DAVID HARSHBARGER,

Grievant,

v. DOCKET NO. 94-MBOT-900

BOARD OF TRUSTEES/MARSHALL UNIVERSITY,

Respondent.

DECISION

Grievant, David Harshbarger, challenges his classification as a Bookstore Assistant at Pay Grade 10 under the "Mercer" reclassification. (See footnote 1) He seeks classification as a Bookstore Manager at Pay Grade 15. Grievant was classified under the Job Evaluation Plan (Plan) for the State College and University Systems of West Virginia, which was developed by the Respondent's Job Evaluation Committee (JEC). The Plan employs a "point factor methodology" which evaluates each job title by analyzing specific characteristics termed "factors" (See footnote 2) , assigning a rating or "degree level" within 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.

A Level IV hearing was conducted on January 23 and March 4, 1997. This matter became mature for decision on April 18, 1997, the due date for post-hearing submissions.

In this grievance, the degree level ratings received in the following point factors are specifically challenged: Knowledge,Complexity and Problem Solving, Freedom of Action, Scope and Effect/Nature of Actions, Breadth of Responsibility, Intrasystems Contacts/Nature of Contacts and Level of Contacts, and External Contacts/Nature of Contacts. (See footnote 3)

PRELIMINARY MOTIONS

Respondent moved to dismiss this grievance, based on Grievant's failure to appear at a hearing scheduled for September 24, 1996. Respondent also moved that Respondent's costs of appearing for that hearing be assessed against Grievant. Both Grievant and Jonathan Brown, Grievant's representative, responded to an Order to Show Cause issued upon their failure to appear at the scheduled hearing. In addition to these responses, evidence was taken on the reason for the failure

to appear, during the Level IV hearing.

Based upon the evidence, I find the following facts: Grievant's non-lawyer representative, Jonathan Brown, was ill prior to the hearing scheduled for September 24, 1996. However, Mr. Brown thought he might be well enough to attend the hearing, and did not inform Grievant he would be unable to attend until the evening of September 23, 1996. Thereupon, Grievant telephoned Jackie Hoppe, one of Respondent's witnesses, to advise her that hewould not be able to attend the scheduled hearing due to his representative's illness. The next morning, Grievant telephoned the Grievance Board about the matter, and requested a continuance. This was followed by facsimile transmission of a written request and explanation. This matter is Grievant's first involvement in the grievance process. Mr. Brown has represented numerous employees in grievances, but appeared for the first time in a Level IV proceeding in this grievance.

Respondent implied that Grievant intentionally waited until the eleventh hour to request continuance of the hearing, and that Grievant intended to cause Respondent inconvenience and expense by his actions. However, I find insufficient evidence to prove such intent on Grievant's part. Assuming that this Grievance Board is legally vested with authority to award costs at all, it is clear that dismissal and awarding of expenses against a grievant are penalties imposed only in extraordinary circumstances involving bad faith. See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996). Such extreme circumstances are not present here. Respondent's motions are denied. (See footnote 4)

FINDINGS OF FACT

1 1. Prior to the reclassification, all higher education classified employees were asked to complete a Position Information Questionnaire (PIQ) in which employees described their job duties and responsibilities and other aspects of their jobs by answering a series of questions designed to elicit this information. Grievant filled out PIQs in 1991 and 1995. Jt. Ex. 1; G. Ex. 3.

2 2. Grievant was classified as a Bookstore Assistant (Assistant) on January 1, 1994, as a result of the Mercer reclassification. Grievant works in the medical school bookstore at Marshall University (MU), which has undergraduate and graduate school programs, including four-year medical degree programs.

3 3. Grievant's basic job duties are to supply medical books, equipment and supplies to students, residents, nurses, physicians, and faculty, including taking and maintaining inventories. He oversees MU's medical school bookstore, which is in a separate physical location from the main MU bookstore.

4 4. Grievant's job duties, and the approximate percentage of time spent in each are as follows: assisting students in selecting texts, study aids, equipment or material, including identifying and describing available items, explaining their availability, and recommending selections (50%); assisting faculty, graduates, attorneys and physicians in locating information and resources, and recommending selections (40%); writing and placing orders, filing invoices, supervising work-study students, stocking shelves,cleaning, reading technical data applicable to various medical specialties; and reading reports on new books, changing editions, new equipment and supplies (10%).

5 5. Medical school students can get all texts, supplies, equipment and materials needed at the medical school bookstore, including items such as paper, writing implements, stethoscopes, sweatshirts, and study aides.

6 6. Grievant's position does not mandate that he know the content of the books and materials ordered and sold, or the curriculum taught at the medical school, although such knowledge may assist Grievant in making recommendations regarding customer selections. Grievant's position does not require him to engage in philosophical discussions with students, residents or others about such topics as euthanasia or death and dying, although he is required to locate and place orders for texts on such topics. While Grievant may voluntarily serve as a sounding board and mentor for medical students, his position does not require him to do so. Grievant engages in these activities not for purposes of fulfilling his essential job duties, but voluntarily due to his active interest in the students served, and for personal satisfaction.

7 7. Ray Welty is the Director of Auxiliary Services at MU. The MU bookstore is one of several auxiliary services for which Mr. Welty is responsible. Although the organizational structure of the bookstore has changed significantly since January 1, 1994 (See footnote 5) , and Mr. Welty's title has changed over the years, Mr. Welty is familiarwith the functioning of the bookstore at the times relevant to this grievance.

8 8. Based upon Mr. Welty's testimony, Grievant is not formally accountable for a budget for the medical school bookstore portion of the MU bookstore. Many administrative tasks pertaining to the

medical school bookstore's functioning are handled by personnel in the main MU bookstore, not by Grievant, including finance and accounting tasks. While Grievant handles cash, at day's end the monies are turned over to another individual in the main bookstore (a Bookstore Supervisor) for accounting purposes. The MU Bookstore Manager (See footnote 6) , to whom Grievant reports, is accountable for all bookstore functions and the budget. Other individuals in the main bookstore are responsible for shipping and receiving merchandise for the medical school bookstore, and for payment of invoices, obtaining credits from vendors, authorizing payments, reconciling accounts, and other such activities.

9 9. Grievant is the only classified staff person in the medical school bookstore.

10 10. Grievant decides what inventory, other than required texts, will be stocked in the medical school bookstore. Texts, equipment and materials requested or required by the curriculum or by individuals must be ordered and sold. Grievant signs Purchase Orders for books and other merchandise.

11 11. The Bookstore Manager I (Manager) position at the West Virginia School of Osteopathic Medicine (WVSOM) is not identical toGrievant's position, because it is an independent management position which reports directly to the Vice President of Finance; it is solely and completely in charge of the only bookstore at that institution; and it is formally accountable for budget, account reconciliations, and accounts receivable and payable. In other respects, the position is comparable with Grievant's in terms of duties and responsibilities.

12 12. Grievant has a Bachelor's Degree in Business Administration, with minors in economics and accounting. Grievant has no formal medical training. He worked in the MU medical school bookstore for two years before taking his current job duties. 13 13. The Bookstore Assistant job title received a total of 1486 points, placing it into Pay Grade 10. There are 16 incumbents in the job title. The point range for Pay Grade 10 is from 1475 to 1560 points.

14 14. The Bookstore Manager I job title received a total of 2004 points, placing it into Pay Grade 15. There are 4 incumbents in the job title. The point range for Pay Grade 15 is from 1985 to 2113 points.

DISCUSSION

I. BURDEN OF PROOF AND STANDARD OF REVIEW:

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, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant must identify the job he or she feels is being done. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991). The grievant must also identify which point factor degree levels are challenged. This is because the Plan's reclassification system is not based upon whole job comparisons, but is largely a "quantitative" system, in which the components of each job are evaluated separately by applying the point factor methodology contained in the Plan. Therefore, the focus in these grievances is upon the point factors the grievant is challenging. 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).

Some "best fit" analysis is involved in determining which degree level of a point factor should be assigned. However, this system must by statute be uniform across all higher education institutions. Therefore, the point factors are not assigned to the individual position, but to the job title. Burke, supra.

In this case, whether Grievant is properly classified is almost entirely a factual determination. As such, the JEC's interpretation and explanation of the point factors at issue must be given great weight unless clearly erroneous. See Tennant v. Marion Health Care Found., 459 S.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). A grievant may prevail by demonstrating his or herreclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989). Generally, action is arbitrary and capricious if it 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 is so implausible that it cannot be ascribed to a difference of view. 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). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the

scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the JEC. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W.Va. 1982).

II. COMPARISON WITH THE MANAGER I PIQ:

Throughout his testimony, Grievant compared his position to that of a Manager at WVSOM, whose PIQ was submitted as Grievant's Exhibit 1. (See footnote 7) One of Grievant's primary assertions was that thescope of his position was greater than that of the Manager position because his bookstore serves a greater population and covers a broader, four-year curriculum. By comparison, the WVSOM bookstore serves first- and second-year students and curriculum, at least generally speaking. According to Grievant, this distinction means that his position is the more demanding of the two, as he must do twice as much work as the WVSOM position.

Testimony of Respondent's witnesses, and the terms of the Plan itself, show that the Plan did not, and was not intended to, measure the **volume** of work, or take volume into account in assigning ratings to point factors. Thus, Respondent asserts, the number of students or other customers served is irrelevant for classification purposes (See footnote 8) , although it may be relevant for performance evaluation purposes. Similarly, the fact that a significantly broader curriculum is served by the MU medical school bookstore does not mean that the essential job duties are significantly broader. Ms. Brenda Nutter, Director of HumanResources at WVU Institute of Technology and member of the JEC, noted the same procedures are followed to order a medical text as to order an art history text. One need not be conversant in neuroses in order to locate and sell a psychology book, she stated. If one is interested and knowledgeable, and wishes to discuss a topic or text, that is nice, but it is not required of the employee. Thus, any differences in curriculum are also irrelevant for classification purposes, she opined.

While volume of work may impact stress levels or speed required in performing specific job duties, and has obvious implications for one's job satisfaction, volume of work is not assessed by the Plan in any meaningful way. It is not a consideration in rating job duties under most factors. Thus, Grievant's arguments based upon volume of work, whether in terms of numbers of customers or breadth of curriculum, are misplaced.

Respondent asserted that a vital difference between Grievant's job duties and those of WVSOM's Manager was control over financial matters. The WVSOM Manager works in a medical school bookstore, just as Grievant does, and performs many similar duties. However, the WVSOM

incumbent has budget authority and accountability, which Grievant does not have, according to Ms. Nutter's testimony and that of Glenna Racer, a Human Resources professional at MU and a JEC member. While such budgetary duties are not obvious on the PIQ, they are at least implied, and Grievant did not challenge the testimony on this point. Respondent argues that, because of the budgetary duties, it was appropriate to put the WVSOM position inthe Manager job title while assigning Grievant to the Assistant job title.

The WVSOM PIQ includes duties such as "Paper work dealing with buying and selling of all merchandise... Prepare deposit slips... Return of textbooks... [and] Pricing..." Grievant admitted he did not prepare deposit slips, and the evidence showed that Grievant does not have the formal budgetary accountability which the WVSOM position has. Grievant did not specifically mention his tasks in terms of completing paperwork, making pricing decisions, or returning merchandise. He thus failed to prove that his job duties are similar to those of the WVSOM Manager in these regards. Thus, Grievant's job can be distinguished from that described in the WVSOM PIQ.

Moreover, this Board has previously held that it is not sufficient to argue that the duties of different titles are nearly identical. Martin v. Bd. of Trustees, Docket No. 94-MBOT-658 (Mar. 28, 1997); Wilson v. Bd. of Trustees, Docket No. 94-MBOT-835 (Feb. 6, 1997). Specifically, a comparison with the PIQ of one incumbent in a title covering many incumbents is insufficient, even if the duties listed on the PIQ and those of the grievant are very similar. "When classifications are based upon a point factor methodology, a minor difference in duties can affect the classification." Martin, at 57, citing Campbell-Turner v. Bd. of Trustees, Docket No. 94-MBOT-1035 (Jan. 1, 1996); Barber, supra; Jordan, supra; and Hughes, supra.

"While in a whole job comparison system one might find the two jobs sufficiently similar to be placed in the same classification,the point factor methodology requires evaluation of every point factor." Wilson, at 11. Regardless of the similarities and differences between Grievant's job duties and those of the WVSOM Manager, each point factor challenged must be analyzed in determining whether Grievant's position was misclassified. The point factors and ratings disputed must be discussed separately in detail.

III. POINT FACTOR ANALYSIS:

A. KNOWLEDGE:

The Job Evaluation Plan ("the Plan") defines Knowledge as:

> This factor measures the minimum level of education equivalency and/or training typically required for an incumbent to reach acceptable occupational competence on the job. The factor considers the technical, theoretical, and/or mechanical skills required, and the complexity and diversity of the required skills. (See footnote 9)

The Assistant job title received a level 3 rating in Knowledge, while Grievant asserts his position merits a level 6 rating. Level 3 is defined as "[j]ob requires basic knowledge of grammar, spelling, punctuation, and simple mathematical functions like percentages, ratios, etc., as might normally be acquired through attainment of a high school diploma or GED." Level 6, the Manager job title's rating, is defined as "[j]ob requires a thorough knowledge of a professional discipline or technical specialty as would normally be acquired through a relevant baccalaureate education program. Knowledge of principles,concepts, and methodology of a highly technical, professional, or administrative occupation is indicative of this level."

Grievant asserted that his position requires knowledge of the curriculum of all MU medical school classes, including all four years of the doctoral program and all special programs such as nursing, in order to advise faculty and students regarding references, study aids, texts, and equipment. Ms. Nutter stated that in-depth knowledge of curricular areas such as anatomy are not essential to perform the basic job duties of Grievant's position. While such knowledge may be helpful, it is not required to perform the basic tasks of ordering and selling books and merchandise, and maintaining inventory. She added that an individual incumbent's expertise is not considered in assessing this factor, as it measures the absolute minimum requirements for a new employee to competently perform the job, after an initial training period of approximately six months.

Although "an employee with a higher degree of education might perform the duties with a shorter training period and offer the employer other benefits," Grievant has not proven his duties could not be performed satisfactorily by an individual with a high school diploma or GED. See Perkins v. Bd. of Trustees, Docket No. 94- MBOT-733 (Oct. 31, 1996). Grievant's particular qualifications are not relevant to the issue of the point factors for his position, because "[t]his factor measures the position not the employee." Aronhalt v. Bd. of Trustees, Docket No. 94-MBOT-1013 (May 2, 1996). Grievant's difference of opinion with the JEC's determination onthis point is insufficient to prove that the JEC's determination was clearly wrong, arbitrary or capricious.

B. COMPLEXITY AND PROBLEM SOLVING:

The Plan defines Complexity and Problem Solving as a factor which "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."

The Assistant job title received a level 2 rating, while Grievant asserted his position merits a level 4 rating. The Manager job title received a level 2.5 rating in this factor, which is between the defined levels of 2 and 3, and gives credit for some work at both those levels. Level 2 is defined as:

> Problems 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.

Level 3 is defined in the 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 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.

Grievant asserted that the breadth of curriculum in the medical school makes his problems complex. However, the argument is misplaced, as noted above, as the same procedures are used whether one is handling an anatomy text or an art history text.

The primary "problem" discussed by Grievant was locating materials on different topics and advising customers on selections. Grievant asserted he helps students choose study materials, often choosing outlines and texts other than those required by the faculty. He explained that if a student is preparing for a "mini- board" (an important and difficult test), and asks him what the best review materials are, Grievant will go through a process in advising the student. Grievant asks the student how much study time is available, what the student's reading ability level is, and how the student learns best. Some students learn well from diagrams, while others do best with a question and answer book, for instance. Based upon this information, Grievant recommends study materials. He

stated that he works with department heads in determining what texts and materials are available, what items are new, and which selections to make, as well.

Respondent's witness explained that Grievant's job does not require him to advise students or faculty about their purchases, and that, if Grievant does so, it is voluntarily and for his ownreasons. She added that such dedication and excellence are taken into account for performance evaluation and merit raise purposes, but that position classification only measures the "bare bones" requirements of a position.

Common sense suggests that advisory services may not be an essential part of this position's job duties and responsibilities. However, Grievant clearly testified that his job does require him to advise students and others on the content and selection of texts and materials. While Respondent asserts that this is not the case, Respondent failed to elicit testimony from reliable sources, such as Grievant's supervisors, on this point. Indeed, Grievant's supervisors must have concurred generally with his testimony, as they signed his PIQ without comment regarding the 90% of his time which includes references to such advisory work. The more reliable and probative evidence presented mandates finding that Grievant's position requires him to assist in locating and selecting merchandise, including recommending selections.

However, recommendations may be based upon others' satisfaction, relative cost, the type of presentation used therein, or a listing of the contents. None of this information is exclusively obtained through first-hand familiarity with the content. While Grievant's interest and knowledge of the subject matter in the curriculum and the content of his merchandise is impressive and laudable, Grievant has not shown that detailed personal knowledge of the contents is necessary in making recommendations. Moreover, Grievant does not make the final selection, he merely makes recommendations, and the customer makesthe decision. Thus, he does not "solve the problem" of selecting texts and other items.

Grievant places special orders, buys books and other merchandise, and ensures that inventory is maintained. (See, e.g., "Supervisor Assessment of Appeal," Jt. Ex. 2, p. 6.) However, these tasks are governed by established policy, procedure and precedent. Grievant testified that, if he receives a bill for more books than received, he would call the vendor and get another book shipped. However, if the problem could not be solved in this fashion, Grievant would turn the matter over to an Accounting Clerk in the main bookstore. (See footnote 10) Someone in the main bookstore is responsible for all

billings, and someone in the main bookstore is responsible for all shipping and receiving, except in unusual situations.

Grievant is responsible for day-to-day operations of the medical school part of the MU bookstore, but these duties do not go much beyond ensuring that customers are served and that inventories are replenished. His job, as described, is not complex, and the problems he is **required** to solve as part of his basic job are not difficult. More complex operational problems (such as resolving disputes with vendors) and all financial matters appear to be handled by referring them to others, not by Grievant.

Understanding procedures which must be followed to process various types of documents, performing basic computation work incompleting forms, and understanding which procedure applies are within level 2. Barber v. Bd. of Trustees, Docket No. 94-MBOT-872 (Oct. 31, 1996). The difference between the ratings in this factor involves a subjective determination. Miller v. Bd. of Directors, Docket No. 94-MBOD-495 (Oct. 29, 1996) at 13. To the extent that Grievant is required to engage in problem solving, set policy and procedure guide his work. While he may occasionally have to use judgment in performing his required tasks, the JEC gave some credit for work at level 3 by assigning the intermediate rating. On this record, the JEC cannot be said to be clearly wrong in its assignment of a level 2.5 rating to Grievant's position.

C. FREEDOM OF ACTION:

The Plan defines Freedom of Action as:

> 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.

The Assistant job title received a level 1.5 rating in this factor, which is between the defined levels 1 and 2. The Manager job title received a level 3.5 rating. Grievant asserts his position merits a level 4 rating. Level 1 is defined as:

> Tasks are substantially structured with the employee receiving clear, detailed and specific instructions from the immediate supervisor or where tasks are so highly routine that they simply require following standardized instructions or procedures without ongoing, on-site supervision. The work is checked for accuracy, adequacy, and adherence to instructions and established procedures by the supervisor or through established monitoring systems. The employee consults with the supervisor onmatters not covered in the original instructions or guidelines.

At level 2:

> Tasks 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.

At level 3:

> 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.

At level 4:

> 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.

Grievant stated that he receives no supervisory direction regarding what items are stocked, ordered, or kept in inventory. He testified he signs Purchase Orders, and no other signatures are required for ordering texts, materials or supplies for the medical school bookstore. The original Purchase Order is sent to the person in charge of receiving in the main bookstore, and Grievant keeps a copy. He acknowledged that his discretion in ordering is somewhat restricted by what customers instruct him to order. Grievant testified at length about his review, critique, andrecommendation of books and supplies to his customers. However, the evidence indicated that customers make the final selections, and most, if not all, texts are ordered based upon what instructors require.

Grievant admitted that he is not in charge of any budget, and the auditor from the main bookstore checks the cash drawer at the end of the day, he said. Mr. Welty confirmed that Grievant's monies and "books" go to the auditor at the end of the day, and that Grievant's supervisor has accountability for the budget.

Ms. Nutter explained that Grievant's required tasks are rather routine and structured. While he does not need much supervision, due to his long tenure in the position and his competency, his supervisor has managerial and budgetary control over Grievant's position. She testified that the MU Bookstore has standard procedures which limit the creative thinking and problem solving required of

Grievant. Grievant need not develop policy or procedure, as they are determined by others and cannot be changed by Grievant. She said Grievant's ordering of texts is dictated by which courses are offered and which texts are selected by instructors, and thus do not require decision-making on Grievant's part. She further stated that Grievant's independence and autonomy is affected by the fact that others handle finances for the bookstore as well as shipping and receiving. Having these services provided at a different level of the bookstore organization makes Grievant's focus more specialized, and therefore limits his freedom of action, she said. Under similar restrictions on one's freedom to make decisions and to depart from established procedures, other decisions have found level 1.5 and 2 ratings acceptable. Barber v. Board of Trustees, Docket No. 94-MBOT-872 (Oct. 31, 1996); Perkins v. Bd. of Trustees, Docket No. 94-MBOT-733 (Oct. 31, 1997). "The level of supervision exercised over the employee is not the key issue for measuring this point factor, rather it is whether the employee has the option to make decisions on [his] own if and when such situations arise." Kretzmer v. Bd. of Directors, Docket No. 94- MBOD-751 (Feb. 6, 1997).

Freedom of action is minimal where duties are established and repetitive, highly structured and controlled by procedures, practices, precedents, regulations and time schedules. Such appears to be the situation here. While I might have chosen a level 2 rating for Grievant's position, I cannot simply substitute my judgment for that of the JEC. The JEC gave Grievant credit for some decision-making and autonomy at level 2 when it assigned the intermediate rating of 1.5. In view of the limitations on Grievant's decision-making authority due to standard practices, and the fact that instructors are responsible for ultimately deciding what texts will be required, I cannot say that the JEC's determination was clearly wrong, arbitrary or capricious.

D. SCOPE AND EFFECT/NATURE OF ACTIONS:

> 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 systems, 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. Also, consideration should be given for the possibility that a unit, program or department within a large institution may be equivalent in size to multiple units, programs or departments within a smaller institution. In making these interpretations, assume that the incumbent would have normal knowledge, experience and judgment, and that errors are not due to sabotage, mischief or lack of reasonable

attention and care.

This factor is analyzed in a matrix having two parts, Impact of Actions and Nature of Actions (Nature). Grievant challenges only the rating in Nature.

The Assistant job title received a level 2 rating in Scope and Effect/Nature, while Grievant asserts his position merits a level 3 rating, which the Manager job title received. Level 2 is defined as "[w]ork contributes to the accuracy, reliability, and acceptability of processes, services, or functions. Decisions are limited to the application of standardized or accepted practices and errors could result in some costs and inconveniences within the affected area." Level 3 is defined as "[w]ork provides guidance to an operation, program, function or service that affects many employees, students or individuals. Decisions and recommendations made involve non-routine situations within established protocol, guidelines, and/or policies. Errors could easily result in moderate costs and inconveniences within the affected area."

The evidence was uncontroverted that Grievant ensures that necessary books, supplies and materials are on hand to servestudents and other customers. This is an obviously important service which directly impacts on MU's ability to provide educational services. However, Grievant did not describe "non- routine situations" which he is required to address.

Respondent pointed to the support services provided in the main bookstore, in showing that Grievant and the medical school bookstore are not expected to function autonomously. This also shows that many "non-routine situations" are addressed by persons other than Grievant. Ms. Nutter explained that the position at WVSOM is solely responsible for all aspects of the WVSOM bookstore, including the functions which, in Grievant's case, are handled by personnel in the main bookstore.

This factor is difficult to assess, due to the value-laden terms used in the definitions. Miller, supra. Here, Grievant's duties impact the ability of the bookstore to provide essential services to many students. However, Grievant's duties are only part of the functioning of the bookstore, and other essential duties are provided by others. Respondent explained its rating in a manner which is neither implausible nor inconsistent with the terms of the Plan. Where, as here, subjective determinations are involved, a more compelling case must be made before this Board will disturb the JEC's rating.

E. BREADTH OF RESPONSIBILITY:

The factor Breadth of Responsibility is defined in the Plan as:

This factor 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 theincumbent'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.]

The Assistant job title received a level 1 rating, which is defined as "[a]ccountable for only immediate work assignments but not for a functional area." Grievant asserts his position merits a level 4 rating, which is defined as "... acountability for three functional areas ..."

It is well established that this factor only gives credit to those who have formal financial accountability for an area. See e.g., Riggs v. Bd. of Trustees, Docket No. 94-MBOT-711 (Apr. 29, 1996); and Mitchell v. Bd. of Directors, Docket No. 94-MBOD-348 (May 21, 1996). "The definition...makes it clear that each position does not constitute a functional area..." Barber v. Bd. of Trustees, Docket No. 94-MBOT-872 (Oct. 31, 1996). Grievant did not dispute that, although he is permitted to order merchandise for the medical school bookstore, he has no formal financial responsibility for a separate budget. Grievant was correctly rated in this factor.

F. INTRASYSTEMS CONTACTS:

Intrasystems Contacts is defined in the Plan as 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 discussingcontroversial issues. This factor considers only those contacts outside the job's immediate work area.

This factor is analyzed in a matrix having two parts, Nature of Contacts (Nature) and Level of Regular, Recurring and Essential Contacts (Level). Grievant challenged ratings in both parts.

In Nature, the Assistant job title received a level 1 rating, while Grievant asserts his position merits a level 2 rating. Level 1 in Nature is defined as "[r]outine information exchange and/or simple service activity; requires common courtesy (e.g., furnishing or obtaining factual information, ordering supplies, describing simple procedures)." Level 2 in Nature is defined as "[m]oderate 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.)"

In Level, the Assistant job title received a level 2 rating, while Grievant asserts his position merits a level 3 rating. Level 2 in Level of Contact is defined in the Plan as "[s]taff and faculty outside the

immediate work unit." Level 3 is defined in the Plan as "[s]upervisors, managers and/or chairpersons, other than own, within an institution, or coordinators within the Systems' Central Office."

In support of his position, Grievant testified that he works very closely with faculty on choosing texts and materials for courses, and that it is not unusual for Department Chairs to call requesting information from him about what books or other materials are available on certain courses. He also helps them selectreference materials. In his PIQ, Grievant stated that he has weekly contact with Administrative Assistants in all medical departments, and with faculty members, about special orders, books and available merchandise.

Ms. Nutter stated that Grievant's basic duties of ordering and selling books and taking inventory do not require him to explain policy or procedure to his customers, although he must know them. At most, he might have to tell a customer how long it will take to get a book in stock. His advice on selections, and his discussions on philosophical topics are not required duties, Ms. Nutter again stated, but are incidental activities. She asserted that Grievant's contacts were with administrative secretaries, administrative assistants, and faculty.

As to Level, Grievant's testimony that Chairs called him was unrebutted. However, he did not clarify the frequency with which such contacts occur, other than to say that such contact was "not unusual." This is insufficient to show that such contacts are "regular" or "recurring" enough to dictate the rating under this factor. The level of other contacts identified fall under the definition of level 2. The level 2 rating in Intrasystems Contacts/Level was not shown to be clearly wrong, or arbitrary and capricious.

As to Nature, as noted previously, Grievant's assistance and recommendations to customers selecting merchandise is apparently a required job duty. However, these duties can be accomplished through information exchange. The subject matter and tenor of Grievant's contacts, assessed under Nature, would seem to fit bestunder the level 1 definition. However, Grievant's contacts seem at first blush to be quite similar to those of the Manager job title, which received a level 2 rating. The contacts listed in the Manager PIQ are about sources of vendors and ideas for items to sell or better ways to operate. G. Ex. 1, p. 10. Respondent stated that the Manager PIQ, taken in its entirety, showed differences in both Intrasystems and External Contacts because of the nature of contacts a manager would have, particularly regarding policy and budget issues. The Manager PIQ did specify contacts of a nature potentially different from Grievant's contacts, when it mentioned discussing better

ways to operate. That language can reasonably be interpreted to include policy and budgetary issues, and the nature of Grievant's contacts are thus distinguishable from those specified in the Manager's PIQ.

Respondent explained why its ratings of the Manager position was different from that of Grievant's position, and did so in a way which is plausible, in light of this evidence. Grievant has failed to show, by a preponderance of the evidence, that the JEC rating was arbitrary and capricious, or clearly wrong.

G. EXTERNAL CONTACTS/NATURE OF CONTACTS:

External Contacts is defined in the Plan as:

> 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 on a regular, recurring and essential basis during operations. Consider whether the contacts involve furnishing or obtaining information, influencing others or negotiation. Like Intrasystems Contacts, this factor is analyzed in a matrix having two parts, Nature and Level. Grievant challenges only the rating in Nature.

The Assistant job title received a level 1 rating, which is defined as "[r]outine information exchange and/or simple service activity; requires common courtesy (e.g., furnishing or obtaining factual information, ordering supplies, describing simple procedures)." Grievant asserts his position merits a level 2 rating, which is defined as "[m]oderate tact and cooperation required; communication is largely of a noncontroversial 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's external contacts are generally with students, vendors, and the general public, such as physicians. He discusses book orders, customer needs, and availability of various books and materials, on a daily basis. The WVSOM Manager's PIQ lists various vendors with whom she discusses books and merchandise, orders, "credits invoices," and special shipments. The Manager job title received a level 2 rating in Nature.

Respondent argued that the WVSOM Manager would be in a position to determine what bills should not be paid, and would thus have occasion to explain policy and procedure to vendors. As Grievant turns vendor disputes over to other personnel, he would not need to explain policy or procedure. Respondent pointed to the Manager's budgetary authority to support a distinction between the positions' ratings. Even a seemingly small distinction can result in substantial rating

differences. See Wilson, supra; Martin, supra; and cases cited therein. While the Manager PIQ does not provide detail regarding content of "discussions" with vendors about topics including "credits invoices," it is reasonable to presume that these discussions include resolution of billings disputes. Such discussions are a sufficient basis to support the JEC's exercise of discretion to award the Manager job title a higher rating. Moreover, Grievant's individual contacts clearly consist of information exchange, and cannot merit more than a level 1 rating. Grievant is correctly rated in External Contacts/Nature.

IV. SUMMARY:

Grievant failed to prove he should have received a higher rating in the challenged point factors. Grievant has not proven the ratings assigned to the Assistant job title were clearly wrong, or that he was misclassified.

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 classification 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.

3. Determinations of the Job Evaluation Committee("JEC") regarding application of the 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 atissue must 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., 194 W.Va. 97, 459 S.E.2d 374 (1995).

4. Subjective determinations of the JEC regarding application of the Plan's point factor methodology are entitled to deference when being reviewed by this Grievance Board. Miller v. Bd. of Directors, Docket No. 94-MBOD-495 (Oct. 29, 1996).

5. The JEC's subjective 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, 193 W.Va. 687, 458 S.E.2d 780 (1995); Bd. of Educ. v. Wirt, 192 W.Va. 568, 453 S.E.2d 402 (1994); Kyle v. W. Va. State Bd. of Rehab., Docket

No. VR-88-006 (Mar. 28, 1989). 6. While a searching inquiry into the facts is required, an administrative law judge may not simply substitute her judgment for that of the JEC. See generally, Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982).

7. The JEC's assignment of the Bookstore Assistant job title to Grievant's position, and its assignment of rating levels to the point factors for that job title are not clearly wrong, arbitrary or capricious.

Accordingly, this Grievance is **DENIED.** Any party may appeal this decision to the Circuit Courts of either Kanawha County or Cabell County. 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.

Dated: June 26, 1997

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

The reader is referred to Burke, et al. v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995), for the background of the reclassification project, the procedural history of the grievances arising therefrom, and definitions of some terms of art specific to the reclassification.

Footnote: 2

The point factors are set forth in 128 C.S.R. 62 §2.27 and in 131 C.S.R. 62 §2.27.

Footnote: 3

Respondent challenges the ratings in Direct Supervision Exercised as applied to Grievant's individual job duties, asserting that any increased points in some factors must be offset by reducing points for factors where his individual job duties merit a lower rating than was given to the job title. This approach has been accepted in prior Grievance Board decisions. See Gregg v. Bd. of Trustees, Docket No. 94-MBOT- 863 (Dec. 18, 1996); Black v. Bd. of Directors, Docket No. 94-MBOD-967 (Apr. 17, 1997). However, as Grievant did not show that he was entitled to increased points sufficient to change his Pay Grade, the challenge to Direct Supervision Exercised need not be addressed.

Footnote: 4

There appeared to be great animosity between Grievant and Respondent's counsel and witnesses, as demonstrated by these motions and the general tone of the hearing. Documents in the record show that Grievant's correspondence has included insulting and offensive remarks throughout the reclassification process, which may be the source of this animosity. While some level of emotional outburst on the part of grievants is not wholly unexpected, Grievant's aspersions seem almost calculated to obtain the most negative response possible. While such insults did not continue at the hearing, the sorts of comments made are inappropriate, to say the least. The response of Respondent's counsel and witnesses in possibly vindictive use of the legal process is also inappropriate.

Footnote: 5

The MU Bookstore is currently managed by a private entity.

Footnote: 6

This position is presumably a Bookstore Manager II or III, as Respondent's witness did not include this position in identifying the four Manager I incumbents.

Footnote: 7

Respondent's counsel asserted that the Manager PIQ, G. Ex. 1, should not be used for comparison purposes, because such comparison between PIQs means resorting to "whole job comparison" methods of classification, which the Plan renounced, and also that information not contained in the Manager PIQ may have been used to classify that position. Ms. Nutter explained that after the JEC established the "data line" ratings for each job title, as shown in Jt. Ex. 6, classification professionals at each institution "slotted" positions into job titles independently. The individual who slotted the PIQ position as a Manager may have used independent knowledge of the position's job duties, or may have misclassified it, she stated.

However, evidence shows that positions were classified based upon information in the PIQs, with possible additions from personal knowledge during the appeals process. The PIQ was utilized to determine that the position described was a Manager, and Respondent failed to supplement that information with any evidence other thansecond-hand testimony, although Respondent had more than adequate notice and opportunity to prepare a rebuttal. Respondent submitted no other evidence of what job duties a Manager has, nor did it show that the PIQ did not adequately represent the Manager job title. Respondent admitted that no other Manager PIQs exist, that at least one other Manager had refused to complete a PIQ, and that there is no generic job description for this title.

Because Respondent did not show that the PIQ was unreliable, or that the position described was misclassified, Respondent's arguments are rejected. The PIQ is reliable and probative evidence of the job duties and characteristics of the Manager job title, and that information is relevant to the issue of whether Grievant should have been classified as a Manager.

Footnote: 8

*It appears that an exception must be made for the Nature of Actions part of the factor Scope and Effect, as the definition of level 3 pertains to work which "affects **many** employees, students or individuals." (Job Evaluation Plan, Jt. Ex. 5,*

emphasis added.)

Footnote: 9

This and all subsequent definitions are taken from the Job Evaluation Plan, Jt. Ex. 5, with emphasis in the original, unless otherwise noted. Information as to ratings assigned to job titles are taken from the PIQ Summary by Job Family, Jt. Ex. 6.

Footnote: 10

The WVSOM Manager position clearly handles more difficult operational problems than Grievant, as the PIQ lists problems dealing with short shipments and overbillings.