BARBARA LONG, et al.,

Grievants,

v. **DOCKET NO. 94-MBOT-725**

BOARD OF TRUSTEES, WEST VIRGINIA
NETWORK FOR EDUCATIONAL TELECOMPUTING, et al.,

Respondents.

D E C I S I O N

This is a grievance by Barbara Long, George Chastain, and Chester Cook (Grievants) challenging their classification as EDP (Electronic Data Processing) Technical Editors - Senior at Pay Grade 15 by Respondent Board of Trustees (BOT) under the Job Evaluation Plan (Plan) for the State College and University Systems of West Virginia developed by William M. Mercer, Inc. Their grievances were initiated in August of 1994 in accordance with specific procedures established in the Legislative Rule for Personnel Administration promulgated by the University System of West Virginia Board of Trustees on May 5, 1994. 128 C.S.R. 62 § 18 (1994). In October 1994, BOT waived thesegrievances to Level IV. (See footnote 1) In accordance with W. Va. Code § 18-29-5(b), these three grievances were consolidated by Order of Consolidation dated December 15, 1994. An extensive Level IV evidentiary hearing was conducted in this matter on August 2, 1995, at West Virginia University, in Morgantown, West Virginia, on October 26 and 27, 1995, at this Board's office in Elkins, West Virginia, on November 7, 1995, at this Board's office in Morgantown, West Virginia, and on March 22, 1996, at this Board's office in Charleston, West Virginia. Following the completion of additional depositions, (See footnote 2) the parties agreed to make written post-hearing submissions, and this matter became mature for decision on October 15, 1996.

The Plan adopted by Respondent's Job Evaluation Committee (JEC) employs a "point factor methodology" which evaluates each job title by analyzing specific characteristics termed "factors"

(See footnote 3) , assigning a rating or "degree level" to each factor, andapplying a weighted equation to the assigned levels to arrive at a numerical total, which determines the job title's Pay Grade. In this grievance, Grievants are not seeking a different job title, conceding that they are appropriately assigned to the EDP Technical Editor - Senior job title. Rather, Grievants assert that the JEC significantly undervalued the duties of their positions through its arbitrary application of the point factor methodology. Thus, Grievants are specifically challenging the degree levels assigned to the following factors: Experience; Complexity and Problem Solving; Freedom of Action; Scope and Effect, Impact of Actions and Nature of Action; External Contacts, Nature of Contact and Level of Contact; Physical Coordination; and Physical Demands. (See footnote 4) The following Findings of Fact are made based upon a preponderance of the relevant evidence contained in the record developed at Level IV.

FINDINGS OF FACT

1. In 1991, all higher education classified employees were asked to complete Position Information Questionnaires (PIQ's). 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.

2. Grievants were each classified as an EDP Technical Editor - Senior, Pay Grade 15, effective January 1, 1994.

3. Grievant Cook is employed by West Virginia University (WVU) in the Academic Computing Unit of the Division of Computing and Information Resources (CIR). HT at 12;G Ex 4. (See footnote 5) Grievants Long and Chastain are employed by the West Virginia Network for Educational Telecomputing (WVNET).

4. Grievants Chastain and Long submitted a revised PIQ for their positions in February 1994 as part of the process of appealing their classification to the JEC. Grievant Cook similarly submitted a WVU Position Description in conjunction with his appeal to the JEC.

5. On January 1, 1994, Grievant Cook's primary job duties (with the percentage of time spent performing each duty shown in parenthesis) were researching, organizing, designing, and scheduling production of all publications relating to computing and information resources (20%); evaluating technical information from various sources for possible inclusion in publications (20%); setting schedules and reviewing progress of writing projects assigned to other employees as required (5%); consulting with the Director of Academic Computing, staff, faculty, and students to determine

publication needs (5%); using appropriate resources to develop publications or other methods for disseminating computing-related information in written, oral, or electronic form (10%); designing, adapting, and incorporating graphic materials into unit publications (5%); maintaining current knowledge in a wide range of information technologies by attending training seminars and reading professional publications (10%); serving as a contact point for dissemination of computing-related publications throughout WVU (5%): assistingcustomers in resolving technical problems relating to word processing, desktop publishing, electronic publications, and use of scanners (5%); supporting consulting staff by assisting customers with routine technical problems (5%); assisting the Director of Academic Computing in assessing, developing, and planning strategies for dissemination of computer publications and information (5%); and creating and maintaining a publication subscription database (5%).

6. On January 1, 1994, the primary job duties of Grievants Chastain and Long (with the percentage of time spent performing each duty shown in parenthesis) were researching, writing, and editing computer-related publications and documentation to provide relevant information to current and potential WVNET customers (40%); providing technical assistance, consultation, and guidance to WVNET personnel and customers as requested (20%); administration of all aspects of technical documentation from determining need to archiving completed products (25%); providing writing, editing, and graphic design support for non-routine projects and activities, and providing back-up assistance for the WVNET Help Desk (10%); and reviewing and testing computer software and documentation, and programming documentation databases (5%).

7. At the time he started working in his current position in 1985, Grievant Cook had four years of experience as a technical writer. HT at 224. In order to perform the essential functions of the EDP Technical Editor - Senior position at WVU a new employee entering the job with a relevant bachelor's degree would require three to four years' directly related experience. HT at 167.

8. At the time Grievant Long began working in her current position, she had less than one year's experience as a technical editor. HT at 556. Grievant Chastain had overfive years' experience as a technical writer before he began working in his current position. HT at 430. In order to perform the essential functions of the EDP Technical Editor - Senior positions at WVNET a new employee entering the job with a relevant bachelor's degree would require three to four years' directly related experience.

9. Grievant Cook is responsible for production of virtually all publications produced by CIR. HT at 51-52. He also serves as Publicity Chair and Co-Coordinator for WVU's annual Computing Technology Fair. HT at 227, 292. Grievant Cook is responsible for recommending the appropriate technology to be employed in producing CIR's recurring publications.

10. Grievants Chastain and Long are expected to identify appropriate projects to address, and, following an agreement with the supervisor concerning their primary objectives, are routinely given wide latitude in completing the project. Grievants generally have substantial discretion in selecting the methods and means for accomplishing all assigned duties.

11. Grievants Chastain and Long have regular and recurring external contacts involving evaluation of products, gathering and verifying technical information, and providing information regarding WVNET systems, services, and resources. Grievant Cook has similar regular and recurring external contacts which primarily involve obtaining and disseminating technical information, and specifically includes explaining editorial and subscription policies.

12. Grievants lift items in excess of 50 pounds on an occasional basis. However, lifting heavy items is not an essential function of their positions. 13. Grievants meet with their supervisor at least annually to set goals for their work areas. Grievants are expected to work toward broad goals, performing the vast majority of their duties with minimal supervision and guidance.

14. The majority of Grievants' duties are performed while seated in front of a computer screen. Grievants are not expected to perform data processing, word processing, or graphics applications activities at a time-sensitive level of productivity. 15. The EDP Technical Editor - Senior job title received 1988 total points from the following degree levels in each of the thirteen point factors: 6.0 in Knowledge; 5.0 in Experience; 2.5 in Complexity and Problem Solving; 3.0 in Freedom of Action; 2.0 in Scope and Effect, Impact of Actions; 3.0 in Scope and Effect, Nature of Action; 1.0 in Breadth of Responsibility; 2.0 in Intrasystems Contacts, Nature of Contact; 3.0 in Intrasystems Contact, Level of Contact; 1.0 in External Contacts, Nature of Contact; 2.0 in External Contacts, Level of Contact; 1.0 in Direct Supervision Exercised, Number; 1.0 in Direct Supervision Exercised, Level; 1.0 in Indirect Supervision Exercised, Number; 1.0 in Indirect Supervision Exercised, Level; 2.0 in Physical Coordination; 2.0 in Working Conditions; and 1.0 in Physical Demands.

16. The point score range for a Pay Grade 15 is from 1985 to 2113 points. The point score range for a Pay Grade 16 is from 2114 to 2254 points.

DISCUSSION

I. BURDEN OF PROOF AND STANDARD OF REVIEW: The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that he 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 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).

The Mercer classification system is largely a "quantitative" system, in which the components of each job are evaluated using the point factor methodology. Therefore, the focus in grievances challenging classification determinations under this system is upon the point factors which the grievant is challenging. A grievant may challenge any combination of point factors and 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 Zara v. Bd. of Trustees, Docket No. 94-MBOT-817 (Dec. 12, 1995); Jessen v. Bd. of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995). 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 is statutorily required to be uniform throughout all higher education institutions. W. Va. Code § 18B-9-4. Therefore, the point factor degree levels are not assigned to the individual, but to the job title. Burke, supra. A Mercer grievant may prevail by demonstrating that his reclassification was made in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989). Finally, whether a grievant is properly classified is almost entirely a factual determination. Accordingly, the interpretation and explanation of the point factors and Position Information Questionnaires (PIQ) at issue by the JEC 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. See also Snider v. W. Va. Bureau of Environment, Docket No. 95-DEP-306 (Sept. 29, 1995). However, no interpretation or construction of a term used in the 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 & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). Thus, the higher education employee seeking to overturn his classification will have to overcome a substantial obstacle to establish that he is misclassified. (See footnote 6)

These standards must now be applied in reviewing the decisions challenged here. Grievants contend that the EDP Technical Editor - Senior classification was undervalued when the JEC rated certain factors using the Point Factor Methodology. Grievants are the only higher education employees classified in this job title. Therefore, whether Grievants were correctly classified is synonymous with whether their assigned job title was correctlyclassified. In order to determine if Grievants were misclassified, the disputed point factors and ratings must be discussed separately in detail.

II. POINT FACTOR ANALYSIS:

A. EXPERIENCE:

The JEC evaluated Knowledge and Experience as related factors. See Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996). The Plan defines Knowledge as follows:

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

The Plan similarly defines Experience in the following language:

> 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.

Under the Plan, Experience may be rated at eight levels ranging from "no experience and up to six months of experience" (Level 1), to "more than eight years of experience" (Level 8). Grievants agree that the JEC correctly evaluated the Knowledge requirement for these positions at a degree level of 6.0, equating to a relevant bachelor's degree. However, they disagree with the JEC's evaluation of the Experience requirement at level 5.0, equating to "over three years and up to four years of experience." Grievants argue that these positions should have been rated at a degree level of 6.0, which requires "over four years and up to six years of experience." As noted by this Grievance Board in Zara, supra, the minimum amount of experience required to perform the

essential duties of a position represents a subjective determination regarding which reasonable people may reach different conclusions. In this matter, Grievants' evidence tended to support the conclusion that a new employee hired to replace one of them, who did not have over four years of prior directly related experience, would not be able to function at their level of performance. However, Grievants did not establish by a preponderance of the evidence that a newly hired employee with a relevant bachelor's degree, and three to four years of directly related experience, would not be able to perform the essential functions of the position, following a reasonable period of on-the-job training. See Hastings v. Bd. of Trustees, Docket No. 94-MBOT-943 (May 28, 1996). Therefore, Grievants did not show that the JEC's evaluation of their job title on this factor was clearly wrong.

B. COMPLEXITY AND PROBLEM SOLVING

The Plan defines Complexity and Problem Solving as follows:

> 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 the extent to which guidelines, standards, and precedents assist or limit the position's ability to solve problems.

The JEC assigned a degree level of 2.5 in Complexity and Problem Solving to this job title. This rating indicates that the duties of these positions were determined to fall between the 2.0 and 3.0 degree levels under the Plan, based upon a determination that a significant portion of the duties were performed at the 3.0 level. HT at 760. A degree level of 2.0 is defined in the Plan as:

> Problems encountered require the employee to make basic decisions regarding what needs to be done, but the employee can usually choose among a few easily recognizable solutions. Established procedures and specific instructions are available for doing most work assignments, with some judgment required to interpret instructions or perform basic computation work such as in the comparison of numbers or facts.

A degree level of 3.0 is defined as:

> Problems encountered can be somewhat complex and finding solutions to problems may require some resourcefulness and originality, but guides, methods and precedents are usually available. Diversified guidelines and procedures must be applied to some work assignments. Employee must exercise judgment to locate and select the most appropriate guidelines, references, and procedures for application, and adapt standard methods to fit variations in existing conditions.

Grievants contend they should have received at least a level 5.0 rating. The Plan defines a 4.0 degree level 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.

The Plan defines the 5.0 degree level Grievants are seeking as follows:

> 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.

Respondent's witness, Debra Fusco, a member of the JEC, testified that Grievants' job responsibilities did not require them to develop new policies, practices, and procedures, according to the JEC's application and interpretation of the Plan's definitions. Thisexplanation is entitled to great weight, unless it is contrary to the plain meaning of the language in the Plan, or is inherently unreasonable. See Watts, supra; Burke, supra. Therefore, Grievants have failed to demonstrate that the JEC was clearly wrong, or acted in an arbitrary and capricious manner, by failing to rate their positions at a 5.0 level for Complexity and Problem Solving.

Curiously, Ms. Fusco only explained the 2.5 rating assigned in mechanical terms, noting generically how the JEC arrived at half point ratings. HT at 760. Beyond explaining why a 5.0 level was inappropriate, she did not apply the definitions of 3.0 and 4.0 levels to the duties and responsibilities Grievants perform to demonstrate how the JEC determined that a 2.5 rating was appropriate in this particular case. In any event, Grievants retain the burden of persuasion that the JEC was clearly wrong in applying the Plan to their particular job duties. See Burke, supra.

Having considered the extensive testimony from Grievants and their supervisors regarding the nature of their work, and having reviewed several typical publications which Grievants introduced to illustrate the work they produce, the undersigned finds that Grievants fall squarely within level 3.0 for Complexity and Problem Solving. Specifically, Grievants are expected to exercise resourcefulness

and originality in producing publications for their employers. Certainly, guides, methods, and precedents are usually available to Grievants when performing these tasks. However, it is clear that Grievants are expected to exercise judgment as "senior editors" to locate and select the most appropriate guidelines, references, and procedures for application. They are expected to select and adapt material for their subscribers and prospective subscribers, insuring that the end product (generally a publication) is meaningful, useful, and readily comprehendible by thetarget audience. Although certain duties performed may meet the level 4.0 definition, the undersigned is unable to conclude that such duties are performed with sufficient regularity and frequency to warrant another half level, according to the standard application of the Plan described by Ms. Fusco.

Accordingly, Grievants have demonstrated by a preponderance of the evidence that the JEC was clearly wrong in evaluating their job duties at a 2.5 level for Complexity and Problem Solving. Id. Where the JEC's determination is not sustained, Grievants may be assigned the correct rating level of 3.0 in accordance with the Plan. Jessen, supra. See Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994). Further, Grievants must be awarded the number of points they would have received had their positions been properly evaluated by the JEC. See Jessen, supra. This increases the total points awarded to their job title by 43 points.

C. FREEDOM OF ACTION

Explaining Freedom of Action, the Plan states:

> This factor measures the degree to which the position is structured as is determined by the types of control placed on work assignments. Controls are exercised in the way assignments are made, how instructions are given to the employee, how work assignments are checked, and how priorities, deadlines and objectives are set. Controls are exercised through established precedents, policies, procedures, laws and regulations which tend to limit the employee's freedom of action.

The JEC rated Grievants at a 3.0 degree level under this factor. Grievants claim they should have been rated at level 4.0 or 5.0. To place this claim in context, a 3.0 rating is defined by the Plan as follows:

> Tasks are moderately structured with incumbent working from objectives set by the supervisor. At this level, the employee organizes and carries out most of the work assignments in accordance with standard practices, policies,instructions or previous training. The employee deals with some unusual situations independently.

A 4.0 rating is defined as:

> Tasks are minimally structured with incumbent working from broad goals set by the supervisor and established institutional policies. The employee and supervisor work together to establish objectives, deadlines and projects. The employee, having developed expertise in the line of work, is responsible for planning and carrying out the assignment; resolving most of the conflicts which arise; and coordinating the work with others. The employee keeps the supervisor informed of progress and potentially controversial matters. Completed work is checked only to determine feasibility, compatibility with other work, or effectiveness in meeting the objectives of the unit.

The Plan explains a 5.0 rating in the following terms:

> Virtually all tasks are unstructured; assignments are in terms of setting objectives within strategic planning goals. At this level, the employee has responsibility for planning, designing and carrying out programs, projects and studies; employee sets goals for a major unit, program or department. Approval from higher supervision may be necessary only in terms of financial impact and availability of funds, but little reference to detail is discussed with the next level supervisor. Work review concerns matters such as fulfillment of goals and objectives.

Review of Respondents' evidence indicates that only employees employed in a supervisory capacity, primarily Directors, Assistant Directors, and Associate Deans, were rated at level 5.0 by the JEC. Grievants' job duties clearly do not fall within the 5.0 definition. Grievants and their supervisors consistently testified that they mutually agree upon goals, and Grievants then receive minimal supervision while working toward those goals. Indeed, there was uncontroverted evidence that Grievants and their immediate supervisors work together to establish objectives, deadlines and projects. It is likewise apparent that the supervisors expect Grievants to be creative and innovative in their approach to disseminating information to the various constituencies served by their employers. Although Grievants' major work products are reviewed prior to publication, thiswas described as a cooperative effort to insure that the information being disseminated was up to date and accurate, not to check on Grievants' work performance.

Given these undisputed facts, Grievants' primary job duties appear to fall squarely within the level 4.0 definition under Freedom of Action. Indeed, the JEC's selection of the term "editor" in Grievants' job title is indicative of their discretion to supervise the publications in their respective areas of responsibility by selecting, arranging and annotating materials obtained from various sources. See Watts, supra. Likewise, the fact that Grievants have been titled as "senior editors" exemplifies their expertise in technical writing, another specific element in the 4.0 level definition which Grievants meet. Id.

Ms. Fusco did not articulate any specific rationale for the JEC's determination that a 3.0 was

proper, beyond describing the 3.0 and 4.0 definitions in generic terms. A preponderance of the evidence of record indicates that the majority of Grievants' duties are minimally structured, that Grievants are individually responsible for planning and carrying out their assignments independently, and completed work is generally checked only for effectiveness in meeting the objectives of the unit as described in the 4.0 rating definition. Thus, the undersigned must conclude that the JEC's decision to assign Grievants' job title a 3.0 rating for this factor in the Plan was clearly wrong. See Burke, supra. Awarding Grievants the points they would have received, had their positions been correctly evaluated, increases their total points by an additional 100 points. See Jessen, supra.

D. SCOPE AND EFFECT

The Plan explains Scope and Effect as follows:

> This factor measures the scope of responsibility of the position with regard to the overall mission of the institution, and/or the West Virginia higher education systems, as well as the magnitude of any potential error. Decisions regarding the nature of action should consider the levels within the systems that could be affected, as well as impact on the following points of institutional mission: instruction, instructional support, research, public relations, administration, support services, revenue generation, financial and/or asset control, and student advisement and development. In making these judgments, consider how far-reaching is the impact and of what importance to the institution and/or the higher education systems is the work product, service or assignment. Decisions regarding the impact of actions should take into account institutional scope and size as reflected by operating budget, student enrollment and institutional classification. Also, consideration should be given for the possibility that a unit, program or department within a large institution may be equivalent in size to multiple units, programs or departments within a smaller institution. In making these interpretations, assume that the incumbent would have normal knowledge, experience and judgment, and that errors are not due to sabotage, mischief or lack of reasonable attention and care.

This factor involves a matrix approach containing two complimentary elements, "Impact of Actions" and "Nature of Action." The JEC rated Grievants at level 2.0 on Impact of Actions and level 3.0 for Nature of Action. Grievants propose that they should have been assigned ratings one level higher on each element; a 3.0 for Impact of Actions and 4.0 for Nature of Action. The Impact of Actions element of this factor will be addressed first.

Level 2.0 is defined in the Plan as follows: "Work affects either an entire work unit or several major activities within a department." The Plan explains level 3.0 in these terms:

> Work affects the operations of more than one school, branch campus, community college or baccalaureate-level institution with a budget of < $13M; a school or a division of a graduate-level institution with an operating budget of $13-$18M; several departments within a graduate or baccalaureate 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 doctorate-level institution with an operating budget of more than $200M.

Ms. Fusco noted that this factor was primarily intended to accommodate the differences inherent among positions at large and small institutions governed by the Plan. HT at 763. She further explained that the JEC determined that Grievants' work had a major impact on a major activity within their assigned unit. HT at 764. In other words, Grievants were simply an integral part of the information dissemination function within their respective organizations. Although this assigns Grievants to a relatively low point in the hierarchy, the Plan clearly states that this factor is intended to measure the employee's "scope of responsibility."

Thus, the JEC's application of this factor to Grievants reflects a value judgment that the work they perform is incidental to the overall mission of their respective employers. As previously held in Jessen, supra, such value judgments are an inherent element of the function of position classification. See Steven W. Hays & T. Zane Reeves, Personnel Management in the Public Sector 101-120 (1984). Furthermore, the JEC's interpretation is not so inconsistent with the language of the Plan as to constitute an abuse of discretion. See Watts, supra. An administrative law judge may not simply substitute his judgment for that of the JEC. See generally, Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Therefore, the undersigned is not persuaded that the JEC's determination was either arbitrary and capricious or clearly wrong. See Burke, supra. Turning to the Nature of Action element of Scope and Effect, the Plan defines the 3.0 level assigned Grievants by the JEC in these terms:

> 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.

Grievants assert entitlement to a 4.0 rating which reads:

> 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.

As discussed above, in addressing the Impact of Actions element of this factor, the Plan's language gives the JEC considerable latitude in determining what constitutes "significant impact" of an employee's work. See Jessen, supra. In these circumstances, Grievants have not presented any

compelling rationale to support a finding that the JEC either abused its discretion or was clearly wrong in assigning a 3.0 rating to Grievants' job title under the Nature of Action element of Scope and Effect. See Burke, supra.

E. EXTERNAL CONTACTS

According to the Plan:

> This factor appraises the responsibility for working with or through other people outside the SCUSWV to get results. Consider the purpose and level of contact encountered on a regular, recurring and essential basis during operations. Consider whether the contacts involve furnishing or obtaining information, influencing others or negotiation. (Emphasis in original.)

This factor has two elements: Nature of Contact and Level of Contact. Grievants disagree with the level 1.0 rating assigned by the JEC under Nature of Contact as well as the level 2.0 rating assigned for Level of Contact. Grievants propose that they should be rated at 2.0 and 3.0, respectively.

The JEC rated Grievants' duties under Nature of Contact at level 1.0. The Plan defines this level as:

> Routine information exchange and/or simple service activity; requires common courtesy; (e.g., furnishing or obtaining factual information, ordering supplies, describing simple procedures). The Plan defines a level 2.0 rating as follows:
>
> Moderate 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, coordinat ing/scheduling complex meeting or conference arrangements.)

The primary emphasis of Grievants' positions involves dissemination of information to customers. The JEC assigned a 2.0 rating to Grievants under the Nature of Contact element of the Intrasystems Contacts factor, but only a 1.0 rating for the same element in the External Contacts factor. Respondents' witnesses offered no cogent reason for this distinction. The nature of Grievants' work is such that the same level of tact and sensitivity is required in dealing with people, either internally or externally, when the same or related subjects are being discussed. Once again, as "senior editors" with responsibility for producing a variety of technical publications, at least moderate tact and cooperation are required in performing their duties. Grievants' duties are comparable to those of other employees whose 2.0 rating by the JEC has been upheld by this Grievance Board. See, e.g., Perkins v. Bd. of Trustees, Docket No. 94-MBOT-733 (Oct. 31, 1996); Miller v. Bd. of Directors,

Docket No. 94-MBOD-495 (Oct. 29, 1996). In this instance, the JEC's action is found to be arbitrary and capricious. See Burke, supra. Therefore, Grievants are entitled to an additional 8 points. See Jessen, supra.

The Plan defines level 2.0 under Level of Contact to require regular, recurring and essential contact with the "general public, visitors, and/or service representatives and vendors." Level 3 is similarly defined to involve such contact with "students, parents, alumni, faculty of institutions outside the systems, sales engineers, higher-level product representatives, recruiters and/or prospective students." Ms. Fusco explained that thecontact referred to in this factor means "personal" contact, including face-to-face, telephonic, or written correspondence. HT at 767-69. Thus, generic publications and "to whom it may concern" written or electronic communications were not considered in evaluating this element.

Although Grievant Cook has regular and recurring contact with persons who match the level 3 definition in the Plan, a preponderance of the evidence indicates that such contacts are not inherent in the work performed by all Grievants. Moreover, these contacts arise only because Grievant Cook serves as one of the Coordinators for WVU's annual Computer Technology Fair. This activity is not specifically addressed in the Position Description he submitted with his appeal. Grievants Chastain and Long have occasional contact with persons at level 3.0, but such contact was not demonstrated to be regular and recurring. Accordingly, the undersigned finds that the JEC's evaluation of the Level of Contact element of this factor was not clearly wrong considering the predominant duties Grievants perform. See Hastings, supra.

F. PHYSICAL COORDINATION

The Plan explains this factor as follows:

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

The Plan breaks down this factor into five levels. The JEC determined that Grievants function at level 2.0 which states:

> Work 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.

Grievants maintain that the proper rating for their duties is 4.0, which reads:

> 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.

Also pertinent to this factor is level 3.0:

> Work 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.

Because Grievants' primary job duties are essentially intellectual, they are not subject to any particular speed and accuracy standards in their use of computer terminals or personal computers. Grievants note that their positions require them to work with graphics, not just word processing, and suggest that this aspect of their work entitles them to a higher rating on this factor. Indeed, Grievant Chastain testified in some detail about the difficulty he faced in modifying a particular graphic "pixel by pixel" on his computer screen, in order to customize the item for use in a publication.

Grievants' argument is plausible. However, there is insufficient evidence that the special skill described by Grievant Chastain is regularly required in performing Grievants' day-to-day job duties. Moreover, the activities described are not consistent with the Plan's requirement for "rapid physical motions" in the use of office equipment in order to obtain a 4.0 rating. While accuracy may be required in working with graphics, there is no indication that speed is a consideration. Both speed and accuracy are prerequisites for a level 3.0 rating under this factor. Where the employer has not required that these duties be performed at a set level of speed and accuracy, the JEC has not abused its discretionand has not been shown to be clearly wrong in assigning a 2.0 rating to Grievants' duties. See Barber v. Bd. of Trustees, Docket No. 94-MBOT-872 (Oct. 31, 1996).

G. PHYSICAL DEMANDS

The Plan states:

> This factor 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.

This factor has five available rating levels. The JEC rated Grievants at level 1.0. Grievants assert they should have been rated at level 2.0 or 3.0. Those ratings are defined in the plan as follows:

> [1.0] Job is physically comfortable; individual is normally seated and has discretion about walking, standing, etc. May occasionally lift very lightweight objects.

> [2.0] Light physical effort required involving stooping and bending; individual has limited discretion about walking, standing, etc.; occasional lifting of lightweight objects (up to 25 pounds).

> [3.0] Moderate 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).

Grievants Chastain and Long rated themselves at level 2 on their PIQ, noting:

> Minimal physical demands; occasional handling of desktop computing hardware and boxes containing paper, printed newsletters and other documents.

Grievant Cook similarly stated on the WVU Position Description he submitted with his appeal:

> Incumbent is normally seated to perform duties, but occasional lifting of microcomputers and associated peripheral equipment may be necessary. Some lifting of boxes (up to 50 pounds) is occasionally required. Occasional travel and overtime may be required.

Although it is undisputed that Grievants occasionally lift items such as boxes of paper and various computer components, their predominant duties, as indicated by the duties and responsibilities listed in Section III of their PIQs, are primarily intellectual, and essentially sedentary. Indeed, in testifying extensively concerning their duties, Grievants only discussed lifting when addressing this particular factor.

Therefore, the JEC's conclusion that lifting is not an essential function of these positions does not represent such a departure from the available evidence as to represent a clear mistake of fact or an arbitrary and capricious determination. See Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985). Accordingly, the JEC was not clearly wrong in assigning a 1.0 rating to the EDP Technical Editor - Senior job title for Physical Demands. See Hastings, supra; Zara, supra.

H. SUMMARY

Grievants failed to establish by a preponderance of the evidence that Respondents, through the JEC, interpreted or applied the Plan to the duties and responsibilities of their positions in a manner that was clearly wrong or arbitrary and capricious in regard to the evaluations assigned to

Experience, Scope and Effect, the Level of Contact element of External Contacts, Physical Coordination, and Physical Demands. However, Grievants established by a preponderance of the evidence that the JEC was clearly wrong or acted in an arbitrary and capricious manner in assigning a level 2.5 rating for Complexity and Problem Solving, a 3.0 rating for Freedom of Action, and a 1.0 rating for the Nature ofContact element of External Contacts. Accordingly, Grievants must be constructively awarded the appropriate number of points to match the ratings they should have received in accordance with the Plan. Changing the data line for the EDP Technical Editor - Senior job title to reflect the proper ratings, as previously discussed, results in 151 additional points in accordance with Respondents' table. This increases the total points for this job title to 2139. Under the Plan, positions with point totals between 2114 and 2254 are allocated to Pay Grade 16. Therefore, while Grievants are properly classified as EDP Technical Editors - Senior, Respondents will be required to assign Grievants to Pay Grade 16 and to pay backpay, with interest, retroactive to January 1, 1994, based upon the difference, if any, between each Grievant's actual salary and the salary each would have received had he or she been properly assigned to Pay Grade 16 at that time.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

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. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

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; Burke, supra.

3. The interpretation and explanation of point factors by Respondent's Job Evaluation Committee (JEC) will be given great weight unless clearly wrong, where the proper classification of a grievant is almost entirely a factual determination. See Tennantv. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995); Burke, supra. Likewise, subjective determinations of the JEC regarding application of the point factor methodology in Respondent's Job Evaluation Plan (Plan) to an employee or group of employees are entitled to deference when being reviewed by this Grievance Board. Miller v. Bd. of Directors, Docket No. 94-MBOD-495 (Oct. 29, 1996). However, such

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, review of the evidence of record makes it clear that a mistake has been made. Jessen v. Bd. of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995). 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 Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989).

4. While a searching inquiry into the facts is required, an administrative law judge may not simply substitute his judgment for that of the JEC. See generally, Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

5. Grievants failed to prove by a preponderance of the evidence that the JEC's interpretation and application of the Plan to their EDP Technical Editor - Senior positions as regards the evaluations assigned to the point factors of Experience, Scope and Effect, the Level of Contact element of External Contacts, Physical Coordination, and Physical Demands, was clearly wrong or otherwise unsupported by the available evidence.

6. Grievants established by a preponderance of the evidence that the JEC was clearly wrong, or acted in an arbitrary and capricious manner, in assigning a rating of 2.5for Complexity and Problem Solving, a 3.0 rating for Freedom of Action, and a 1.0 rating for the Nature of Contact element of External Contacts to the EDP Technical Editor - Senior job title.

7. Grievants demonstrated by a preponderance of the evidence that by assigning the point values to which they are properly entitled under the Plan to the point factors of Complexity and Problem Solving, Freedom of Action, and the Nature of Contact element of External Contacts, their properly classified position of EDP Technical Editor -Senior should be assigned to Pay Grade 16.

Accordingly, this Grievance is **GRANTED**, in part. The Respondent Board of Trustees is hereby **ORDERED** to change the data line for the EDP Technical Editor - Senior classification to reflect a rating of 3.0 for Complexity and Problem Solving, a rating of 4.0 for Freedom of Action, and a rating of 2.0 under the Nature of Contact element for External Contacts. Respondent is further **ORDERED** to allocate the properly classified EDP Technical Editor - Senior positions occupied by Grievants Barbara Long, George Chastain, and Chester Cook to Pay Grade 16, retroactive to January 1, 1994, and to pay each of them damages in the form of the difference between the salaries they would have received had their positions been properly allocated to Pay Grade 16 and the salaries which each of

them received while their positions were improperly allocated to Pay Grade 15, if any, with interest. All other requested relief 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 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 30, 1997

Footnote: 1

These grievances were among over 540 grievances waived to Level IV at the same time by the BOT and the Board of Directors for the State College System of West Virginia. For a more detailed recitation of the procedural history involving these grievances, the background of the Mercer reclassification project, and the definitions of various terms of art specific to the Mercer reclassification, the reader is referred to this Board's decision in Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

Footnote: 2

In regard to the testimony of Michael Messina, Grievant's motion to qualify Mr. Messina as an expert witness is granted for the purposes for which his testimony was offered, for the reasons stated in an Order dated July 10, 1996, in Liston v. Bd. of Trustees, Docket No. 94-MBOT-845, which is hereby adopted in its entirety in this case. In addition, Grievant's Rebuttal Exhibits 1 through 7 are hereby admitted, except that such exhibits shall include the entire text of the depositions of Michael Messina and Margaret Robinson, and the entire text of the testimony of Teresa Crawford and Margaret Phillips, as offered in the matter of Lawrence v. Bd. of Trustees, Docket No. 94-MBOT-461. Further, the training tapes offered by Respondent as Respondent's Rebuttal Exhibit 1 are likewise admitted.

Footnote: 3

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

Footnote: 4

Grievants challenged additional factors in their earlier appeals to the JEC, and in certain aspects of the evidence presented at Level IV. However, any ratings which were not argued in their extensive post-hearing brief are considered

abandoned.

Footnote: 5

After the parties submitted their written post-hearing arguments, a written transcript of the Level IV hearing was prepared by this Grievance Board to facilitate adjudication of this grievance. This transcript will be cited herein as "HT at ." Exhibits admitted at the hearing will be cited as "G Ex ," for Grievants' exhibits, "R Ex ," for Respondents' exhibits, and "J Ex ," for joint exhibits.

Footnote: 6

Grievants' contention that this Grievance Board extends undue deference to the JEC's factual conclusions and discretionary interpretations in applying the Plan under the foregoing standards is rejected for the reasons set forth in this Board's earlier decision in Gregg v. Board of Trustees, Docket No. 94-MBOT-863 (Dec. 18, 1996). Although the classification process could have been conducted differently, Grievants' evidence, including expert opinions from an outside consultant, did not demonstrate that the JEC made a clear error of judgment in designing the classification methodology or included clearly irrelevant factors in the classification process. See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).