

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**KAYLA HAWLEY,
Grievant,**

v.

DOCKET NO. 2017-0211-WVU

**WEST VIRGINIA UNIVERSITY,
Respondent.**

DECISION

Grievant, Kayla Hawley, filed a grievance on July 25, 2016, against her employer, West Virginia University. The statement of grievance reads, “[t]he grievant is constantly asked to perform jobs outside of her PIQ.”¹ The relief sought by Grievant, as stated on the grievance form, is “[t]he grievant asks for the action to cease, and to be made whole and right in every way.” At level one, Grievant indicated that she believed she was not properly classified. At the level three hearing, Grievant’s representative advised that Grievant does not believe the PIQ completed for her position is accurate, and that she is asking that her PIQ accurately reflect her duties.

A conference was held at level one on November 3, 2016, and a level one decision was issued on November 17, 2016, denying the grievance. Grievant appealed to level two on November 28, 2016, and a mediation session was held on March 24, 2017. Grievant appealed to level three on April 20, 2017, and a level three hearing was held before the undersigned Administrative Law Judge on August 9, 2017, at the Grievance Board’s

¹ PIQ is the acronym for position information questionnaire, which lists the duties and responsibilities of a position, and is used in the classification process.

Westover office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision on September 26, 2017, on receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleged that her PIQ at the time she filed her grievance was not accurate, as she believed she had been performing maintenance duties rather than custodial duties more than 30% of the time. Rather than asserting that she was misclassified and asking for relief that her position be placed in a particular classification, the relief sought by Grievant is that a new PIQ be prepared which is accurate for the period at issue. At the time of the level three hearing, Grievant had a new supervisor who had removed some of the maintenance duties from Grievant's duties. Grievant's supervisor prepared a new PIQ for Grievant's position after this grievance was filed, which Grievant signed without reviewing, and WVU Human Resources personnel conducted a desk audit and concluded Grievant was properly classified.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU") as a Campus Service Worker (Custodian), pay grade 7. Grievant has been employed by WVU since 2012.

2. In 2015, Grievant began working at a new building on campus referred to as University Place. When she began working at University Place, Grievant signed a new PIQ which listed her duties as 70% custodial and 30% maintenance, which was different from her previous PIQ.

3. Grievant performed few maintenance type duties when she first began working at University Place. Over time, the percentage of time she spent performing maintenance type duties increased. The maintenance duties performed by Grievant include changing light bulbs, smoke detector batteries, and batteries in locks on apartments, changing air filters every six months on the HVAC unit for each apartment, and some painting. At the end of each semester Grievant also assists the maintenance employees in “turning” rooms when a student moves out, which involves making sure all the appliances and outlets work, checking for damage to walls, and checking to see whether anything has been broken in the room. Grievant also lets outside contractors into rooms at times who are installing carpeting or painting, and stays to monitor them if the room is still occupied by a student.²

4. From June 6, 2016, through July 11, 2016, HVAC units in the University Place apartments were being cleaned by an outside contractor. Grievant did not perform any custodial work during this time, as she was assisting with this project. Grievant cleaned the vents, cleaned the water out of the window sills, let the contractor in the apartment to perform maintenance or install new units, made sure the units were installed

² Grievant asserted that she was supervising the contractors. Supervision entails directing and approving work. Grievant at times observed the contractor for security reasons, but she did not supervise the work of the contractor.

so that no light was around the unit and it was blowing out heat and air conditioning, installed new weather seal around the units, and caulked around the units. This was a one-time event, as the units were being cleaned as a result of some construction. These duties were temporary.

5. WVU employees who are temporarily performing duties outside their classification may be eligible for an interim upgrade. It is the responsibility of the employee's supervisor to request a temporary upgrade. Grievant's supervisor did not request a temporary upgrade for Grievant during June and July of 2016.

6. At some point, Grievant was asked to assist with maintenance type work as much as two to three days a week, for all or part of the day. Grievant did not maintain a log of her duties at any point, but stated that "probably about" 50% of her duties were maintenance and 50% custodial.

7. In October 2016, after this grievance was filed, a new PIQ was prepared by Thomas Evans, Facilities Manager and Grievant's supervisor, for Grievant's position, which Grievant signed on October 6, 2016. Mr. Evans prepared the PIQ after discussions with Joe Pompura, Lead Campus Service Worker. Mr. Pompura is responsible for Grievant's assignments. Mr. Evans and Mr. Pompura discussed Grievant's duties to try to determine whether Grievant was performing maintenance type duties more than 30% of the time. They concluded that she was not. Grievant signed the new PIQ, but she did not review the PIQ before signing it. The PIQ lists Grievant's duties as 30% maintenance type duties and 70% custodial duties. Mr. Evans believes this PIQ accurately reflects Grievant's duties.

8. On October 26, 2016, Jacqueline Bumps, a Senior Compensation Specialist at WVU, conducted a job audit of Grievant's position, meeting with Grievant and her

supervisor to discuss Grievant's duties. Grievant was allowed the opportunity by Ms. Bumps to provide additional information on her job duties and to clarify any information on her PIQ. Grievant did not indicate to Ms. Bumps that her PIQ was incorrect in listing her duties as 30% maintenance type duties and 70% custodial duties, and in fact, told Ms. Bumps that this was accurate. Ms. Bumps concluded that Grievant was properly classified.

9. Grievant had been assigned to compile information documenting what work has been completed on apartments when they are being turned, and what work needs to be done, and to type work lists prepared by Mr. Pompura. The record does not reflect how frequently Grievant performed this task, and it is not reflected on her PIQ, but Ms. Bumps was made aware of this task during the desk audit. Grievant's new supervisor, Joan Crabtree, advised Grievant in the spring of 2017, that she will no longer be performing this task. Ms. Bumps concluded that this task was similar to duties performed by Office Assistants, who are in the same pay grade as Campus Service Workers.

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*, 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. The thirteen point factors and the degree levels under each point factor are defined in the Job Evaluation Plan. Therefore, the focus in Mercer decisions issued by this Grievance Board is on the point factors the grievant is challenging.³ While some "best fit" analysis of the definitions of the degree levels is involved in determining which degree level of a point factor should be assigned, where the position fits in the higher education classified employee hierarchy must also be evaluated. In addition, this 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 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

³ A grievant may challenge any combination of point factor degree levels, so long as he clearly identifies the point factor degree levels he is challenging, and this challenge is consistent with the relief sought. See *Jessen, et al., v. Bd. of Trustees*, Docket No. 94-MBOT-1059 (Oct. 26, 1995); and *Zara, et al., v. Bd. of Trustees*, Docket No. 94-MBOT-817 (Dec. 12, 1995).

(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.

Grievant believes she is, or has been, misclassified, but she did not identify any job title she believes better reflects her duties, or any point factors she believed should have been assigned a higher degree level in evaluating her job duties and responsibilities, nor did she place into the record the degree levels assigned in any point factor to either of the classifications at issue. Without this basic information, the undersigned cannot evaluate whether Grievant was at any time misclassified. Grievant, however, is not asking as relief that her position be assigned to a different classification, rather Grievant asserts that her PIQ is not accurate, and that if an accurate PIQ were prepared, it would then lead to her being properly classified. Respondent argued that the PIQ was accurate, pointing out that an on-site job audit was conducted after the grievance was filed, and that Human Resources personnel spoke to Grievant about her duties during this job audit, and that Grievant was found to be properly classified.

As was pointed out to the parties at the hearing, the undersigned is unclear as to how an order that requires an accurate PIQ be completed could be enforceable. Whether the current PIQ is accurate or not is a matter of opinion, with Grievant now believing it was not accurate, and her supervisor believing it was. Ordering the completion of a new PIQ is an exercise in futility. The real question is whether Grievant is properly classified. This

grievance was Grievant's opportunity to contest her classification and she chose not to do so.

Further, Grievant now has a new supervisor, Joan Crabtree, and Ms. Crabtree has advised Grievant's co-worker, Shelley Buseman, also a Campus Service Worker, that the custodians will not be performing maintenance tasks. Accordingly, the new PIQ sought by Grievant would detail duties which she no longer performs, and be for some limited period of time in the past. Finally, Grievant was already provided the opportunity by Respondent to point out any inaccuracies in the PIQ during the desk audit. Grievant, however, did not indicate during the desk audit that she was performing maintenance tasks more than 30% of the time, and, in fact, she acknowledged at the level three hearing that she had told Ms. Bumps that the PIQ was accurate in stating that she performed maintenance type duties 30% of the time, but that when she thought about it, she messed up.

“Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].’ *Bragg v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep’t of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep’t of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).” *Pritt, et al., v. Dep’t of Health and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008). In situations where “it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion.” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002). The undersigned concludes that the relief sought by Grievant is illusory, and unavailable.

Moreover, Grievant failed to demonstrate that her most recent PIQ is not accurate. First, the maintenance duties with regard to cleaning the HVAC units which Grievant performed during the summer of 2016 were a one time event. While the performance of these duties continually during June and the beginning of July of 2016 could possibly have pushed Grievant over the 30% mark of maintenance duties for 2016, that function will not be repeated, and is more in the nature of duties which could have called for an interim upgrade of her position, not a revision of the PIQ for her position. Whether Grievant should have received an interim upgrade, however, was an issue raised by the undersigned, and was not pursued by either party, and will not be addressed further.

As to Grievant's normal duties, Grievant never kept a log of her duties, although she stated that her tasks were "probably about" 50% maintenance, 50% custodial. It is not clear how Grievant arrived at this estimate, or whether this estimate includes the period in June and July 2016 when the HVAC units were being cleaned. At one point in her testimony, Grievant stated that it was after October 2016, when her maintenance duties increased to above 30%, but at another point stated this occurred prior to June 2016. Grievant admitted that she told Ms. Bumps during the desk audit that the PIQ percentages were accurate. Grievant's testimony on this key point at the level three hearing was confusing at times, and it is quite clear that Grievant's estimates are nothing more than a guess on her part, unsupported by any documentation which can be relied on by the undersigned. The undersigned must conclude that Grievant did not meet her burden of proof on this issue.

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. Grievant did not demonstrate that she is not properly classified.

4. In situations where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

5. The relief sought by Grievant that an accurate PIQ be prepared is illusory and unavailable.

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).

Date: October 31, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge