actions" relevant to Scope and Effect, factor 5. Grievant contends that she should have received a "28" "because of an ongoing working relation with Marshall University Forensic Science division and her involvement with the AIA Committee which affects all higher education construction projects." Citing Grievant's PFOF/COL Document.[7]

The JEP defines Scope & Effect - Impact of Actions degree level "4" as:

> Work affects the entire operations of a specialized school, branch campus, community college or baccalaureate-level institution with an operating budget of < $13M; more than one school or division of a graduate or baccalaureate-level institution with an operating budget of $13 - $18M; a school or division of a graduate or baccalaureate-level institution with an operating budget of $19 - $25M; several departments within a graduate-level institution with an operating budget of more than $50M; or a major department within a doctorate-level institution with an operating budget of more than $200M.

The Job Evaluation Plan defines level 7 for Scope – Impact as follows:

> Work affects the entire operations of a graduate-level institution with an operating budget of more than $50M; or more than one school or division of a doctoral-level institution with an operating budget of more than $200M.

Grievant indicated in her testimony that she believed that she should be given a "7." Ms. Clay testified that typically most jobs get a 1 or a 2 on impact. Impact of Actions for a level 4, for example, would most typically be used for some position that has impact across the entire organization. Work product affects all the aspects of an organization: instruction, instructional support, research, public relations, administration, student

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[7] While Grievant's explanation of how she determined her score to be "28" is somewhat convoluted, Respondent provides "a "28" on the matrix would be given if an employee received a point level of 7 for Impact of Actions and a 4 for Nature of Actions."

services. Degree levels 7 and 8 are reserved or applied for positions that have impact across all of higher education or all of the State of West Virginia.

Grievant received a level "4" on impact. Grievant's position being one of the two who are responsible for buying, processing, bidding, doing all these things for Marshall University for construction and other relevant areas. The JEC reasoned such influence would be applicable for Impact of Action at level 4 because it could affect a major department within a doctoral level institution or several departments within a graduate institution. Grievant's actions impact Marshall; however, her job does not affect the entire organization of Marshall University (e.g., student development, student services, financial aid, research, etc.).

Grievant is of the opinion that her activity with AIA Committee, whose decisions effect higher education, justifies a higher impact level number for her position at Marshall University. Grievant highlights her participation on this committee includes giving her opinion and voting on recommendations and decisions. The JEC does not concur with Grievant with regard to how this translates to an increased degree level for her position. The JEC assigns the degree levels according to the duties of the position, not to the individual holding the position. *Burke, supra.* Further, Grievant is but one member of this regulatory organization, not the decision maker.

It was also discussed that Grievant's actions do not have the immediate impact indicative of a higher degree level in this factor. JEC member, Clay, testified that Grievant's work product gets reviewed and can be fixed and changed before dramatic impact. There are a number of review levels after Grievant's position designed to stop and correct errors; this lowers a position's impact of action. So, the JEC believed or felt that

based on the job duties, the Scope and Effect answers and the attachments provided, that this position fits at level 4 on Impact of Actions and level 4 on Nature of Actions. In these circumstances, Grievant has not presented any compelling rationale to support a finding that the JEC either abused its discretion or was clearly wrong in assigning a level "4" rating to her position under the elements of Scope and Effect. The JEC's reasonable interpretation of the Plan is given deference. *See Tennant, supra*; *Burke, supra*; *See also Snider, supra*. An administrative law judge may not simply substitute his judgment for that of the JEC. *See generally, Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001)*; Hattman v. Bd. of Directors*, Docket No. 98-BOD-439 (Apr. 30, 1999)*; Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned is not persuaded that the JEC's determination was either arbitrary and capricious or clearly wrong.

D. Intrasystem Contacts (Factor 7)

Intrasystem Contacts, factor 7 also has two separate components for scoring purposes; Nature and Level. Each position is rated for the Nature of the Contact, which is shown on the data line as "IC:NC," along with a rating regarding the Level of Regular, Recurring and Essential Contact, which is reflected on the data line as "IC:LVL".

> This factor appraises the responsibility for working with or through other people within the SCUSWV to get results. Consider the purpose and level of contact encountered and a regular, recurring and essential basis during operations. Consider whether the contact involves furnishing or obtaining information, explaining policies or discussing controversial issues. This factor considers only those contacts outside the job's immediate work area.

Job Evaluation Plan, Gr. Ex. 4. (Emphasis in original).

Grievant received a degree level "2" from the JEC for Intrasystem Contacts - Nature of Contact and a degree level of "4" for Intrasystem Contacts - Level. Grievant asserts that her score should be higher because her contact is not simple or routine. Grievant highlights that she interacts with "Project Managers, Assistant Vice Presidents and Directors of other higher education institutions" as well as "contact with government officials, community business leaders, architects and engineers." It is not clear that Grievant specifies a quantified number in opposition to the JEC's "2" and "4."

In review of Grievant's statement of work, e.g., PIQ, and addendum material, the JEC evaluated responsibilities that describe regular, recurring and essential contact with the necessary levels of authority. Appropriate contact with individuals who possess budgetary responsibility is acknowledged, thus the "4." Grievant has not, however, established any fact or evidence that demonstrates the JEC's evaluation of Intrasystem Contacts, Factor 7 and her position is erroneous, (IC:NC "2"). Grievant's disagreement with the JEC's analysis isn't sufficient to demonstrate arbitrary or capricious conduct. Grievant has failed to prove that the JEC's allocation of degree level for either component, Nature or Level was clearly wrong.

E. External Contacts (Factor 8)

> 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 and a regular, recurring and essential basis during operations. Consider whether the contact involves furnishing or obtaining information, influencing others or negotiation.

Job Evaluation Plan, Gr. Ex. 4. - Factor 8: External Contacts (Emphasis in original).

This factor is scored by rating the Nature of the Contact, which is shown on the data line as "EC:NC" along with the Level of Regular, Recurring and Essential Contact, which is reflected on the date line as "EC:LVL." The JEC evaluated Grievant's position at a degree level "2" for Nature and at "3" for Level.

JEC member, Patricia Clay, testified, "external contact is applied the same way as internal contact but it is applicable to persons outside of the higher education systems of West Virginia, including students." The JEP defines External Contacts - Nature of Contact degree level "2" as:

> Moderate tact and cooperation required; communication is largely of a non-controversial 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 does this activity on a regular basis with institutions, sales, engineers, high level product reps., governmental officials and contractors. Thus, the undersigned is not convinced the JEC's evaluation is in error. Neither is it apparent that a degree level of "3" is an arbitrary or capricious rating for Level of Regular, Recurring and Essential Contact. Grievant challenges the JEC's scores but doesn't provide persuasive alternative scores.

F. Direct Supervision (Factor 9)

> 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.

(Job Evaluation Plan, Gr. Ex. 4. - Factor 9: Direct Supervision Exercised). Pursuant to this factor a position is rated for the Number of Direct Subordinates, which is shown on the data line as “DSE:NUM”. Further, the position is rated regarding the “Level of Supervision”, which is reflected on the data line as “DSE:LVL”. Grievant received a point level of 1 for Direct Supervision in both number and level of supervision. Grievant does not supervise anyone in her position at Marshall.

Grievant attempts to challenge the JEC’s evaluation by noting that one or more Contact Specialists at another facility do not have direct supervision responsibility. This fact, even if accurate, does not establish that the JEC’s assessment of Grievant’s position with a supervisory factor degree level of “1” is inaccurate or inappropriate. Certain factors are evaluated according to specific relationships, such as the number of employees an employee directly supervises, and whether those directly supervised employees supervise subordinate employees. It is possible for an employee responsible for a particular activity at one institution of higher education to be classified at a different grade level from an employee who is responsible for a comparable activity at another institution. Grievant has not demonstrated that the JEC's determination, in the instant case, is a violation of the mandate for a uniform system of classification. The undersigned is not persuaded by Grievant’s contention or alleged comparison of duties. Grievant does not directly supervise another classified employee as a duty or responsibility associated with her current position. Consequently, Grievant did not prove that she qualified for a higher rating under Direct Supervision, Factor 9.

III. SUMMARY

The point factor degree levels are not assigned to the individual, but to the job title. *Burke, supra.* The JEC assigns the degree levels according to the minimum degree level required to perform the duties of the position, not to the individual holding the position. Grievant's position point total as reviewed and evaluated by the JEC was 2174. Gr. Ex. 5b. This equates to a pay grade 16 position. *See* Job Evaluation Plan, Gr. Ex. 4. Grievant failed to establish by a preponderance of the evidence that Respondent, through the JEC, interpreted or applied the applicable point factor methodology to the duties and responsibilities of her position in a manner that was arbitrary and capricious. Grievant doesn't agree with the JEC determination of her position with regard to the evaluations assigned to Complexity and Problem Solving; Freedom of Action; Scope and Effect; Intrasystem Contacts; External Contacts; and Direct Supervision (Factors 3, 4, 5, 7, 8 and 9). However, Grievant has not demonstrated that the point factor degree levels attributed to these factors were clearly wrong.

_____It has not been established that Grievant is misclassified. Grievant did not meet her burden of proof regarding the point factors she challenged. In accordance with the applicable methodology used by the Higher Education Job Classification System, it was demonstrated that Grievant's position was properly designation as a pay grade 16, Purchasing Agent.

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. 156 C.S.R. 1 § 3 (2008); *Burke, et al., v. Board of Directors*, Docket No. 94-MBOD-349 (Aug. 8, 1995).

2. Within the West Virginia Higher Education Job Classification System, the Job Evaluation Committee is charged with job evaluation and classification determinations following an evaluation system, formerly known as *Mercer*. Accordingly, the JEC is empowered with the authority to review Position Information Questionnaires and assign degree levels under each point factor for positions in review. *See* WEST VIRGINIA CODE § 18B-9-1 *et seq*; 133 C.S.R. 8 *et seq*.

3. Whether a grievant is properly classified is almost entirely a factual determination. Accordingly, Respondent's interpretation and explanation of the point factors and Generic Job Descriptions or PIQs at issue will be given great weight unless clearly erroneous. *See Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995); *Burke, et al., v. Board of Directors*, Docket No. 94-MBOD-349 (Aug. 8, 1995).

4. 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 Board of Rehabilitation, Div. of Rehabilitation Services*, Docket No. VR-88-006 (March 28, 1989).

5. "Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion. *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)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. The JEC assigns the degree levels according to the minimum degree level required to perform the duties of the position, not to the individual holding the position.

7. The undersigned Administrative Law Judge's review is limited to determining whether the JEC was clearly wrong or acted in an arbitrary and capricious manner.

8. The JEC's determination that Grievant's position was appropriately classified at the level of pay grade 16 was not clearly erroneous or arbitrary and capricious.

9. Grievant failed to prove by a preponderance of the evidence that the JEC's interpretation and application of the Plan in regard to classifying her position as Purchasing Agent in pay grade 16, or the evaluations assigned to the challenged point factors of Complexity and Problem Solving; Freedom of Action; Scope and Effect; Intrasystem Contacts – Level; External Contacts; and Direct Supervision, was clearly wrong or otherwise unsupported by the available evidence.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: May 20, 2011

Landon R. Brown
Administrative Law Judge