THOMAS WISE,

Grievant,

v. DOCKET NO. 94-MBOD-401

BOARD OF DIRECTORS/WEST VIRGINIA STATE COLLEGE,

Respondent.

DECISION

Grievant Thomas Wise submitted a grievance challenging his classification as Manager/Operator of the Educational Network, at Pay Grade 18. He seeks classification in that same title, at Pay Grade 21. Mr. Wise 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"). (See footnote 1) 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. This total then determines the job title's Pay Grade.

A Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on December 4, 1996. This matter became mature for decision on January 6, 1997, following the receipt oftimely post-hearing submissions from the parties.

Grievant specifically challenges the degree level ratings received in several point factors used to evaluate his position and assign it a Pay Grade under the Plan. The point factors challenged are: Complexity and Problem Solving; Scope and Effect; Breadth of Responsibility; Intrasystems Contacts; External Contacts; and Direct Supervision Exercised/Level of Supervision.

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

FINDINGS OF FACT

1 1. All classified employees were asked to complete a Position Information Questionnaire ("PIQ")

prior to the reclassification. PIQs are 17 page documents on which individual employees described the duties of their position, as well as certain minimum qualifications required to carry out their duties. The PIQ was reviewed, commented upon, and signed by the employee's supervisor, and the supervisor's supervisor. Mr. Wise filled out a PIQ in 1993.

2 2. Mr. Wise is employed as the Manager/Operator of the Educational Network (EdNet). EdNet is located on the campus ofWest Virginia State College (WVSC), which also serves West Virginia Graduate College (WVGC).

3 3. EdNet serves all higher education institutions in West Virginia by providing satellite distance education, video production services, teleconference downlinking services, audio- conferencing and technical support services. EdNet also generates a large part of its own funds by providing services to entities outside the higher education system, such as state and federal agencies and private businesses. EdNet was created in 1987. It operates 14 hours per day, and is the only uplink facility in the State higher education system.

4 4. Grievant's job duties are essentially the same as they were on January 1, 1994, and include (with approximate percentages of time): coordinating and scheduling all video and audio programming, whether it originates at the EdNet offices or at another location (20%); planning and consulting with various persons and groups regarding materials and programming (20%); coordinating, supervising and scheduling activities of technical, production, and office staff for productions, uplinking and maintenance of equipment (15%); acting as liaison between EdNet and different programming sources (15%); ensuring continuity of programming and operational procedures (10%); determining equipment status and needs (10%); providing proper orientation for those who utilize EdNet facilities (5%); and providing staff with training and education opportunities (5%).

5 5. Mr. Wise serves as a non-voting, ex officio member of theAcademic Users Group (AUG), which selects courses appropriate for transmission as distance learning classes. The AUG selections are given to Mr. Wise, who then prepares a draft schedule. In scheduling the courses for transmission or taping, Mr. Wise considers and works out logistical difficulties, such as where classes originate and whether a transmission path from that location is available. Classes are generally transmitted by satellite uplink in live, two hour segments between four and ten o'clock p.m. Planning is long-term, as it may take up to a year and a half for programs to actually be aired. Mr. Wise's draft schedule is presented to the AUG. Once approved by the AUG, Mr. Wise finalizes it by confirming the availability

of the instructor. Mr. Wise then utilizes this schedule in creating a daily programming schedule for faculty, institutions, and EdNet staff. Mr. Wise also contacts the satellite provider, and encumbers the satellite time. Similar activities are involved in scheduling teleconferences and other such services. However, the AUG is not involved in programming or scheduling for State agencies or private businesses.

6 6. Members of the AUG include representatives from each higher education institution. The members include persons such as an Associate Vice President for Academic Affairs, Chairs of Academic Departments, Coordinators, Deans, Directors, and faculty, as well as others designated as alternates or ex officio members. G. Ex. 1. The AUG meets monthly. Mr. Wise also serves on other committees such as the Distance Learning Coordinating Council, andthe Distance Education Oversight Committee.

7 7. Mr. Wise has contact with personnel from entities outside the higher education system which use EdNet's services. State agencies involved include the Department of Education, Governor's Office, and Department of Health and Human Resources. EdNet services are also utilized by federal agencies and offices, extension services, Charleston Area Medical Center, the School Board Authority, and various private entities and businesses.

8 8. Mr. Wise prepares Requests for Proposals (RFPs) for satellite contracts and for equipment purchases. He estimates the hours of use of satellite time to be secured. He works with the purchasing department to develop bid documents. He also evaluates bids which are received, and recommends the entity to be awarded the contract. Mr. Wise writes letters of justification for awarding contracts to one who is not the low bidder.

9 9. Mr. Wise provides technical, scheduling and cost information to the AUG and to different users of EdNet's facilities and services. As part of his liaison and scheduling duties, Mr. Wise has frequent contacts with persons outside the higher education system. For example, Mr. Wise speaks with plant managers of chemical facilities regarding how EdNet can assist in meeting the plant's training needs, and with personnel in various state agencies regarding conducting teleconferences.

10 10. Mr. Wise supervises the six people who constitute EdNet'sentire engineering and production staff. (See footnote 3) Hiring decisions regarding EdNet staff are made after team interviews and through joint decision-making. The Director of EdNet, Mr. Wise's supervisor, signs documents concerning hiring and firing. Both Mr. Wise and the Director sign leave slips and purchase orders.

11 11. Mr. Wise has regular contacts with vendors of equipment and supplies, as well as vendors of satellite services.

12 12. Mr. Wise has no formal budget accountability for EdNet, although he assists the EdNet Director in projecting needs and costs of satellite time, equipment and supplies, and in making presentations in order to obtain increased funding.

13 13. The job title Manager/Operator of EdNet received 2447 total points under the Plan. The point range for Pay Grade 18 is from 2408 through 2573 points. Jt. Ex. F.

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, 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 theMercer reclassification system is not based upon whole job comparisons, but rather is a quantitative system in which the components of each job are analyzed separately. The components are then evaluated using the point factor methodology contained in the Plan. 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, but to the job title. Burke, supra. In order to maintain the integrity of the overall classification scheme, the individual grievant's case must be analyzed with reference to where the position fits in the higher education classified employee hierarchy, and the "best fit" must be determined in relation to other similar positions.

In this case, whether Mr. Wise is properly classified is almost entirely a factual determination. As such, the JEC's interpretation and explanation of the point factors at issue will be given great weight unless clearly erroneous. See Tennant v. Marion Health Care Found., 194 W.Va. 97, 459 S.E.2d 374

(1995); Burke, supra. Of course, no interpretation or construction of aterm is necessary where the language is clear and unambiguous. See Watts v. Dept. Of Health & Human Resources, 195 W.Va. 430, 465 S.E.2d 887 (1995). A 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 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, entirely ignored important aspects of the problem, 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 substitute her judgment for that of the JEC. See generally, Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E. 2d 276 (1982).

Mr. Wise challenged his ratings in several of the factors analyzed in assigning his Pay Grade. Each point factor which is subject to dispute in this grievance will be addressed separately.

A. COMPLEXITY AND PROBLEM SOLVING:

The Plan defines this factor as:

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

(Jt. Ex. E. All definitions are quoted from this exhibit, unless otherwise noted.)

Mr. Wise's position was assigned level 4 under this factor. Level 4 is defined 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.

Mr. Wise seeks assignment of level 5, which is defined as:

> Problems encountered involve unusual circumstances, variations in approach, and incomplete or conflicting data. Employees exercise considerable analytical, valuative and reasoning skill in researching information and developing new methods to perform work assignments or optimum solutions to problems. The development of new

> programs, procedures or methods are typical end results of the problem-solving process. Determination of the effectiveness of a policy or practice may be involved at this level.

Mr. Wise noted that EdNet is a unique entity, serving the entire higher education system with the only satellite uplink facility. Mr. Wise provides scheduling services for all the institutions, which involves consideration of complex logistical difficulties. For example, Mr. Wise noted that planning presentation of a course is long term, and he must coordinate the schedule of different courses by considering such things as the site where the course originates, available pathways for linking the originating signal to EdNet, other transmissions being made atthe same time, and the type of instruction given. Also, he noted that his scheduling must allow for different academic schedules at different institutions. For example, on at least one occasion, the different institutions participating in a televised class had their spring breaks scheduled such that some students were on spring break throughout the month of April. He accounted for the sequential absences of different students by taping classes for that month, and sending the appropriate tapes to different institutions so that students could watch the missed classes.

As another example of problems encountered in this position, Mr. Wise stated that he deals with budgets from many institutions. He encumbers satellite time based on the schedule, and directs the satellite provider to bill the originating institution. In other words, Mr. Wise stated, he commits the funds of many institutions. He does the same with funds from State agencies, as well.

As an example of the complexity of his job, Mr. Wise testified about his preparation of RFPs and other work in the bidding process. Mr. Wise stated that it was his decision to extend the current satellite contract, rather than to obtain new bids. Mr. Wise stated that he was involved in setting up a new procedure for proposing and processing courses for satellite presentation, through developing new forms and identifying the information and signatures required. He also testified that he was involved in developing new programs, such as the Spanish 6 program transmitted from Capitol High School.

Respondent's witness was Ms. Patricia Hank, Director of HumanResources at Southern West Virginia Community College, and a JEC member. Ms. Hank testified that this factor does not measure the intricacy and complexity of the tasks performed, but measures the types of problems one encounters in performing one's tasks. It evaluates how problems are discovered and addressed, and the degree of decision-making required. She noted that scheduling is governed by established

procedures, processes and criteria, which provide guidelines for the work of this position. She also stated that this position deals with logistics, not with policy issues. The problems encountered by Mr. Wise are not ones which require him to find new methods for performing his work assignments. She testified that the position's impact is evaluated, not EdNet's impact. She opined that the end result of Mr. Wise's work is to provide a service: course presentation and teleconferencing. The end result of his work is not new program development. He does not plan to offer new programs, but is involved in determining how to put programs on the air.

As Mr. Wise stated, EdNet is a unique entity in the higher education system. However, that fact does not necessarily mean that the problems encountered in performing an EdNet employee's tasks "involve unusual circumstances." Most, if not all, work units are unique in some fashion, and most, if not all, employees consider their work to have unique attributes. The essential issue under the Complexity and Problem Solving factor is not the characterization of the work unit, but the assessment and characterization of the types of problems encountered in performingthe employee's normal work duties.

While Mr. Wise's responsibilities are complicated and varied, the problems appear to fall into several general categories, rather than involving unusual circumstances. Mr. Wise must certainly exercise great care and skill in finding optimum logistical solutions to scheduling problems. However, the same logistical problems recur, and have a limited number of options for resolution. The responsibilities he has in the bidding and funding processes are not "problems" so much as standard tasks entailing responsible performance on Mr. Wise's part. It does not appear that "typical end results" of his work are new programs, procedures or methods. Rather, he gave a single example of altering the course scheduling process. His involvement in the Spanish 6 program was, as Ms. Hank noted, not "development" of the program but provision of logistic and engineering services to put it on the air. It thus appears that new procedures are developed only occasionally.

"The difference between a Level 4 and Level 5 rating on this factor involves a subjective determination." Miller v. Bd. of Directors, Docket No. 94-MBOD-495 (Oct. 29, 1996). Where the JEC's decision is not so implausible that it cannot be ascribed to a difference of view between reasonable minds, the standard of review in these cases does not allow for the undersigned to substitute her judgment for that of the JEC. Id. Mr. Wise has provided insufficient information to prove that the JEC's evaluation of this factor was clearly wrong.

B. SCOPE AND EFFECT/NATURE OF ACTIONS AND IMPACT 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.

Scope and Effect is divided into two parts, Impact of Actions (Impact) and Nature of Action (Nature). Mr. Wise challenged his rating in both parts. The JEC assigned his position a level 3 rating in Impact, which is defined as:

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

Mr. Wise argues that he should be assigned level 7 in Impact,which is defined as:

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

In support of his assertion, Mr. Wise points out that his work affects "more than one school" in delivering instruction by establishing the distance learning calendar and schedule, and argues that this meets the second part of the level 7 definition. If he makes an error, it could result in the costs associated with satellite transmission ($800/class) and also the interruption in instruction of many students (generally 50-150 per class). Mr. Wise testified that he generally catches his own mistakes, through the cross-checks built into the scheduling process. Mr. Wise argued that his rating in this factor should not be determined by the size of WVSC, as he and EdNet could have as easily been

part of a graduate level institution. He argued that he should get a rating at the same level as the EdNet Director.

In response, Ms. Hank stated that the JEC analyzed Mr. Wise's position, not EdNet. While Mr. Wise's work affects EdNet, it is EdNet which affects multiple institutions, she opined. She pointed out that the number of televised classes is much smaller than the total number of classes taught throughout higher education, and that higher education instruction would continue even if EdNet ceased operations entirely. She admitted that the size of WVSC's budget was a determinative factor in the JEC's analysis. She further stated that the EdNet Director received a higher level rating because she is accountable, and has decision-making and longrange planning responsibility for the EdNet department. Testimony indicated the EdNet Director was assigned level 6 in this part of the factor, (See footnote 4) although the PIQ Summary lists level 7. See Jt. Ex. F. Ms. Hank also opined that Mr. Wise provides guidance to a function or service affecting many students or employees in more than one school or division.

Mr. Wise's initial proposition, that because his work impacts "more than one" institution he meets the "second part" of the level 7 definition, is wrong. The other definitions in Impact show that the phrase "more than one school" is part of a larger phrase. Specifically, in the level 7 definition, the applicable notion is that the work affects more than one part of a doctoral-level institution, which the definition terms "school or division."

The two main purposes of this position's work are to develop the distance learning schedule, and to oversee general operations of EdNet in terms of staffing and equipment. Clearly, these activities have some impact on many institutions throughout the higher education system, both directly (through scheduling of instructional programming) and indirectly (through oversight of EdNet's work production). It is reasonable that the Director would get a higher level rating in Impact, as the Director has complete control of EdNet. However, Mr. Wise's position is responsible forensuring that classes are scheduled and aired, which appears to be the activity which most affects higher education and other institutions. It is difficult to understand why the EdNet Director's position was assigned a rating several levels above that of Mr. Wise's position in Scope and Effect/Impact, in terms of relative affect on other institutions. Moreover, it does not seem that the definitions account for the situation involved here, where EdNet is part of one institution, but clearly impacts more than one institution statewide. Clearly, EdNet is not part of WVSC in the same way as an academic department or physical plant.

Neither Grievant nor Respondent provided any evidence regarding the budget, enrollment, or classification of WVSC. These facts supply the objective basis for evaluating Impact. Thus, no determination can be made as to the highest level of Impact available for employees at WVSC. Without budget information it is also impossible to analyze the Director's rating at all. The JEC's decisions regarding Scope and Effect/Impact appear arbitrary and capricious when comparing ratings of the Director's position and that of Mr. Wise. However, the evidence provided is insufficient to prove which position was misclassified on this point, or which level definition is the best fit for Mr. Wise's position. Therefore, because Mr. Wise bears the burden of proof in this grievance, the undersigned must conclude that he has failed to carry his burden of proving the rating to which his position is entitled. As any assignment of a rating on this record would also be arbitrary and capricious, no change in rating is permitted. In the part of this factor designated Nature, Mr. Wise's position was assigned a level 3 rating, which is defined as:

> Work 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.

Mr. Wise seeks assignment of level 4, which is defined as:

> Work contributes to or ensures the effectiveness of operations or services having significant impact within the institution and involves application of policies and practices to complex or important matters. Errors could easily result in substantial costs, inconveniences, and disruption of services within the affected area.

Mr. Wise states that errors in his scheduling can result in substantial costs, inconveniences and disruption of services to students and institutions. As many as 900 students at 300 locations can be affected by satellite distance learning classes which Mr. Wise schedules and has EdNet produce. Again, Ms. Hank noted the proportion of classes aired through EdNet compared with all higher education classes, and stated that an error would affect only one class for one night.

The costs, inconveniences and disruption of services which might result from an error in this position's work could be characterized as either "moderate" or "substantial" depending on one's point of reference. Similarly, while Ms. Hank characterized Mr. Wise's position as one which provides guidance to EdNet, his position may also be characterized as one which ensures the effectiveness of

operations or services, as he clearly manages other professional positions, such as engineers, who produce theprograms and support other services provided by EdNet. These services have significant impact, in that they affect many institutions as well as many students. Mr. Wise's job involves complex scheduling, at a minimum. He applies standard practices and policies to his scheduling tasks, as previously noted. His decision to extend EdNet's contract with a satellite provider, rather than obtain a new contract with a new provider, may be an example of applying policies and practices to complex or important matters. However, his work might also be characterized as involving decisions and recommendations made in non-routine situations within established protocol, guidelines, and/or policies. Clearly, the definition involves subjective value judgments about the characterization of one's tasks and duties.

Ms. Hank's written direct testimony explains the JEC interpretation of the definitions. It declares that in the Nature part of this factor, level 3 is the beginning of professional level work, level 4 begins the management levels of work, and level 5 is for directors and high level administrators. R. Ex. 1. Mr. Wise's position is obviously a management level position, as he oversees the production operations at EdNet and supervises at least six subordinates. Ms. Hank's written direct testimony thus shows that Mr. Wise is entitled to a level 4 rating in this part of Scope and Effect.

Where the JEC was clearly wrong, or arbitrary and capricious in its assignment of point factor ratings, the correct rating can be assigned in the grievance proceeding. See Jones v. Bd. ofTrustees, Docket No. 94-MBOT-978 (Feb 29, 1996). The JEC was clearly wrong according to its own interpretation of the definitions, and Mr. Wise is entitled to assignment of a level 4 rating in Scope and Effect/Nature. This assignment results in an increase of 30 points for his position.

C. BREADTH OF RESPONSIBILITY:

The Plan defines this factor 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 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.]

Mr. Wise was assigned level 1, which is defined in the Plan as "[a]ccountable for only immediate work assignments but not for a functional area." He seeks assignment of level 5, which is defined as

"[i]n-depth knowledge of and accountability for four or more functional areas as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations."

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). Mr. Wise admitted that he had no formal financialaccountability, even though his activities impact funding for EdNet and for other institutions and agencies. Consequently, Mr. Wise is correctly rated in this factor.

D. INTRASYSTEMS CONTACTS/NATURE OF CONTACTS AND LEVEL OF CONTACTS:

The Plan defines this factor as one which:

> appraises the responsibility for working with or through other people within the [State College and University Systems of West Virginia] 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, explaining policies or discussing controversial issues. This factor considers only those contacts outside the job's immediate work area.

This factor is analyzed in two parts, Nature of Contact (Nature) and Level of Regular, Recurring and Essential Contact (Level). Mr. Wise challenged his rating in both parts of Intrasystems Contacts.

His position was assigned level 2 in Nature, which 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.)” He seeks assignment of level 4 in Nature, which is defined as “[d]iplomatic/negotiative interactions on complex and important issues; tact, diplomacy and persuasion usually required (e.g., problem-solving discussions about key issues which have substantial impact on the organization.)”

Mr. Wise stated that he has negotiating interactions anddiplomacy is required in discussing time slots for airing classes. The faculty get angry when they cannot have the time they request. He also testified that he must make both written and oral presentations to the Central Office staff when requesting more funding, and that the committees on which he serves discuss and make plans for system-wide distance learning. As examples, the committees discuss common budgets, information to submit to the Legislature, and telecommuting policies.

Ms. Hank stated that Mr. Wise deals with complex scheduling issues, and merely explains

procedures and provides factual information. She explained that Mr. Wise may make choices, but he does not really negotiate, such as one would do in settling a lawsuit.

Ms. Hank's explanation regarding the Nature of Mr. Wise's contacts is persuasive. It seems clear that most of Mr. Wise's contacts are informational rather than persuasive. Most contact is about scheduling. He explains to faculty that everyone wants to air his/her class from 6 to 8 o'clock p.m., but that only two classes per night can have that time slot. He may also explain the criteria considered in arriving at the schedule approved by the AUG. Similarly, he may explain funding needs to Central Office staff. He may also seek to persuade them of the necessity of more funding. However, his position is required to be persuasive only on rare occasions, if at all. The majority of his intrasystems contacts meet the level 2 definition in Nature. Mr. Wise has not shown that the JEC was clearly wrong, arbitrary or capricious innot assigning level 4 in Intrasystems Contacts/Nature.

Under the Level part of Intrasystems Contacts, Mr. Wise's position was assigned level 3, which is defined as "[s]upervisors, managers and/or chairpersons, other than own, within an institution, or coordinators within the Systems' Central Office." He seeks assignment of level 6, which is defined as "Vice Presidents or Systems' Central Office Senior Administrator."

In support of his position, Mr. Wise testified that he has high level contacts through his participation on committees, such as the AUG. He also pointed to his attendance at Board of Directors meetings and contacts with Senior Administrators when requesting more EdNet funding. Mr. Wise did not state how often he made such funding requests to these persons, however. His PIQ listed weekly contact with Vice Presidents, Presidents, Academic Directors, faculty members and Academic Deans. Jt. Ex. A.

Ms. Hank opined that Mr. Wise's participation on various committees was not essential to performing the daily tasks of his position. Mr. Wise's daily work would not change if he stopped attending committee meetings, she said. Finally, she stated that this factor does not consider the identity of persons who call or visit the studio by happenstance, but who Mr. Wise contacts as a regular, recurring and essential part of his job.

While Ms. Hank is undoubtedly correct that this factor is not correctly utilized to give credit for happenstantial contacts, it appears that Mr. Wise has recurring and required contact with at least department heads, faculty and administrators on a regularbasis as a large part of his duties and responsibilities. At least 20%, and perhaps as much as 40%, of his job duties involve coordinating,

consulting and discussing EdNet services with persons and entities utilizing them. See Mr. Wise's PIQ, Jt. Ex. A. The evidence as a whole indicates that his participation on committees is an important part of his responsibility. The AUG is made up primarily of Deans, Directors, Coordinators and faculty. These are also the persons who would be directly involved in providing distance learning classes, even without participation on the AUG. It is reasonable to conclude that Mr. Wise does have regular, recurring and essential contacts with Academic Deans and Directors, in addition to other faculty in order to discuss course offerings, procedure and programming issues. (See footnote 5) These contacts meet the definition of level 4 in Level, which is "Deans or Directors in an institution or Assistant Directors in the Systems' Central Office." Mr. Wise has carried his burden of proving that the JEC was clearly wrong in assigning level 3, and that his regular, recurring and essential contacts meet the definition of level 4. By assigning him level 4 in Level, he is entitled to an increase of 18 points.

E. EXTERNAL CONTACTS/NATURE OF CONTACTS AND LEVEL OF CONTACTS:

This factor is defined as one which ”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 two parts, Nature and Level. Mr. Wise challenged his rating in both parts of External Contacts.

In Nature, Mr. Wise's position was assigned level 2, which 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.)” Mr. Wise apparently believed he was entitled to a level 3 rating, which is defined as “[s]ubstantial sensitivity and cooperation required; discussions are frequently controversial and require some delicacy (e.g., project interactions, interpretation of policies, resolution of problems.)

Ms. Hank testified that the level 2 rating assigned to Mr. Wise's position in the Nature part of this factor was appropriate. She stated that Mr. Wise's position may have "sticky" discussions occasionally, but that he still just explains policy and procedure. His job entails complex scheduling, which is clearly covered by thelevel 2 definition. Otherwise, his position's external contacts consist of

factual information exchange.

While Mr. Wise asserted that his contacts included discussion of policy matters with the Secretary of Education and the Arts (Secretary), he was not sufficiently definite as to his personal role in such contacts. From the context of his testimony, it appeared that he was part of a group which met with the Secretary to discuss such matters. He may or may not have been a spokesperson or advocate, as opposed to a source of technical or logistic information. Moreover, he did not specify the frequency with which such contacts were made. The contacts which were identified specifically as occurring on a regular and recurring basis appeared to consist of information exchange, or communication of a non-controversial nature, such as scheduling and coordinating programs. On this record, it cannot be said that the JEC was clearly wrong in assigning this position a level 2 rating in Nature of External Contacts.

Mr. Wise's position was assigned level 3 in Level, which is defined as "[s]tudents, parents, alumni, faculty of institutions outside the systems, sales engineers, higher-level product representatives, recruiters and/or prospective students." He seeks assignment of level 5 in Level, which is defined as "[s]ubstantially prominent persons (e.g., community leaders, business and industry leaders) and officials of government agencies, financial agencies, and other important constituents."

Mr. Wise testified that he is the key contact for stateagencies regarding teleconferences, or provision of other services. He testified that the manager or director of a state agency will call him about scheduling and production matters. While he pointed to members of some committees on which he serves as contacts outside the higher education system, these persons were not specifically identified. He identified contacts with persons he believed to be substantially prominent, such as the Secretary, state agency directors, and plant managers. Mr. Wise has contacts with plant managers every two weeks, on average, about scheduling and producing training programs and teleconferences. When he contacts the Secretary, it is about distance learning policy and equipment needs. Sometimes the EdNet Director is also present at these meetings. Mr. Wise was not clear as to his role in discussing policy matters, but he clearly provides the benefit of his technical expertise and his experience in dealing with logistical concerns and limitations.

He also noted that he talks to television producers outside the higher education system on a regular basis. He also has contact with various vendors, and the staff in the State Purchasing Division. Further, he asserted that his characterization of which contacts were required was accurate,

as he did not include happenstantial contacts based on who participated in programs produced at EdNet. For example, he testified that the Governor has frequently appeared on programs produced at EdNet, but that he did not include the Governor as a contact identified for credit under this factor. Ms. Hank stated that the majority of Mr. Wise's contacts are at level 3 of External Contacts/Level. She testified that the higher level contacts identified by Mr. Wise were not essential to performing his work. For instance, she stated that contacts with plant managers could as effectively be made with the administrative assistants to those managers in arranging teleconferences. She also opined that his contacts did not have a policy or problem resolution purpose, but were about technical production issues such as the cost of air time. Such contacts are typically made with staff, rather than higher level persons, she stated. Mr. Wise admitted that staff persons call him, in addition to the higher level persons he identified.

While Mr. Wise clearly has contacts with the higher level persons he identified, Mr. Wise did not submit evidence sufficient to prove the frequency of his high level contacts, or that the majority of his external contacts usually were made with higher level individuals rather than a staff person. As Ms. Hank observed, and as discussed above, the general nature of the communications does not mandate high level contacts. His PIQ is not helpful, as it identifies entities with which he has contact, but not the individuals within those entities. Moreover, whether such contacts are essential is doubtful, given that Mr. Wise's primary duty pertains to meeting higher education system needs. He is apparently authorized to accommodate the needs of state and federal agencies and private entities only when such accommodation does not interfere with services provided to higher education. Thus, his external contacts appear to be primarily supplemental or secondary to his primary duties in serving the higher education system. Mr. Wise did not show that the JEC was clearly wrong in assigning level 3 in Level of External Contacts.

F. DIRECT SUPERVISION EXERCISED/LEVEL OF SUPERVISION:

> This factor measures the job's degree of direct supervision exercised over others in terms of the level of subordinate jobs in the organization, the nature of the work performed, and the number supervised. Only the formal assignment of such responsibility should be considered; informal work relationships should not be considered. Supervision of student workers may be taken into account if they are essential to the daily operation of the unit. The number of subordinates should be reported in full-time equivalency (FTE) and not head count.

The factor is analyzed in two parts, Number of Direct Subordinates and Level of Supervision

(Level). Mr. Wise challenges only his rating in Level. Mr. Wise's position was assigned 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.

He seeks assignment of level 7, which is defined as:

> Directs and coordinates the work of at least two or more units performing different functions within the same department. The work of these units is coordinated through subordinate managers who exercise full supervision over each unit. This position reports to the head of the department.

Mr. Wise testified that EdNet has two distinct functions, engineering and production. He stated that these constitute twodifferent units within EdNet. However, he stated that he supervises and makes assignments for all regular employees in both groups. (See footnote 6) Moreover, his PIQ shows that he directly supervises all six regular employees of EdNet. He testified that both he and the EdNet Director interview and jointly decide to hire personnel, and that they both sign leave slips. Hiring and firing are done under the Director's signature.

Ms. Hank explained that tasks do not equate to functions, as that term is used in the definition. She stated that EdNet does not have distinct units, but rather individuals with distinct functions. She also stated that the level 7 definition requires at least one level of indirect reporting and supervision. In other words, the only persons who can be assigned to level 7 of Direct Supervision Exercised/Level are persons who supervise positions which in turn have formal supervisory responsibility. Ms. Hank pointed out that there are no subordinate managers who exercise full supervision over either of the two "units" identified by Mr. Wise. She further testified that Mr. Wise has input and recommendation powers, but that the EdNet Director actually makes hiring and firing decisions.

Ms. Hank's interpretation of the level 7 definition as requiring intermediate supervisors is not unreasonable, and accords with the plain meaning of the terms used. As Mr. Wise has no firstline supervisors reporting to him, who formally supervise subordinate employees, he is ineligible for the level 7 rating. Mr. Wise has not proven that the JEC was clearly wrong in assigning his position a level 3 rating in this factor.

SUMMARY

Mr. Wise has shown that the JEC was clearly wrong in assigning rating levels under the factors Scope and Effect, and Intrasystems Contacts. By assigning him the number of points afforded under proper assignment of ratings in these factors, he is entitled to an increase of 48 points, for a total of 2495 points for his position. This equates to a Pay Grade 18. Although no change in Pay Grade results, Mr. Wise is the only employee in the position of Manager/Operator of EdNet, and therefore a change in the data line for this position is warranted.

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 classifi cations 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 Mercer Plan's point factor methodology are essentially questions of fact. In that regard, the JEC'sinterpretation 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., 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 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, 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).

5. "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. Jessen v. Bd. Of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995). See Bd. Of Educ. V. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994)." Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb 29, 1996).

6. The JEC's assignment of degree levels to the point factors Complexity and Problem Solving, Scope and Effect/Impact, Breadth of Responsibility, Intrasystems Contacts/Nature, ExternalContacts and Direct Supervision Exercised for Grievant's position is not clearly wrong.

7. The JEC was clearly wrong, arbitrary or capricious in assigning Grievant's rating under the factor Scope and Effect/Nature, and Intrasystems Contacts/Level. Assigning the correct number of points under these factors results in an increase of 48 points, or a total of 2495 points for this job title.

Accordingly, this Grievance is **GRANTED IN PART AND DENIED IN PART.** The Respondent Board of Directors is hereby **ORDERED** to change the data line for Grievant's job title, as he is the only Manager/Operator of EdNet. As Grievant is properly allocated to Pay Grade 18, his request to be allocated to Pay Grade 21 is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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 appropri ate court.

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JENNIFER J. MEEKS

Administrative Law Judge

Dated: January 30, 1997

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 this mass reclassification project, the procedural history of the grievances arising from the reclassification, and the definitions of some terms of art specific to the reclassification Plan.

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. Burke, supra.

Footnote: 3

The only other people working within EdNet are the EdNet Director, the Office Manager, and student workers. The Director supervises Mr. Wise and the Office Manager. Jt. Ex. C.

Footnote: 4

Level 6 is defined as "[w]ork affects the entire operations of a graduate- or baccalaureate-level institution with an operating budget of $19-$25M; more than one school or division of a graduate-level institution with an operating budget of more than $50M; or a school or division of a doctoral-level institution with an operating budget of more than $200M."

Footnote: 5

While one Associate Vice President is identified as being on the AUG in 1995, it is unknown whether anyone with this title served on the AUG during the time period relevant in deciding this grievance. Moreover, if the only contact with this person was at monthly meetings, it is questionable whether the contact could be considered regular and recurring. Thus, this position has not been included in assessing the Level of Intrasystems Contacts. Similarly, as the Vice Presidents and Presidents listed on the PIQ are not sufficiently identified to determine that they are not within Mr. Wise's chain of command, those positions have not been included in assessing this part of the factor.

Footnote: 6

Several student workers are employed at EdNet. Although Jt. Ex. C indicates that these students are supervised by Mr. Wise's subordinates, testimony indicated that the supervisory relationship is informal, and that Mr. Wise assigns the students' tasks and approves their work schedules.