

THELMA BLAKE, ET AL.,

Grievants,

v. DOCKET NO. 94-MBOT-475

BOARD OF TRUSTEES/MARSHALL UNIVERSITY,

Respondent.

DECISION

___Thelma Blake, Charles Newsom, Charles Harless and Earl Johnson each submitted a grievance challenging his or her classification as an Assistant Supervisor/Building Services (“Assistant Supervisor”) and pay grade of 11. Grievants were classified by the Respondent Board of Trustees (“BOT”) under the Job Evaluation Plan for State College and University Systems of West Virginia. [\(See footnote 1\)](#) The Job Evaluation Plan was developed by the Respondent's Job Evaluation Committee (“JEC”) with assistance from a private consultant, William M. Mercer, Inc. and is known as the “Mercer Plan.” Grievants seek the title Supervisor/Building Services and Pay Grade 15. In addition, they specifically challenge the degree levels received in several point factors, which are items used to evaluate jobs under the Mercer Plan.

These grievances were initiated in January 1994 in accordance with specific procedures established in §18 of the Legislative Rule for Personnel Administration promulgated by the University System of West Virginia Board of Trustees on May 5, 1994. 128 C.S.R. 62. In October 1994, BOT waived these grievances to Level IV. A Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on June 14, 1996. This matter became mature for decision on July 9, 1996, following receipt of timely post-hearing submissions from the Respondent. Grievants chose not to submit post-hearing arguments. For administrative reasons, this grievance was reassigned for decision subsequent to the hearing.

The following Findings of Fact are properly made from the record developed at Level IV:

FINDINGS OF FACT

- 1 1. Each Grievant is employed by Marshall University. Grievants were classified in the Mercer reclassification as Assistant Supervisors/Building Services, Pay Grade 11, effective January 1, 1994.
- 2 2. All classified employees were asked to complete a Position Information Questionnaire ("PIQ") prior to the reclassification. The employees were to describe their job duties and responsibilities, and the job requirements on the PIQ, by answering a series of questions designed to elicit this information. Grievants Blake and Harless filled out PIQs in 1991. (See Jt. Exs. D and H.) PIQs for Grievants Newsom and Johnson do not appear in the record.
- 3 3. Grievants are responsible for cleaning work done on their respective shifts in their respective assigned areas.
- 4 4. Grievants have direct supervisory authority over Building Service Workers ("BSWs"). Grievant Blake supervises 13 BSWs, Grievant Newsom 15, Grievant Johnson 10, and Grievant Harless 11. Grievants train, assign duties to, counsel, discipline, and evaluate performance for the BSWs assigned to them. Grievants sign the performance evaluation forms. Grievants also maintain time and leave records for their staffs, and sign time cards for their subordinates. On at least one occasion, firing of an employee was recommended by Grievants, and the employee was referred to and fired by Grievants' supervisor, Charles Brown.
- 5 5. Grievants must schedule staff to clean buildings and facilities assigned to them. Grievants frequently must perform BSW work themselves and/or contact each other to adjust for staffing problems caused by unscheduled employee absences. Grievants cooperate with each other, reassigning staff and/or areas of responsibility among themselves, to assure that the work is satisfactorily completed.
- 6 6. In order to train and supervise their subordinates, and to perform cleaning work themselves as needed, Grievants must know how to set up and use tools and equipment such as buffers, scrubbers and convertamatics. Grievants must also know how to properly mix and use chemicals.
- 7 7. Grievants must explain the policies and procedures contained in a personnel handbook to their staffs. These policies and procedures are subject to revision, and address routine supervisory issues. Long-standing practices and procedures also exist which govern most of Grievants' other work.
- 8 8. Grievants must adapt to schedule changes regarding the number of employees available to work a given shift, the areas covered, or events and functions for which to prepare or clean up. In addition to their experience in coping with such changes, the Grievants have schedule sheets to which they

refer for information about events and activities. Occasionally, Grievants also deal with unusual situations such as cleaning up after flooding has occurred.

9 9. Grievants have little or no day-to-day contact with their supervisor, Mr. Brown, other than when he assigns them the buildings or people they are to supervise and when he conducts Grievants' yearly performance evaluations.

10 10. Grievants talk with faculty, other Building Services staff and possibly the public regarding unusual functions or activities which require Building Services attention. Such contact consists mostly of routine information exchange.

11 11. Grievants have contact with product representatives and suppliers at least every two to three weeks, testing or seeing demonstrations of new cleaning products or methods. Grievants also have occasional contact with students and the general public, as when a student or other person stops Grievants in the hall to request assistance.

12 12. There is some potential for injury if Grievants or their subordinates do not use equipment and/or chemicals correctly. Equipment must be used with some degree of speed and accuracy in order to complete cleaning within a reasonable amount of time. However, no specific speed requirements are imposed upon Grievants or their subordinates other than the general requirement that work gets done during the shift.

13. Grievants spend much of their time walking or standing, travelling building-to-building and supervising staff. Grievants must do some bending and stooping. Grievants and their staffs must sometimes work in unheated or un-air-conditioned buildings. Most of the work itself, including use of equipment and chemicals and emptying of trash cans, is actually performed by Grievants' subordinates.

DISCUSSION

The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that he or she is not properly classified. 156 C.S.R. 1 §4.19; W. Va. Code § 18- 29-6. Burke, v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant asserting misclassification must identify the job he or she feels is being done. 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 or her burden of proof in a Mercer grievance merely by showing that the grievant's job duties better fit one job description than another, without also identifying which point factor degree levels are challenged. While some "best fit" analysis 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. This system must by statute be uniform across all higher education institutions; therefore, the point factors are not assigned to the individual, but to the job. Burke, supra. A Grievant may challenge any combination of point factor degree levels, so long as he or she clearly identifies the ones being challenged, and this challenge is consistent with the relief sought. See Zara v. Bd. Of Trustees, Docket No. 94-MBOT-817 (Dec. 12, 1995); and Jessen v. Bd. Of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995). A Mercer grievant may prevail by demonstrating his or her reclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989).

In this case, whether Grievants are properly classified is almost entirely a factual determination. As such, the JEC's interpretation and explanation of the point factors and Generic Job Descriptions at issue will be given great weight unless clearly erroneous. See Tennant v. Marion Health Care Foundation, 459S.E.2d 374 (W. Va. 1995); Burke, supra. Of course, no interpretation or construction of a term is necessary where the language is clear and unambiguous. See Watts v. Dept. Of Health & Human Resources, 465 S.E.2d 887 (W.Va. 1995). However, the higher education employee challenging his or her classification will have to overcome a substantial obstacle in attempting to establish that he or she is misclassified.

I. COMPARISON OF GENERIC JOB DESCRIPTIONS

To develop Generic Job Descriptions ("GJD") for Job Titles, the JEC read the PIQs submitted by all persons in the state higher education system in a given classification, looking for similarities and differences in the PIQs. The duties shown on the GJD are those duties most frequently appearing on the PIQs, and are considered the common duties of that job. The duty which occurred most often and/or had the highest percentage of time is listed first. GJDs were developed after January 1, 1994, that is, after employees were notified of their

classifications.

Respondent's witness was Brenda Nutter, Director of Human Resources at West Virginia Institute of Technology, and a JEC member. Ms. Nutter acknowledges that the GJDs for the Supervisor and Assistant Supervisor positions at issue here are very similar and that much of the wording is the same. However, Respondent argues that one cannot compare by the wording alone.

According to Ms. Nutter, supervision is the primary issue separating the positions of Building Service Worker, Assistant Supervisor, and Supervisor. She stated that Grievants were given adequate credit for their supervisory duties when they were classified as Assistant Supervisors, rather than BSWs. The GJDs for Assistant Supervisor and Supervisor are attached hereto, labelled as Level IV Jt. Exh. I and J, respectively. No GJD for the BSW title was introduced into the record.

Grievants assert that they should have been classified as Supervisors. From Grievants' testimony, [\(See footnote 2\)](#) it is apparent that Grievants have substantial supervisory authority over their subordinates. Most tellingly, Grievants are wholly responsible for written performance evaluations of the BSWs who report to them, and also for training, counselling, disciplining and assigning duties and responsibilities to such staff. Grievants appear to have more responsibility and authority than recognized by the Assistant Supervisor GJD.

The GJD for Assistant Supervisor states that “[t]he primary purpose of this position is to supervise all activities associated with maintaining the cleanliness of the institution's buildings and facilities during an assigned shift.” (Jt. Ex. I, emphasis added.) The GJD for Supervisor/Building Services states that “[t]he primary purpose of this position is to plan, coordinate, and manage all activities associated with maintaining the cleanliness of the institution's buildings and facilities, during all shifts of operation.” (Jt. Ex. J, emphasis added.)

Grievants straightforwardly recognized that they were only responsible for supervision of their own respective shifts. Thus, it appears on the face of the GJDs that Grievants cannot properly be classified as Supervisors, as Grievants are not responsible for all shifts of operation.

II. POINT FACTOR ANALYSIS:

Grievants challenged their ratings in several of the factors analyzed in assigning their positions and pay grades. Each point factor which is subject to dispute in this grievance will be addressed separately.

A. EXPERIENCE:

This factor, as defined in the Mercer Plan:

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

(Jt. Ex. K. All subsequent definitions are taken from Jt. Ex. K, except as specifically noted.)
There are eight degree levels ("levels") available under this factor. Grievants were assigned level 3, "[o]ver one year and up to two years of experience." Grievants seek assignment of level 5, "[o]ver three years and up to four years of experience." Level 4 is "[o]ver two years and up to three years of experience." Grievants testified that 3-4 years of experience is needed in order to properly run machines and mix chemicals which are used to clean the buildings and facilities under their purview. Experience also allows Grievants to properly schedule and perform seasonal work. However, Grievant Harless' PIQ stated in narrative that two years of experience as a BSW II (Assistant Supervisor) was required in "learning basics of the responsibilities and duties of a supervisor, BSW III." (Jt. Ex. H.) Grievant Blake wrote that one year of "Building custodial work using (sic) certain machines scrubbers etc (sic)" and two years of "Building service work in a college or university" were required. (Jt. Ex. D.) In the PIQs, both marked the category "[o]ver three years and up to four years of experience." (Jt. Exs. D and H.) It appears that Grievant Blake added the two categories to arrive at a three year requirement. However, there is no evidence that one cannot obtain the custodial work experience while one obtains the college or university work experience. In other words, there is no evidence that the years of experience listed by Grievant Blake must be obtained consecutively rather than concurrently.

Respondent's witness stated that, in this factor, the JEC considered the minimum amount of experience needed to come into a job, not the actual experience which incumbents had. In addition to the High School degree or GED required under the Knowledge factor (which was

not challenged), Respondent decided that one year of experience was sufficient for the Assistant Supervisor position. Respondent completely failed to state any basis for its conclusion, merely noting that a written schedule sheet was available to help Grievants plan for unusual functions and activities.

“Ordinarily, [the question of how much experience is needed] can best be answered by the supervisor or supervisors responsible for seeing that the work is performed.” Jessen v. Bd. of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995). Grievant Blake's PIQ was signed by her supervisors, who did not indicate disagreement with her assessment. Based on their signatures, Grievants supervisors presumably agreed with Grievants' assessment that somewhere between two and four years of experience is needed. However, the supervisors' opinion on the precise number of years' experience needed is not determinable, because of the PIQ's internal inconsistency. One cannot say conclusively that the supervisors wanted “up to” two years experience, and one also cannot conclude on this record that they wanted “over” two years' experience.

The evidence shows that two years' experience is required. When strictly interpreted, neither the level 3 nor 4 definitions encompass exactly two years' experience. However, the JEC obviously intended the Mercer Plan to account for the entire time continuum. As interpreting neither definition to include an exact year is nonsensical, either rating must be judged appropriate. On the record here, Respondent's choice of level 3 cannot be said to be clearly wrong.

B. COMPLEXITY AND PROBLEM SOLVING: As defined in the Mercer Plan, Complexity and Problem Solving:

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.

There are 6 levels available within the factor of Complexity and Problem Solving. Grievants were assigned level 2, where

[p]roblems encountered require the employee to make basic decisions regarding what needs to be done, but the employee can usually choose among a few easily recognizable solutions. Established procedures and specific

instructions are available for doing most work assignments, with some judgment required to interpret instructions or perform basic computation work such as in the comparison of numbers or facts.

The Supervisor title which Grievants seek was given level 3.5, which falls between the defined levels of 3 and 4. Level of 3 is defined in the Mercer Plan 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.

Level 4 is defined in the Mercer Plan as:

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.

Grievants argued that constant changes in the personnel handbook require their analysis and interpretation. These changes present them with complex problems when Grievants must explain the handbook and policies to employees. Grievants also pointed out that they must deal with employee issues and performance problems. As an example, Grievants must first talk to an employee about absenteeism problems, then require the employee to provide a physician's excuse, then document continued absenteeism in written form. Then the matter goes to Mr. Brown, the supervisor, and then to the personnel office. It was unclear from Grievants' evidence whether Mr. Brown or the personnel office typically make decisions regarding a disciplinary action, or just process the action as instituted by Grievants.

Ms. Nutter noted that the most recurrent problem is when the Grievants' shifts are short of employees, at which time adjustments must be made in order to properly staff all areas to be cleaned. She explained that these decisions are typical of the Building Services area. Ms. Nutter stated that Grievants have available and can refer to a handbook for standard, routine supervision issues such as the absenteeism mentioned in Grievants' testimony. In addition,

Grievants can refer difficult problems to their supervisor. For these reasons, Ms. Nutter stated that a level 2 is appropriate in the Complexity and Problem Solving factor.

Grievants do have a written handbook as a reference and guideline. Grievants have established procedures and long-standing routines which govern most of their work. While they must exercise some judgment in addressing personnel issues, the options available are relatively clear. Grievants have not shown that the Respondent was clearly wrong in assigning them a level 2 in Complexity and Problem Solving.

C. FREEDOM OF ACTION:

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.

Grievants were assigned level 2.5 under Freedom of Action, which lies between the defined levels of 2 and 3. In level 2,

[t]asks are structured to the extent that standard operating procedures serve as a gauge to guide the employee's work. The employee can occasionally function autonomously with the immediate supervisor available to answer questions. Questionable items are referred to the immediate supervisor.

In level 3,

[t]asks 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.

Grievants seek a level 4, which is defined as:

Tasks are minimally structured with incumbent working from broad goals set by the supervisor and established institutional policies. The employee and supervisor work together to establish objectives, deadlines and projects. The employee, having developed expertise in the line of work, is responsible for planning and carrying out the assignment; resolving most of the conflicts which arise; and coordinating the work with others. The employee keeps the supervisor informed of progress and potentially controversial matters. Completed work is checked only to determine feasibility, compatibility with other work, or effectiveness in meeting the objectives of the unit.

Regarding this point factor, Grievants testified that they try to work from the policies and

procedures which they have always used. However, they must coordinate with each other to shift people around in addressing staffing problems caused by absenteeism.

Ms. Nutter testified that Grievants' supervisor is ultimately accountable for errors, and that Grievants adhere to basic existing practices and procedures in performing their work. She acknowledged that Grievants independently address unscheduled employee absences. However, she stated that such independence was credited by placing Grievants above level 2 in rating their Freedom of Action, and did not justify raising their rating in this factor to a level 4.

Grievants' jobs are well-structured in terms of areas of responsibility and operating procedures. While Grievants must act to address personnel problems and to address schedule changes, these issues are somewhat routine and recurring, and are dealt with using established procedures and policies. More unusual and difficult issues appear to be rare and are referred to Grievants' supervisor. While Grievants' testimony indicated that they may occasionally have merited a level 3 rating in some respects, they failed to show that the intermediate rating of 2.5 was not a reasonable and measured assessment of their overall situation.

D. SCOPE AND EFFECT:

The factor Scope and Effect is divided into two parts, Impact of Actions and Nature of Actions. Both parties addressed a different part of this factor. While Respondent addressed the Impact of Actions part of this factor, Grievants do not contest their rating in that part. Grievants mistakenly believed that they were assigned level 1 in the Nature of Actions part of this factor, but were, in fact, assigned the rating they desired. The evidence and arguments pertaining to this factor will thus not be discussed further, as there is no real controversy.

E. BREADTH OF RESPONSIBILITY:

Breadth of Responsibility as defined in the Mercer Plan:

describes the variety of specific functional areas in which the job may have formal and ongoing accountability. In reviewing this factor, consider the level of in-depth knowledge required as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations. [Examples of some functional areas within the following divisions would include: (1) Student Services--Housing, Admissions, Financial Aid, Counseling; (2) Business and Finance-- Purchasing, Auditing, Grants and

Contracts, Bursar.]

Grievants were assigned a level 1, which is defined in the Mercer Plan as:

Accountable for only immediate work assignments but not for a functional area.

Grievants seek a level 2, which is defined in the Mercer Plan as:

In-depth knowledge of and accountability for one functional area as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations.

Grievants state that they are accountable for two areas, supervision and sanitation.

Respondent explained that “functional areas” is a term of art, which is intended to divide areas of accountability and responsibility at the institutional level. Respondent's explanation is consistent with the definition of this point factor, and with this Grievance Board's prior rulings. See, e.g., Burke, supra.

While Grievants have responsibility which can fall under several topic headings, they are not accountable for all discipline or sanitation at an institutional level. Rather, they are accountable for one shift within the Building Services schedule. They have not proven that the JEC interpretation was clearly wrong or arbitrary and capricious.

F. INTRASYSTEMS CONTACTS/NATURE OF CONTACTS:

Intrasystems Contacts is a factor which:

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

(Jt. Ex. K, emphasis in original.) Intrasystems Contacts is further divided into two parts, Nature of Contacts and Level of Regular, Recurring, and Essential Contacts (“Level of Contact”). Nature of Contacts consists of 4 levels. Grievants were assigned level 1 in Nature of Contacts, which is defined in the Mercer Plan as:

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

Grievants seek a level 2 in Nature of Contacts, which is

defined in the Mercer Plan 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.)

Grievants testified that coordinating schedules with faculty, other staff and perhaps the public over specific functions or buildings requires tact and cooperation. However, Grievants acknowledged that their contacts consisted mostly of routine information exchange. No evidence was presented regarding the frequency of such contact, nor of how essential such contact was to performance of Grievants' job duties. Grievants' coordination with each other constitutes contact within the immediate work area, and is excluded from consideration by the clear language of the definition.

Respondent maintained that level 1 under Nature of Contact was appropriate as most of Grievants' work is routine.

The difference between levels 1 and 2 of Nature of Contact is at best difficult to discern. Dictionary definitions of the terms included in the phrases “common courtesy” and “moderate tact” show that the two phrases have virtually identical meaning. The most obvious difference between the two levels is the inclusion of the term “cooperation” in level 2, and the fact that level 2 includes explanatory and coordinating communication, where level 1 appears limited to merely providing factual information.

After discounting contacts within Grievants' own work area, Grievants' communications are exchanges of routine information with staff and faculty within the institution. It cannot be said that the JEC was clearly wrong in assigning Grievants a level 1 in Nature of Intrasystems Contacts.

G. EXTERNAL CONTACTS/LEVEL:

External Contacts is defined in the Mercer Plan as:

This factor appraises the responsibility for working with or through other people outside the [State College and University System] to get results. Consider the purpose and level of contact encountered on a regular, recurring and essential basis during operations. Consider whether the contacts involve furnishing or obtaining information, influencing others or negotiation.

(Jt. Ex. K, emphasis in original.) External Contacts is further divided into Nature of Contact and Level of Regular, Recurring and Essential Contact (Level of Contact). Grievants were assigned level 1 in Level of Contact, which is defined as:

Extremely infrequent; virtually no contact beyond immediate work unit/area; or occasional contacts are incidental to the purpose of the job.

Grievants seek a level 2 in Level of Contact, which is defined as:

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

Grievants presented evidence that they meet with product representatives and suppliers every 2-3 weeks, or once or twice per month, or once in 6 months, depending on the product or supplier involved. They also presented evidence that they have some limited contact with students and the general public, but acknowledged that such contact is not required, but occurs by happenstance. Ms. Nutter explained that in her opinion, level 1 was appropriately assigned, as monthly contact or contact once every six months was considered infrequent contact by the JEC. She did not address contact every 2-3 weeks. She also opined that Grievants' supervisor would be the individual to purchase products or supplies, and apparently assumes that Grievants' contact with suppliers and product representatives must be nonessential if Grievants cannot actually place orders with such persons.

The definitions do not suggest that Ms. Nutter's assumption has any validity. Grievants testified that they had contact with product representatives and suppliers in order to remain informed about and to test or see demonstrations of different products and methods. Whether or not Grievants could then order, or merely suggest the ordering of, products has no bearing on the essential nature of the contact. Grievants showed that such contact had a direct bearing on their knowledge of products and methods involved in building services work. This

knowledge is necessary and basic to the job, and is not “incidental.” Grievants' testimony suggested that these contacts were the primary, and perhaps exclusive, method by which they maintained their knowledge.

Applying Ms. Nutter's interpretation of “infrequent” as once per month, contact with vendors every 2-3 weeks cannot be construed as “extremely infrequent” contact. Grievants' contacts actually occur more often than “infrequent” contacts. Grievants' contacts every two to three weeks are regular and recurring. “Where the JEC's decisions are not supported by substantial evidence of record or are based upon an apparent mistake of fact, Grievants may be assigned the correct rating level in accordance with the Mercer Plan.” Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb 29, 1996), and cases cited therein. Grievants have shown that they meet the definition of level 2 in Level of Contacts in the External Contacts factor.

H. DIRECT SUPERVISION EXERCISED/NUMBER:

According to the Mercer Plan, the factor Direct Supervision Exercised

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.

The factor is divided into Level of Supervision and Number of Direct Subordinates. In the Number of Direct Subordinates part (“Number”), there are 6 levels. Grievants were assigned a level 5, which is “7-10” direct subordinates. Grievants seek a level 6, which is “11 or more” direct subordinates. Grievants proved that they directly supervised ten to fifteen people each, with a mathematical average of 12.25 direct subordinates. Respondent's witness agreed that Grievants' initial rating in this part of Direct Supervision Exercised was wrong. Given Respondent's agreement with the clear evidence, Grievants have proven that their supervision meets the level 6 definition in the Number part of the factor Direct Supervision Exercised.

I. DIRECT SUPERVISION EXERCISED/LEVEL:

The part of Direct Supervision addressing Level of Supervision is broken down into eight

levels. Grievants were assigned a level 4, which is defined as:

Direct supervision over a unit of non-exempt employees or lead responsibility over a group of exempt employees. Most of the time is spent assigning, reviewing, and checking work or eliminating normal difficulties involving standard policies, procedures, or work practices. Input would be significant in subordinate employees' performance appraisal, hire or fire decisions.

Grievants seek a level 5, which is defined as:

Direct supervision over exempt employees (and non-exempt employees, if applicable). Responsible for results in terms of costs, methods, and personnel. In a position to hire/fire or strongly recommend such personnel actions.

In support of their argument, Grievants reiterated their responsibility for performance appraisals and disciplinary action, and for achieving the end results for their shifts in terms of cleaning. They assign their subordinates' work areas and responsibility, and they maintain their knowledge of new products and cleaning methods. As noted previously, it is clear that, in at least one situation, Grievants' recommended firing a subordinate, and that disciplinary action was carried out by Grievants' supervisor. Respondent's witness explained that assigning a level 4 was appropriate because that level captures direct supervision of non-exempt employees like BSWs. A level 5 would include a group of exempt employees, Ms. Nutter asserted, and Grievants supervised no exempt employees.

Respondent's assertion that level 5 is reserved for those supervising exempt employees completely ignores the language in the definition which includes "non-exempt employees, if applicable," and Respondent has not suggested any alternative interpretation of this clearly inclusive language. The assertion that supervision of exclusively non-exempt employees automatically precludes one from the level 5 definition, regardless of other facts, is not convincing.

Grievants have clearly shown that they have direct supervision over employees. While Grievants are responsible for results in terms of cleaning their areas, no evidence was presented regarding responsibility for methods, personnel, or costs.

Rating Grievants' independent responsibility for conducting performance appraisals, and Grievants' influence on hiring or firing is more difficult. By paraphrasing The American

Heritage Dictionary, Second College Edition, the terms of “significant input” in level 4 and “strongly recommend” in level 5 can be defined as “meaningful information” and “emphatically counsel or advise,” respectively. While the phrases are not easy to distinguish, the former implies that serious personnel actions would be decided upon and taken by someone else, while the latter implies that if one is not actually taking such actions, one very nearly is. Here, Grievants level of responsibility was proven to encompass performance appraisal, but not hiring and firing. Overall, Grievants appear to meet the level 5 definition in some respects, and the level 4 definition in others.

The definition of Direct Supervision Exercised measures supervision “in terms of the level of subordinate jobs in the organization [and] the nature of the work performed.” Grievants' supervisor was assigned level 4 in this part of the factor, which indicates the nature of the work and the jobs. The level of subordinate jobs and the nature of the work involved here are simple, relative to the level and nature of jobs performed throughout the hierarchy of higher education classified positions. While such a characterization is somewhat subjective, value judgments are an inherent element of the function of position classification. Jessen v. BOD, Docket No. 94-MBOD-1059 (Oct. 26, 1995).

On this record, the JEC's determination to assign Grievants level 4 cannot be said to have been clearly wrong, or arbitrary and capricious.

J. PHYSICAL COORDINATION:

According to the Mercer Plan:

This factor assesses the amount of psychomotor skill involved in performing the job. Consider the complexity of body movements, speed/timing of movements, precision of movements, and need for close visual attention regularly required by the job in performing the work.

Grievants were assigned level 1 in Physical Coordination, which is defined as:

Work requires normal level of ability common in almost every job, such as writing, sorting, filing/reviewing text materials, and/or occasional use of office equipment without any demand for speed.

A level 2 in Physical Coordination is defined as:

Work requires simple hand/eye operations and some accuracy and regularity of motions, such as set-up and operation of basic instruments or equipment,

and/or the occasional use of standard hand or power tools with minimal speed requirements.

Grievants seek a level 3 in Physical Coordination, which is defined as:

Work requires some speed and accuracy of hand/eye coordination in the use of somewhat complicated instruments, equipment or hand or power tools requiring some speed and adeptness.

In support of their argument, Grievants point to their use of equipment and power tools, and assert that this activity requires significant eye/hand coordination. There is some potential for injury if the equipment is not used correctly. Grievants also assert that they must have speed and accuracy to clean a given area in a given amount of time. Grievants acknowledged that they usually watch their subordinates perform the required work, but maintained that they must also actually work and use equipment on occasion.

While Respondent acknowledged that it is important for Grievants to know how to use the machines, it argued that Grievants' predominant activity is supervision, including doing paperwork and overseeing the cleaning of buildings. Grievants'PIQs, appeal documents and testimony indicated that they spent the most time supervising. Apparently, Respondent's position is that the time spent supervising negates the time during which physical coordination is required.

Grievants clearly showed that their work requires greater physical ability than is common in most jobs requiring occasional use of office equipment, even if such physical ability is not required continuously. In addition to their more traditional supervisory role, they also perform supervisory work requiring simple hand/eye operations, such as training subordinates in the set-up and use of equipment. In addition, they occasionally use standard equipment such as buffers and sanders, when filling in for absent employees.

The JEC's decision to rate Grievants at level 1 was clearly in error, as Grievants' jobs require more than the normal level of ability common in almost every job in terms of equipment usage. "Where the JEC's decisions are not supported by substantial evidence of record or are based upon an apparent mistake of fact, Grievants may be assigned the correct rating level in accordance with the Mercer Plan. Jones, supra. However, there is no evidence

that the equipment used is “somewhat complicated” or that there are more than minimal speed requirements, although Grievants' desire to get the job done in a reasonable amount of time imposes some restrictions. Consequently, neither level 1 nor level 3 are correct ratings. Grievants warrant a level 2 in Physical Coordination.

K. WORKING CONDITIONS:

This factor is combined with Physical Demands in the Mercer

Plan, and

considers the physical demands of the job as measured by the exertion placed on the skeletal, muscular and cardiovascular systems of the incumbent. It also takes into account the quality of the physical working conditions in which the job is normally performed such as lighting adequacy, temperature extremes and variations, noise pollution, exposure to fumes, chemicals, radiation, contagious diseases, heights and/or other related hazardous conditions.

Working Conditions consists of four levels. Grievants were assigned level 2 of Working Conditions, which is defined as:

Occasional minor discomforts from exposure to less-than- optimal temperature and air conditions. May involve dealing with modestly unpleasant situations, as with occasional exposure to dust, fumes, outside weather conditions, and/or near-continuous use of a video display terminal.

Grievants seek level 3 of Working Conditions, which is defined as:

Routine discomforts from exposure to moderate levels of heat, cold, moisture/wetness, noise and air pollution. May involve routine exposure to light chemical substances such as cleaning solutions or occasional exposure to hazardous conditions such as radiation, chemicals, diseased laboratory animals, contagious diseases, heights, and moving parts.

In support of their argument for level 3, Grievants note that they must walk building-to-building in order to supervise or to perform the cleaning work. They work in unheated or un-air- conditioned buildings with some frequency. The buildings are unbearably hot at times, they assert. Grievant Blake testified that their jobs might be dangerous from breathing the air, whencleaning up after classroom experiments. She did not mention any exposure to or danger from chemicals used in cleaning.

Respondent argued that level 2 was appropriate. Although Grievants experience some occasional discomfort in travelling from place to place and smelling unpleasant odors resulting from experiments, Grievants do not spend enough time daily in such discomfort to receive a higher rating, in Respondent's view. They are not outside or working with chemicals and equipment all day.

The frequency and duration of the circumstances addressed at hearing were not addressed in sufficient detail to label them according to these definitions as discomforts which are "occasional and minor" or "routine and moderate." Consequently, Respondent's assignment of a level 2 in Working Conditions, rather than a level 3, cannot be said to have been arbitrary or capricious, or clearly wrong.

L. PHYSICAL DEMANDS:

Physical Demands is broken down into five levels. Grievants were assigned level 2, which is defined as:

Light physical effort required involving stooping and bending; individual has limited discretion about walking, standing, etc.; occasional lifting of lightweight objects (up to 25 pounds.)

Grievants seek level 3, which is defined as:

Moderate physical effort required involving long periods of standing, walking on rough surfaces, bending and/or stooping; periodic lifting of moderately heavy items (over 25 and up to 50 pounds.)

Grievants testified that they have long periods of standing, walking, bending and stooping. They assert that their jobs require moderate effort because of such activity, and because they must use equipment and perform lifting at times. Respondent acknowledged that standing, bending, stooping, walking around the campus, and other such activity would constitute physical demands. However, Ms. Nutter opined that level 2 was appropriate because a lot of walking and standing was considered to be light effort, and most lifting is performed by Grievants' subordinates.

Reference to Jt. Ex. L, the PIQ Summary By Job Family, is not especially helpful here. While there appears to be some consistency in the different assignment of levels within the Physical Plant/Facilities job group, such consistency and obvious rationality does not appear

when one looks at the ratings across the job groupings.

Ms. Nutter's assertion that long periods of standing and walking constitute light effort directly contradicts the definition's clear language, which states that "long periods of standing..." are involved in "moderate" physical effort. Thus, her argument on this point is not convincing. However, the level 3 definition does suggest that more physical effort is required than just long periods of walking in order to appropriately fit into this category. Ultimately, it cannot be said from the evidence that the Respondent's rating of Grievants at level 2 rather than level 3 is clearly wrong, arbitrary or capricious.

CONCLUSIONS OF LAW

1. The governing boards are required by W. Va. Code § 18B-9- 4 to establish and maintain an equitable system of job classifications for all classified employees in higher education.

2. The burden of proof in a misclassification grievance is on the grievant to prove by a preponderance of the evidence that he is not properly classified. 156 C.S.R. 1 § 4.19. 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).

3. Determinations of the Job Evaluation Committee regarding application of the Mercer Plan's point factor methodology are essentially questions of fact. In that regard, the JEC's interpretation and explanation of the point factors and PIQs at issue will be given great weight unless clearly erroneous. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). See generally, Tennant v. Marion Health Care Found., 459 S.E.2d 374 (W. Va. 1995). Subjective determinations of the JEC regarding application of the Mercer Plan's point factor methodology to an employee or group of employees are entitled to deference when being reviewed by this Grievance Board. Such determinations may nonetheless be found to be arbitrary and capricious if not supported by a rational basis, or to be clearly wrong if there is no substantial evidence in the record supporting the finding or if review of the evidence makes it clear that a mistake has been made. Burke, supra. See Frymier-Halloran v. Paige, 458

S.E.2d 780, 788 (W. Va. 1995); Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR- 88-006 (Mar. 28, 1989).

4. Where the JEC's decisions are not supported by substantial evidence of record or are based upon an apparent mistake of fact, Grievants may be assigned the correct rating level in accordance with the Mercer Plan. Jones v. Bd. of Trustees, Docket No. 94- MBOT-978 (Feb 29, 1996). Jessen v. Bd. of Trustees, Docket No. 94- MBOT-1059 (Oct. 26, 1995).

5. The Job Evaluation Committee's decision that Grievants are not Supervisors/Building Services is not clearly wrong or arbitrary and capricious.

6. The Job Evaluation Committee's assignment of degree levels to the point factors Experience, Complexity and Problem Solving, Freedom of Action, Scope and Effect, Breadth of Responsibility, Intrasystems Contacts, Direct Supervision Exercised/Level, Working Conditions and Physical Demands for the Assistant Supervisor/Building Services Job Title is neither clearly wrong nor arbitrary and capricious.

7. Contact every two or three weeks may be considered regular, recurring contact. The Job Evaluation Committee's assignment of degree level 1 to the point factor External Contacts/Level of Contacts was not supported by substantial evidence of record, is not supported by a rational basis, and is therefore clearly wrong, arbitrary and capricious. By assigning the point value to which Grievants are properly entitled under level 2 of the factor External Contacts/Level of Contacts, they are entitled to an increase of 8 points.

8. The Job Evaluation Committee's assignment of degree level 5 (defined as 7-10 direct subordinates) to the point factor Direct Supervision Exercised/Number was shown to be based on a mistake of fact and is therefore clearly wrong. By assigning the point values to which Grievants are properly entitled under level 6 of the factor Direct Supervision Exercised/Number, they are entitled to an increase of 12 points.

9. The Job Evaluation Committee's assignment of degree level 1 to the point factor Physical Coordination was not supported by substantial evidence of record, is based on a mistake of fact, and is therefore clearly wrong. By assigning the point values to which Grievants are properly entitled under level 2 of the factor Physical Coordination, they are entitled to an increase of 34 points.

10. By assigning the point values to which Grievants are properly entitled, they are entitled

to a total of 1652 points, which equates to a Pay Grade 11. Therefore, no change in Grievants' pay grade results.

11. Where neither a change in title nor a change in pay grade will result from making appropriate changes to point factor ratings in the data line, the grievance will be denied.

Accordingly, this Grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JENNIFER J. MEEKS

Administrative Law Judge

Dated: October 16, 1996

[Footnote: 1](#)

The reader is referred to Burke v. Bd. Of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995) for a discussion of the background of the Mercer Plan mass reclassification project, the procedural history of the grievances arising from the reclassification, and the definitions of some terms of art specific to the Mercer Plan reclassification.

[Footnote: 2](#)

At the hearing, all Grievants agreed that their testimony would be substantially the same as Grievant Blake's testimony. For convenience, Ms. Blake's testimony is referred to as if all Grievants had actually so testified.