RICHARD MACKLEY, et al.

v. Docket No. 94-MBOT-330

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY

D E C I S I O N

Grievants, Richard Mackley and Donald Kormanik, allege they were improperly classified as Electronics Technicians at Pay Grade 13 under the “Mercer reclassification”. Grievant Kormanik challenges one specific point factor which he argues supports his request for classification as an Electronics Technician-Senior, or another, institution-specific job title at Pay Grade 14. Grievant Mackley generally challenges the classification system, and asserts that he should have been classified at Pay Grade 16. Both Grievants request reclassification with backpay, effective January 1, 1994, the date the classification system was implemented. (See footnote 1) A level four hearing was conducted on December 5, 1996, and the matter
became mature for decision on June 19, 1997, with the submission of Grievant Kormanik's post-hearing fact/law proposals. (See footnote 2)

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

Findings of Fact

1. Grievants are employed by the Board of Trustees (Respondent) at West Virginia University, assigned to the Health Sciences Center (Kormanik) and the Physical Plant (Mackley).

2. In 1991, all higher education classified employees, including Grievants, 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. As a result of the Mercer reclassification, Grievants were classified as Electronics Technicians at Pay Grade 13.

4. Grievant Mackley's primary job duties prior to January 1, 1994, generally consisted of providing detailed electronic support including the operation, installation, and maintenance for a wide variety of systems and applications throughout the university complex. More specifically, Grievant

tests, repairs and modifies electronic equipment, analyzes and interprets test data, adjusts, calibrates, aligns and modifies circuitry, and components and records effects on unit performance (40% of his time); maintains base control unit, portable radio system, mobile units and other communications equipment (20%); troubleshoots and repairs building control systems involving microprocessor based automation, and advises the mechanical shop on system trouble (10%); installs and repairs fire alarms, emergency lighting, and back up power generators (15%); installs telecommunication and computer networks (5%); and installs and maintains equipment for sporting events, including providing game day services to broadcast networks assisting in radio and television transmissions (10%).

5. Grievant Kormanik maintains, repairs, and installs paging systems, transmitters, remote control units, digital receivers, encoders, and two-way radios (35%); repairs and modifies allclasses of electronic equipment, including laboratory instruments such as spectrophotometers and oscilloscopes (30%); installs and repairs intercom systems, television cable system, television sets, paging, and radio systems (20%); makes repairs on building equipment that utilizes electronic controls (5%); assists in the design and construction of special instruments, equipment, and electronic controls for research projects or teaching aids (5%); and performs scheduled and unscheduled preventative maintenance (5%).

6. The Electronics Technician job title received 1859 total points from the following degree levels in each of the thirteen point factors (See footnote 3) : 5.0 in Knowledge; 3.0 in Experience; 3.0 in Complexity and Problem Solving; 2.5 in Freedom of Action; 1.0 in Scope and Effect, Impact of Actions; 2.0 in Scope and Effect, Nature of Actions; 1.0 in Breadth of Responsibility; 1.0 in Intrasystems Contacts, Nature of Contact; 2.0 in Intrasystems Contacts, Level; 1.0 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; 5.0 in Physical Coordination; 3.0 in Working Conditions; and 3.0 in Physical Demands.

7. The point range for pay grade 13 is from 1756 points to 1865 points.

8. The point range for pay grade 14 is from 1866 points to 1984 points.

9. The point range for pay grade 16 is from 2114 points to 2254 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 §4.17; 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 the grievant's 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 4) 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 factorsand 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 5)

B. Application of the Point Factor Methodology

Grievant Kormanik challenges only the degree level received in the point factor Knowledge.

Following is the degree levels assigned by the JEC to the point factor in question, and that which Grievant argues would place him in the correct pay grade.

Knowledge

"This factor measures the minimum level of education 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."

The JEC awarded the position of Electronics Technician a degree level of 5.0. Grievant requests a degree level of 5.5. The Plan does not define half levels; however, in this point factor an additional .5 was awarded to those positions which require that the employee hold a certificate or licensure. Grievant Kormanik asserts that he is required to hold a license from the FederalCommunications Commission to perform the duties of his position, and the additional half level credit would increase his total score by 39 points, enough to bump him into pay grade 14.

Teresa Crawford, a senior classification and compensation analyst at West Virginia University and member of the JEC, testified on Respondent's behalf. Ms. Crawford stated that a degree level of 5.0 was appropriate credit for Grievant Kormanik because no such licensure is required in that he only works on the internal transmitter and not the hospital transmitter. The additional credit was granted only to employees who actually performed duties which required licenses. She emphasized that the JEC considered the minimum education necessary for a new employee, without creating artificial barriers, and noted that Electronics Technician positions require an Associates degree; therefore, a degree level of 5.0 was correct in her opinion.

It is accepted that this point factor measures the minimum level of education, certification, and licensure necessary to enter the job. See Perkins v. Bd. of Trustees, Docket No. 94-MBOT-733 (Oct. 31, 1996). Further, the focus in Mercer grievances is upon the qualifications required of the individual entering the position, not that of the incumbent. Payne v. Bd. of Directors, Docket No. 94-MBOD-372 (Jan. 8, 1997). Grievant testified that he possessed a First Class License from the FCC at the time he began his employment at WVU, and that he had since been told in a class that he was required to hold an FCC license because the transmitter was sending out a signal, and that in December 1996 a sales representative from Motorola had advised him that the licenses were still required. Attached to the proposed findings and conclusions, Respondent provided documentation, including relevant

portions of Section 90 of the FCC regulations. Respondent notes that §90.433 specifically states that no operator's license is required to tune and maintain a radio transmitter. Grievant notes that paragraph (c) of that section requires that all adjustments or testsmade during the installation, servicing, or maintenance of stations “should be performed by or under the immediate supervision and responsibility of a person certified as technically qualified to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.”

Grievant also cites portions of Section 90 which requires that the name of the person maintaining records required by §90.215 and that a licensee is required to employee a suitable procedure to ensure that the carrier frequency of each transmitter with an output power higher than two watts is maintained within a prescribed tolerance, in support of his claim. Attached to his proposed findings and conclusions was an Affidavit in which Grievant Kormanik stated that he had reviewed these portions of the FCC regulations and that he believes that he is required to possess a First Class FCC license to perform the duties of his position.

A review of the FCC provisions cited by the parties does not support a conclusion that Grievant is required to hold a license to perform the duties of his position. Section 90.433 requires only that servicing and maintenance be performed by or under the immediate supervision of a certified person. The requirement that Grievant sign his name as part of the recordkeeping process, and the remaining sections upon which he relies, do not conclusively state that he must hold a license. Therefore, it cannot be determined that the JEC erred in assigning Electronics Technician a degree level of 5.0 in Knowledge.

Grievant Mackley did not challenge any specific point factor but noted that the field of electronics is constantly changing all phases of life and, in his opinion, his work merited assignment at pay grade 16. He suggested job titles of Electronics Systems Specialist or Electronics Technologist would be appropriate for his position. Ms. Crawford briefly addressed the point factorsand explained the JEC's determination regarding Electronics Technicians. Because the Mercer classification system is based upon assigned point factors, a general disagreement with the outcome is insufficient basis upon which to evaluate a claim of misclassification. Skidmore v. Board of Trustees/W.Va. University, Docket No. 94-MBOT-819 (May 13, 1997); Suppa v. Bd. of Trustees/W.Va. University, Docket No. 94-MBOT-295 (May 17, 1997). Accordingly, it cannot be determined that Grievant Mackley is

misclassified. It is further noted that the Grievance Board has previously ruled that employees performing similar work were properly classified as Electronics Technicians at pay grade 13. Hastings v. Bd. of Trustees, Docket No. 94-MBOT-943 (May 28, 1996).

D. Summary

___Grievants have failed to prove that the JEC was clearly wrong or acted in an arbitrary and capricious manner in the allocation of degree levels in any point factor. Because there is no change in the point factors or the total point score, Grievants are not entitled to assignment to a higher pay grade or title.

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

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 Grievants to prove by a preponderance of the evidence that they are not properly classified. 156 C.S.R. 1§4.1. Elkins v. Southern W.Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991). 3. Determinations of the 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 at issue will be given great weight unless clearly erroneous. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

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

5. Grievants failed to prove by a preponderance of the evidence that the Job Evaluation Committee's assignment of the position Electronics Technician to pay grade 13 was clearly wrong or arbitrary and capricious.

6. Grievants failed to prove that their duties and responsibilities warrant different classification and/or compensation at any higher pay grade.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County, and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State EmployeesGrievance 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: June 27, 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

Respondent's proposals were filed on April 10, 1997. Grievant Kormanik's submissions were due on the self-designated date of June 13, but ultimately were hand delivered after the work day of June 18, 1997. Appearing pro se, Grievant Mackley did not file any post-hearing submissions.

Footnote: 3

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: 4

A grievant may challenge any combination of point factor degree levels, so long as he clearly identifies the point factor degree levels he is challenging, and this challenge is consistent with the relief sought. See Jessen, et al. v. Bd. of Trustees, 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: 5

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.