SUSAN WEINSTEIN,

Grievant,

v. DOCKET NO. 94-MBOT-649

BOARD OF TRUSTEES/MARSHALL UNIVERSITY,

Respondent.

DECISION

Grievant, Susan Weinstein, challenges her classification as an Academic Lab Manager II at Pay Grade 16 under the "Mercer" reclassification. (See footnote 1) She seeks classification as an Academic Lab Manager III at Pay Grade 17, with back pay from January 1, 1994. 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. In this grievance, the degree level ratings received in the following point factors are specifically challenged: Experience, Direct Supervision Exercised/Level of Supervision, Physical Coordination, Working Conditions and Physical Demands. For reasons explained herein, the grievance is granted in part, as Grievant hasshown by a preponderance of the evidence that her individually rated position must be placed in Pay Grade 17. (See footnote 3)

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 a PIQ in 1991.

2 2. Grievant is employed by Marshall University (MU) in the Biology Department, and held the title

"Laboratory Manager III." She was classified as an Academic Lab Manager II on January 1, 1994, as a result of the Mercer reclassification.

3 3. Grievant's job duties, with approximate percentages of time spent on each shown in parentheses, are: preparation of laboratory materials for thirteen labs in each of four courses, including determining amounts and types of supplies needed, listing materials needed, creating lab preparation sheets, preparing solutions and materials needed, maintaining the supplies needed as laboratories progress (live, chemical or other supplies), and scheduling audio-visual programs (35%); maintenance and inventory of laboratory materials, including maintaining supplies such as glassware and chemicals, maintaining records of supplies, ordering materials and live cultures, maintaining live plants and animals, maintaining and repairing laboratory equipment such as microscopes, and maintaining records of lending laboratory materials to faculty and others (30%); supervision of Graduate Teaching Assistants (TAs) and student workers, including conducting weekly lab preview/review sessions, preparing and disseminating memoranda regarding administrative and procedural matters, directing them in setting up, tearing down and storing laboratory materials, evaluating their performance, and scheduling assignments (20%); and other services, including reviewing, revising, editing, proofreading, and authoring new laboratory exercises, participating in laboratory manual review committee meetings, and attending faculty meetings (15%).

4 4. Grievant has both a Bachelor's and a Master's degree, in Science. She had more than three years of experience prior to taking this position, as a laboratory technician at the United States Department of Agriculture and also at the University of Maryland. She had additional laboratory experience while obtaining her educational degrees.

5 5. Grievant supervises numerous TAs, including training them and evaluating them. Grievant does not hire the individuals herself. The TAs may be fired, based upon Grievant's evaluation and recommendation.

6 6. Grievant must repair and maintain compound and dissectingmicroscopes, spectrophotometers (See footnote 4) , balance beams, water baths (See footnote 5) , hot plates and other lab equipment. Precision and control of hand movements is needed in adjusting and replacing mirrors and other optical equipment, changing light bulbs, cleaning out filters, rewiring equipment, and taking apart eyepieces, objective lenses, optical glass, and mirrors. This repair work requires use of standard and specialized tools, and takes approximately 10% of Grievant's time. She also spends approximately

5% of her time teaching others to use this equipment, by showing them how to properly use each type, and using the equipment herself. However, repair of the equipment requires much more precision than operating the equipment.

7 7. As a consequence of preparing chemicals for use in multiple laboratories for four different courses, Grievant is exposed to chemicals daily, while weighing them, handling them, and mixing them into solutions. The chemicals include ether, hydrochloric acid, chloroform, acetone, calcium hydroxide, formaldehyde, potassium hydroxide, and others generally recognized as hazardous. Her desk is next to the chemical cabinet, where chemicals are stored in proper containers.

8 8. Grievant must purchase, transport, and use forty pound bags of soil; move plants in pots weighing more than 25 pounds; and move equipment weighing more than 25 pounds to and from the laboratories. Moving such items involves lifting them severaltimes per move, to transport and set up the items. Grievant averages moving an item weighing more than 25 pounds on a weekly basis.

9 9. The Academic Lab Manager II job title received a total of 2180 points. The point range for Pay Grade 16 is from 2114 to 2254 points. Jt. Ex. 4.

10 10. The Academic Lab Manager III job title received a total of 2304 points. The point range for Pay Grade 17 is from 2255 to 2407 points. R. Ex. B and Jt. Ex. 4.

DISCUSSION

I. BURDEN OF PROOF AND STANDARD OF REVIEW:

At the hearing, Respondent moved that Grievant be held to the burden of proof announced in Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995), for those seeking to show that a new classification should be created, as the Academic Lab Manager III job title did not exist on January 1, 1994. Burke held that such grievants "have a nearly insurmountable burden to prove that the JEC and governing boards **abused their broad discretion** in failing to create an additional classification." Burke at 11 (emphasis added).

Grievant's attorney objected to the burden of proving abuse of discretion, as assigned in Burke, and argued that Grievant should only be held to the "clearly wrong" standard by which other challenges to classification have been judged. He observed that there was a generic job description for Academic Lab Manager III, which had been made available to Grievant. Respondent admitted that the JEC did create the Academic Lab Manager III job titlesought by Grievant, at a Pay Grade 17, in

1996. However, Respondent argued that Grievant should have requested reclassification into that new job title in 1996, under a different procedure prescribed in the regulations, rather than pursuing reclassification in this grievance. (See footnote 6)

This motion was taken under advisement. After a review of Burke, and careful consideration of the unique facts in this case, I find that the burden of proof applicable when a grievant seeks creation of a previously non-existent job title, the "abuse of discretion" standard, should not be applied in this grievance. That Respondent reconsidered its classification plan and created the Academic Lab Manager III job title serves as an admission that Grievant was correct to the extent she argued the job title was needed. In light of Respondent's creation of the job title, and the fact that Respondent has not been surprised in any way by Grievant's claim, it is most appropriate to analyze this grievance as if the Academic Lab Manager III job title existed on January 1, 1994.

However, the issue of whether or not Grievant should have been classified in that job title on January 1, 1994, remains to be decided. (See footnote 7) Grievant must show, by a preponderance of the evidence, that she is not properly classified. 156 C.S.R. 1 §4.19; W. Va. Code § 18-29-6. Burke, supra. The grievant must identify the job 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 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 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, 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).

In order to determine if Grievant was misclassified, the point factors and ratings disputed must be discussed separately in detail.

II. POINT FACTOR ANALYSIS:

A. EXPERIENCE:

The Plan defines Experience as follows:

> This factor measures the amount of prior directly related experience required before entering the job. Previous experience or training should not be credited under this factor if credited under Knowledge. (See footnote 8)

The Academic Lab Manager II (Manager II) job title, as well asthe Academic Lab Manager III (Manager III) job title, received a level 3 rating in this factor, which is defined in the Plan as "[o]ver one year and up to two years of experience." Grievant asserts her individual job duties merit a level 4 rating, which is defined as "[o]ver two years and up to three years of experience."

Grievant explained that experience as well as knowledge is required to set up and create laboratory experiments for students. One needs to know how and what to do, but one also needs to have done it. In working in a laboratory, an experiment or demonstration may be performed many times, or only occasionally. For those performed occasionally, one must have many years of experience to have performed them often enough to be able to prepare and teach them properly. Grievant had six years of experience, including that obtained during her undergraduate and Master's

degree education, prior to taking her position.

Brian Warmuth, Human Resources Administrator for West Liberty State College and JEC member, testified for Respondent that Grievant's work with freshman level laboratory classes does not require more than two years of experience, in his opinion. He stated that Grievant's own testimony implied this, as she stated she could train TAs to conduct the laboratories in a relatively short period of time. Mr. Warmuth noted Grievant's PIQ suggested either two years of experience, or, alternatively, a Master's degree in Science (See footnote 9). He concluded from this that one did not need more than two years of experience to perform Grievant's job duties. The minimum amount of experience required to perform the essential duties of a position represents a subjective determination upon which reasonable minds may differ. Zara, supra. Grievant has shown that her current opinion as to the minimum experience necessary differs from that of the JEC, and that her opinion has some reasonable basis. However, Respondent, through Mr. Warmuth's testimony, offered a reasonable explanation justifying the JEC's rating. "Where a subjective determination is involved, this Board is hesitant to second guess the JEC's action in the absence of compelling evidence." Where the JEC's rationale for its choice has been explained in a manner which is not in conflict with the Plan, or with the facts about Grievant's job duties and responsibilities, the JEC is not clearly wrong, arbitrary or capricious. Bennett v. Bd. of Directors, Docket No. 94-MBOD-451 (Feb. 25, 1997); Miller v Bd. of Directors, Docket No. 94-MBOD-495 (Oct. 29, 1996).

B. 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.

This factor is analyzed in a matrix having two parts, Number of Direct Subordinates, and Level of Supervision. Grievant challenges only the rating received in Level of Supervision.

In Level of Supervision, the Manager II job title received alevel 2 rating, which is defined as "[r]esponsible for directing and monitoring the work of student workers essential to the operations of the unit." Grievant asserts that her individual job duties merit a level 4 rating, which the Manager III job title received. Level 4 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.

Grievant's testimony showed that she performs the supervisory tasks specified in the level 4 definition, in supervising TAs. However, the type of employee supervised is determinative of her rating.

Glenna Racer, a Human Resources professional at Marshall University and JEC member, explained that the definition of "student employee" found in 128 C.S.R. 62, §2.1.5, applies to TAs. Mr. Warmuth testified that the JEC consistently considered TAs to be student workers, and the JEC consistently assigned ratings no higher than level 2 in this part of the factor, where only student workers were supervised. He noted that Manager III's supervise regular employees, such as Academic Lab Manager I's, and not just TA's.

This Board has previously determined that graduate teaching assistants are student workers. Perkins v. Bd. of Trustees, Docket No. 94-MBOT-474 (Mar. 12, 1997)(where the grievant held the Academic Lab Manager I job title). As Ms. Racer and Mr. Warmuth ably explained, there is good reason for the determination that TAsare student workers, and the JEC consistently interpreted the Plan in this fashion. The Perkins decision also stated that, when only TAs are supervised, level 2 is the highest possible rating in Direct Supervision Exercised/Level of Supervision. Perkins dictates the outcome here. Grievant is not entitled to a higher rating.

C. PHYSICAL COORDINATION:

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

The Manager II and Manager III job titles received level 2 ratings in Physical Coordination. Level 2 is defined as "[w]ork requires simple hand/eye operations and some accuracy and regularity of motions, such as set-up and operation of basic instruments or equipment, and/or the occasional use of standard hand or power tools with minimal speed requirements." Level 3 is defined as "[w]ork requires some speed and accuracy of hand/eye coordination in the use of somewhat complicated instruments, equipment or hand or power tools requiring some speed and adeptness." Grievant asserts her individual job duties merit a level 4 rating in Physical Coordination, which is defined as:

> Work requires skill and accuracy or other manual actions involving rapid physical motions and closely coordinated performance on or with office equipment; or a high degree of manual skill and exactness in the use of hand instruments or equipment.

Grievant performs repairs on laboratory equipment. Inaddition to the information provided in Finding of Fact number 6, Grievant explained that she must take apart the equipment to reach the mirrors she repairs. She specified that lens elements and other optics measure approximately one centimeter, and that she must be very careful and accurate in placing lubricants or other materials close to them without getting the material on the lenses, and in getting them properly inserted and positioned. She uses both standard and specialized tools, such as regular screwdrivers and special "microscope wrenches". She stated that she tries to get equipment repaired as quickly as possible, to return it to the lab for use, but admitted there are no objective requirements regarding speed of repairs. She said that she spends approximately one-half day per week repairing equipment for use in labs, and an additional three weeks per year in using fine instruments for other purposes required of her position.

Respondent argued that major repairs are sent elsewhere, although no definition of "major repairs" was offered. Respondent also argued that Grievant spent more time supervising than repairing equipment. Mr. Warmuth stated that Grievant was not hired as a repair person, but as a supervisor and developer of laboratories. He stated that she did not spend a significant portion of her time in work requiring speed and accuracy, and suggested that 25% of one's time would be considered significant. (See footnote 10) Her repair activity was one of seven different tasks which together took 35% of her time, according to her PIQ, and it is unlikely theone activity amounted to 25% by itself, he opined.

The definitions in Physical Coordination do not require any particular percentage of one's time to be engaged in work demanding speed and accuracy, before one can be considered "regularly" engaged in that activity. See Barber v. Bd. of Trustees, Docket No. 94-MBOT-872 (Oct. 31, 1996) at 31. Respondent did not prove what, if any, interpretation of the term "regularly" was employed by the JEC. (See footnote 11) The common usage of "regular" includes work which is "periodic" and "customary, usual, or normal." American Heritage Dictionary (2d College Edition 1991). Respondent failed to rebut Grievant's evidence that 10-15% of her time was spent in work requiring fine motor skills, on a weekly basis. Her work "regularly requires" these skills.

While both speed and accuracy are prerequisites for a level 3 rating, as noted in Long v. Bd. of

Trustees, Docket No. 94-MBOT-725 (June 30, 1997), speed is not necessarily required at level 4. As an alternative to work involving a speed component, level 4 also covers work involving "a high degree of manual skill and exactness in the use of hand instruments or equipment." Respondent failed to rebut that Grievant's work requires such skill and exactness, while she repairs and uses instruments and equipment. Her repair work is especially demanding, and she spends approximately four hours per week repairing equipment. Repair activity distinguishes her duties from those of the Academic Lab Manager I in Perkins, supra, who was correctly rated at level 2 in this factor. Grievant has shown that her job duties merit a level 4 rating in Physical Coordination. **D. WORKING CONDITIONS AND PHYSICAL DEMANDS:**

These two point factors are defined jointly in a matrix as one element, which

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

The parts of the matrix are Working Conditions, and Physical Demands, each of which have several defined rating levels. Grievant challenged ratings in both parts.

1. WORKING CONDITIONS:

The Manager III job title received a level 2 rating in Working Conditions, while the Manager II job title received a level 3 rating. Grievant asserts her individual job duties merit a level 4 rating. Level 2 of Working Conditions is defined as:

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

Level 3 is defined as:

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

Level 4 is defined as "[f]requent or prolonged exposure to extreme levels of temperature, air pollution, noise, radiation, chemicals, contagious diseases, gases and substances, heights,

andmoving parts."

Grievant asserted that she handles chemicals on a daily basis generally, and certainly at no less than a weekly basis, ever. She considered near-daily exposure to be "frequent." She did not know if there are industry standards defining "light chemical substances," but opined that, as many chemicals are labelled as hazardous, they are more than "light." She stated that if there were a chemical spill, she would clean it up herself. She stated that moving her desk away from the chemical cabinet was impossible, and that chemical odors were pervasive in the office.

Respondent pointed out that Grievant's supervisor marked level 3 on her PIQ. Mr. Warmuth stated that he did not see " **prolonged** exposure to **extreme** levels" of chemicals or other hazards. The chemicals are correctly and properly stored, according to Grievant's testimony, and therefore there must be no significant exposure while she is simply sitting at her desk, he said. He opined that Grievant likely exercises reasonable care and judgment in handling chemicals, wearing any needed protective gear, and that thus her exposure must be minimal. He testified that the JEC considered daily exposure as "frequent." He did not know whether there was a definition of "light chemical substances" which was applied by the JEC.

Grievant handles hazardous chemicals on essentially a daily basis, which Respondent conceded was "frequent." Grievant is "exposed" to the chemicals, as she must work directly with the chemicals themselves, not just chemicals in their proper packaging. (Cf. Skaggs v. Bd. of Trustees, Docket No. 94-MBOT-809 (June 27,1997) at 22-24, where packaged chemicals were shipped and received.) Respondent's doubtful proposition that the definition requires exposure to "extreme levels" of chemicals need not be determined here, as, even if such were required, Grievant meets such a criterion. Grievant clearly works with full-strength hazardous chemicals, not with "light chemical substances such as cleaning solutions." Chemicals cannot be more concentrated than in their pure form. Grievant meets the definition of level 4 in Working Conditions. (See footnote 12)

2. PHYSICAL DEMANDS:

The Manager II and Manager III job titles both received a level 2 rating in Physical Demands, which is defined as "[l]ight physical effort required involving stooping and bending; individualhas limited discretion about walking, standing, etc.; occasional lifting of lightweight objects (up to 25 pounds.)" Grievant asserts her individual job duties merit a level 3 rating, which is defined as "[m]oderate physical effort required involving long periods of standing, walking on rough surfaces,

bending and/or stooping; periodic lifting of moderately heavy items (over 25 and up to 50 pounds.)"

Grievant must move plants from the greenhouse to the lab and back at least 14 times per semester, lifting them several times per move. She carries the plants sometimes, and at other times uses a cart. She also must lift and carry heavy equipment, such as water baths and spectrophotometers, numerous times for each lab. On average, she testified, she lifts and carries items weighing over 25 pounds at least once a week. She believed that lifting at regular intervals would be considered "periodic." When working on labs, setting them up or running samples for new labs, Grievant has little discretion about standing; it is required. When she is writing new labs, she must sit and use a computer. She testified that, if she did not move the items mentioned or perform these other tasks, she would not be doing her job.

Mr. Warmuth opined that the majority of Grievant's time is spent in level 2 activity. She has limited discretion when working on experiments, and would be seated when working on lab manuals, he stated. He questioned how many of the physically demanding tasks mentioned by Grievant were actually required by her job duties, as opposed to simply volunteered. He suggested that the essential job could be done by a disabled person who could not perform suchtasks. He did not believe the tasks she mentioned were performed on a regular basis.

Standing for long periods of time in performing one part of one's tasks, and voluntarily lifting items weighing more than 25 pounds occasionally, do not prove that level 3 is merited, rather than level 2. Saulton v. Bd. of Directors, Docket No. 94-MBOD-800 (Dec. 5, 1996). See also Reedy v. Bd. of Directors, Docket No. 94- MBOD-721 (Nov. 4, 1996). On the other hand, a level 3 rating has been found appropriate, even where the job regularly required working in cramped areas, walking quickly while loaded, and removing, lifting and carrying components weighing 50-72 pounds three times per shift. Hastings v. Bd. of Trustees, Docket No. 94- MBOT-943 (May 28, 1996). Similarly, lifting and maneuvering items weighing 50-75 pounds three times per week, with other strenuous work, only entitled one to a level 3 rating in Riley v. Bd. of Directors, Docket No. 94-MBOD-450 (Feb. 21, 1997) (at 21-22). By implication, then, lifting three times per day or even three times per week is "periodic."

Respondent failed to rebut Grievant's testimony, and the information on her PIQ, that the physically demanding tasks she discussed were, in fact, required and essential job duties. Still, the JEC's determination that lifting once per week does not constitute "periodic" lifting is not in conflict with the language of the Plan, nor does it appear to be arbitrary or capricious. Grievant's other

evidence was not sufficiently quantified to show that she endures "long periods of standing" rather than merely having "limited discretion about walking [or] standing." The JEC'srating in this factor is neither clearly wrong, nor arbitrary and capricious, and Grievant's job duties best fit the level 2 definition.

III. SUMMARY:

Grievant failed to prove she should have received higher ratings in the factors Experience, Direct Supervision Exercised/ Level of Supervision, or Physical Demands. Her position, if individually rated, merits different ratings in the factors Physical Coordination and Working Conditions. Individual ratings in these factors results in a net increase of 81 points, for a total of 2261 points for Grievant's position. This total falls within a Pay Grade 17, which is different from the Pay Grade 16 assigned to the Manager II job title. Because the point factor ratings are assigned to the job title and not to individual employees, and evidence was not presented regarding the job duties of other Manager II's or III's, Grievant has not proven the ratings assigned to the job titles were clearly wrong. However, she has proven that she 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 areessentially questions of fact. In that regard, the JEC's interpretation and explanation of the point factors and PIQs at issue will be given great weight unless clearly erroneous. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). See generally, Tennant v. Marion Health Care Found., 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 was clearly wrong, arbitrary or capricious in assigning Grievant's rating under the factors Physical Coordination and Working Conditions. Assigning the correct number of points under these factors results in an increase of 81 points, or a total of 2261 points for her position, which equates to Pay Grade 17.Thus, the JEC's assignment of the Academic Lab Manager II job title to Grievant's position was clearly wrong, arbitrary or capricious.

Accordingly, this Grievance is **GRANTED IN PART.** Respondent is ORDERED to place Grievant in a job title in Pay Grade 17, retroactive to January 1, 1994, and to pay her the difference, if any, between the salary she received while improperly allocated to Pay Grade 16 and that which she would have received had she been properly allocated to Pay Grade 17, plus interest.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of 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: July 24, 1997

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

The reader is referred to Burke 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

This grievance was earlier consolidated with another grievance filed by Karl Shanholtzer. Mr. Shanholtzer withdrew his grievance on December 17, 1996, and the grievances were separated. Thereafter, a Level IV hearing was conducted on February 18, 1997. After several extensions by agreement of the parties, this matter became mature for decision on June 20, 1997, the due date for proposed findings of fact and conclusions of law.

Footnote: 4

This equipment uses a series of prisms to break light into its different spectrums.

Footnote: 5

A large, electronic, stainless steel instrument which keeps the water a certain temperature.

Footnote: 6

Respondent referred to "Policy Bulletin 62, §10" in its post-hearing submission. Respondent entered the "data line" developed by the JEC for the Academic Lab Manager III job title, which shows the point factor ratings assigned to it, as R. Ex. B.

Footnote: 7

Of course, Grievant may request reclassification review under the procedure noted by Respondent at any time.

Footnote: 8

This and all subsequent definitions are taken from the Plan, Jt. Ex. 3, with emphasis in the original, unless otherwise noted.

Footnote: 9

The job title received a level 6 rating in the Knowledge factor, which equates to a Baccalaureate degree. The rating in the Knowledge factor was not challenged.

Footnote: 10

Importantly, Mr. Warmuth did not state that this 25% standard was employed by the JEC in assessing this factor.

Footnote: 11

Had it done so, the outcome here may have been different.

Footnote: 12

*Respondent did not argue that exposure to "temperature, air pollution, noise, radiation, chemicals, contagious diseases, gases and substances, heights, **and** moving parts" is required, in the cumulative. Common sense dictates that the JEC*

was not likely to require exposure to each and every one of the itemized conditions before considering a job title to merit the rating, as it is highly unlikely that all would be encountered in one job. For example, radiation and contagious diseases are unlikely to be encountered by a Landscape Gardener, yet that job title received a level 4 rating in this factor. Jt. Ex. 4, p. 15. Moreover, the overall factor definition states that hazardous conditions may be considered individually, by using "and/or" language. It strongly suggests that the degree of hazard to one's health is measured, in terms of likelihood and severity, not strictly in terms of the variety of hazards encountered. Thus, Grievant's exposure here to chemical hazards is deemed sufficient to meet the definition's requirements. Accord, Helmick v. Bd. of Trustees, Docket No. 94-MBOT-948 (Jan. 28, 1997) at 21, where a grievant who regularly hangs lights and wires sound equipment, exposing him to heights and electricity, was granted a level 3 rating. Cf. Carlton v. Bd. of Directors, Docket No. 94-MBOD-430 (July 15, 1997), which found that the level 2 definition "requires exposure to both less-than-optimal air conditions and temperatures." Id. at 35 (emphasis in original). Carlton is distinguishable by the degree level definition involved, and by the fact that that definition addresses only two commonly- encountered and relatively benign environmental factors.