ROBERT E. BEVERLY

v. Docket No. 94-MBOT-897

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievant, Robert E. Beverly, employed by the Board of Trustees at West Virginia University (Respondent), alleges that he was misclassified as a Photojournalist, at Pay Grade 15, under the "Mercer reclassification." Mr. Beverly does not contest his classification as a Photojournalist, but argues that his duties and responsibilities support compensation at pay grade 17. He requests reclassification to the higher pay grade with backpay, effective January 1, 1994, the date the classification system was implemented. (See footnote 1) A level four hearing was conducted on November 18, 1996, and the matter became mature for decision with the submission of post-hearing fact/law proposals by the parties on or before January 21, 1997.

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

Findings of Fact

1. Grievant has been employed by the Board of Trustees at West Virginia University for approximately 10 years.

2. In 1991, all higher education classified employees, including Grievant, were asked to complete a Position Information Questionnaire (PIQ) prior to the reclassification. 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.

3. Prior to January 1, 1994, Grievant was classified as a Photographer II. As a result of the Mercer reclassification, he was classified as a Photojournalist, pay grade 15, effective January 1, 1994.

4. Grievant's primary job duty prior to January 1, 1994, as stated in the Job Summary section of his PIQ, was to produce photographic images of West Virginia University to be used in brochures,

catalogs, news releases, etc. Grievant estimated that 65% of his time was spent selecting the proper equipment, setting up the shots, and taking pictures. Another 15% of his time is required to confer with his clients to determine the desired project goals, while 10% of his work related to laboratory duties, including film process, framing, and printing. The remaining 10% of his time was allocated to travel and assignments made at the discretion of his manager.

5. The Photojournalist job title received 2104 total points from the following degree levels in each of the thirteen point factors (See footnote 2) : 6.0 in Knowledge; 5.0 in Experience; 3.0 in Complexity andProblem Solving; 3.0 in Freedom of Action; 2.0 in Scope and Effect, Impact of Actions; 2.0 in Scope and Effect, Nature of Actions; 1.0 in Breadth of Responsibility; 2.0 in Intrasystems Contacts, Nature of Contact; 2.0 in Intrasystems Contacts, Level; 2.0 in External Contacts, Nature of Contact; 2.0 in External Contacts, Level; 1.0 in Direct Supervision Exercised, Number; 1.0 in Direct Supervision Exercised, Level; 1.0 in Indirect Supervision Exercised, Number; 1.0 in Indirect Supervision Exercised, Level; 2.0 in Physical Coordination; 3.0 in Working Conditions; and 2.0 in Physical Demands.

6. The point range for Pay Grade 15 is from 1985 points to 2113 points.

7. The point range for Pay Grade 17 is from 2255 points to 2407 points.

Discussion

A. Burden of Proof

The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that he is not properly classified. 156 C.S.R. 1 §4.1; W.Va. Code §18-29-6. Burke, et al., v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant asserting misclassification must identify the job he feels he is performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttal or analysis. Elkins v. Southern W.Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991).

A grievant is not likely to meet his burden of proof in a Mercer grievance merely by showing that his job duties better fit one job description than another, without also identifying which point factors he is challenging, and the degree level he believes he should have received. (See footnote 3) While some“best fit” analysis of the definitions of the degree levels is involved in determining which degree level of a point factor should be assigned, where the position fits in the higher education classified

employee hierarchy must also be evaluated. In addition, this system must by statute be uniform across all higher education institutions; therefore, the point factor degree levels are not assigned to the individual, but to the job title. W.Va. Code §18B-9-4; Burke, supra. A Mercer grievant may prevail by demonstrating his reclassification was made in an arbitrary and capricious manner. See Kyle v. W.Va. State Bd. of Rehabilitation, Div. of Rehabilitation Services and W.Va. Civil Serv. Comm'n, Docket No. VR-88-006 (Mar. 28, 1989).

Finally, whether a grievant is properly classified is almost entirely a factual determination. As such, the Job Evaluation Committee's (JEC) 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 Found., 459 S.E.2d 374 (W.Va. 1995); Burke, supra. However, no interpretation or construction of a term used in the Job Evaluation Plan (which provides the definitions of point factors and degree levels) is necessary where the language is clear and unambiguous. Watts v. Dept. of Health and Human Resources, 465 S.E.2d 887 (W.Va. 1995). The higher education employee challenging his classification thus will have to overcome a substantial obstacle to establish that he is misclassified. (See footnote 4)

B. Application of the Point Factor Methodology Grievant challenged the degree levels received in the point factors Complexity and Problem Solving, Freedom of Action, Intrasystems Contacts/Level, and External Contacts/Level. Following are the differences between the degree levels assigned to the point factors for the Photojournalist job title, and the degree levels Grievant believes his position should have been credited with in each of the contested point factors:

	CPS	FA	IC/L	EC/L
Photojournalist	3.0	3.0	2.0	2.0
Grievant's Claim	4.0	4.0	3.0	3.0

To determine whether Grievant is correctly classified requires a review of the degree levels assigned to the position in the challenged point factors.

Complexity and Problem Solving

The Plan defines Complexity and Problem Solving as “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 JEC awarded the position of Photojournalist a degree level of 3.0 in this point factor, defined by the Plan as:

[p]roblems 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.

Grievant requests a degree level of 4.0, defined as:

[p]roblems 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 argues that his work is a creative endeavor which is difficult to measure, and generally not taken into account by this classification system. Addressing the point factor of Complexity and Problem Solving, Grievant notes that he must evaluate the situation he is to photograph so that he may determine what equipment and procedure must be used to attain the desired results.

Testifying on behalf of Respondent, Lu Ann Moore testified that those decisions referred to by Grievant were considered in the point factors Knowledge and Experience. She stated that making determinations as to how to place articles in a photo, and other similar decisions, are not complex, but rather are basic decisions, and that 3.0 was the appropriate degree level for Grievant's position.

Although Grievant may need to exercise judgment in how to best complete an assignment, and the procedure may be complicated in attaining the desired results, these issues more properly fall within the Knowledge and Experience categories. Grievant's duties, the production of photographs which fill the needs of his clients in the University community, do not require that he interpret or apply policies and procedures to complete his work. Grievant has failed to prove that he is entitled to a degree level of 4.0 in this point factor.

<u>Freedom of Action</u> The Plan defines Freedom of Action as:

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.

Photojournalist was accorded a degree level of 3.0, defined by the Plan as:
[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.

Grievant requests a degree level of 4.0, defined by the Plan as:
[t]asks 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 objective of the unit.

Grievant claims the higher level is proper because he works with limited supervision, and organizes and completes his work assignments independently, based on his contacts with his clients. Ms. Moore testified that Grievant had been awarded the appropriate degree level in this point factor because he is not given a great deal of freedom in completing his work. Addressing the examples of work provided by Grievant, Ms. Moore noted that he does not work with a great deal of freedom,but that he is provided general guidelines, and at times specific articles for the photo, by his clients. Grievant is not responsible for setting goals or determining how best to promote the institution. She further opined that Grievant works in a structured environment and does not encounter unusual situations.

Grievant's work is moderately structured in that he works from objectives set by his clients, allowing him to organize and carry out the assignment. Indeed, when discussing some examples of his work, Grievant stated that all of the articles in the photograph were provided and that he had but to arrange them. In another example, the client specifically requested the photograph consist of a

sleeping baby lying on top of the world. It cannot be determined that the production of photographs, made at the client's direction, constitutes Grievant working from broad goals. On the contrary, by his own admission, some assignments are very tightly controlled. Further, it is clear that Grievant does not establish objectives, he produces photographs which other employees use to attain objectives of the institution. The evidence does not support a degree level of 4.0 for this position.

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 discussing controversial issues. This factor considers only those contacts outside the job's immediate work area.

Intrasystems contacts is subdivided into Nature of Contact and Level of Regular, Recurring, and Essential Contact. Grievant contested only the degree level assigned to the Level portion of this point factor. The JEC awarded Photojournalist

> a degree level of 2.0, defined by the Plan as “[s]taffand faculty outside the immediate work unit.” Grievant requests a degree level of 3.0 in Level, defined as “[s]upervisors, managers and/or chairpersons, other than own, within an institution, or coordinators within the Systems' Central Office.”

Grievant argues that he communicates daily with Deans, Directors, managers, and supervisors, who are responsible for publications, and communicates with secretaries to schedule meetings. Ms. Moore testified that because Grievant's regular, recurring and essential contacts are with staff and faculty for the purpose of scheduling, a degree level of 2.0 was correct.

Grievant provided an extensive list of internal contacts which includes many Directors and Assistant Directors. While it is reasonable that he meets with and discusses his work to some extent with these individuals, it would also be reasonable that many of Grievant's contacts are for the purpose of scheduling. It would not be expected that he contact upper level administrators on a daily basis for scheduling purposes. Grievant's testimony indicates that many days he is working on projects and does not meet or talk with his clients. Overall, Grievant has failed to prove that his contacts with these individuals are regular or recurring, and it cannot be determined that a degree level of 3.0 was proper for this point factor.

External 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.

This factor consists of two parts, Nature of Contact and Level of Regular, Recurring and Essential Contact. Grievant challenges only the Level portion of this point factor. The JEC awarded the position of Photojournalist a degree level of 2.0, defined by the Plan as "[g]eneral public, visitors, and/or service representatives and vendors." Grievant requests a degree level of 3.0 in External Contact, Level, defined in the plan as "[s]tudents, parents, alumni, faculty of institutions outside the systems, sales engineers, higher-level product representative, recruiters and/or prospective students."

Grievant provided a list of individuals who are external contacts. Although this list is not contested, there is no indication from the record that these contacts are regular, recurring or essential to Grievant's position. Surely, the Research Director at NASA, the contact from the American Bar Association, and other similarly situated individuals are incidental contacts who are not routinely essential to Grievant's daily work. A degree level of 3.0 in this point factor cannot be sustained by the evidence of record.

C. Summary

___Grievant has failed to prove that he is entitled to a pay grade 17 or that his duties warranted higher degree levels in the point factors of Complexity and Problem Solving, Freedom of Action, Internal Contacts/Level, and External Contacts/Level.

In addition to the foregoing facts and narration it is appropriate to make the following formal conclusions of law

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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§4.1.

3. Grievant has failed to prove by a preponderance of the evidence that the Job Evaluation Committee's assignment of degree levels to the point factors of Complexity and Problem Solving, Freedom of Action, Internal Contacts/Level, and External Contacts/Level was clearly wrong.

4. The evidence does not establish that Grievant's duties and responsibilities warrant classification and/or compensation at pay grade 17.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the county in which the grievance occurred, 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.

Date: April 30, 1997 _____ SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The reader is referred to Burke, et al. v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995), for a discussion of the background of the Mercer reclassification project, the procedural history of the Mercer grievances, and the definitions of various terms of art specific to the Mercer reclassification.

Footnote: 2

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

Footnote: 3

A grievant may challenge any combination of point factor degree levels, so long as he clearly identifies the point factor degree levels he is challenging, and this challenge is consistent withthe relief sought. See Jessen, et al. v. Bd. of Trustees, W.Va. Univ., Docket No. 94-MBOT-1059 (Oct. 6, 1995); and Zara, et al., v. Bd. of Trustees, W.Va. Univ., Docket No. 94-MBOT-817(Dec. 12, 1995).

Footnote: 4

This discussion is not intended to address challenges to the way the Mercer system as a whole is set up, that is, challenges to the methodology.