DONNA BURGRAFF and

LAURIE SHAW,

Grievants,

v. Docket No. 97-BOD-523/532

BOARD OF DIRECTORS, SOUTHERN WEST VIRGINIA

COMMUNITY AND TECHNICAL COLLEGE,

Respondent.

D E C I S I O N

Dr. Donna L. Burgraff and Laurie J. Shaw ("Grievant Burgraff" and "Grievant Shaw" or "Grievants") initiated substantially identical grievances under W. Va. Code §§ 18-29-1, et seq., on August 19, 1997, alleging that they were improperly classified by Respondent Board of Directors ("Respondent") in their positions at Southern West Virginia Community and Technical College ("SWVCTC"). Grievant Burgraff seeks to be reclassified from Program Manager in Pay Grade 17, to Director of Talent Search in Pay Grade 19. Grievant Shaw similarly seeks to be reclassified from Program Manager to Director of Student Support Services in Pay Grade 19.

The grievances could not be resolved at Level I, and Grievants appealed to Level II where a consolidated evidentiary hearing was conducted on October 17, and November 4, 1997. On November 20, 1997, SWVCTC President Travis Kirkland denied the grievances at Level II. Grievants each elected to waive Level III, as authorized by W. Va.Code § 18-29-4(c). Thus, Grievant Burgraff appealed to Level IV on November 24, 1997, and Grievant Shaw submitted her appeal on December 2, 1997. After this matter was set for hearing, on December 23, 1997, Grievant Burgraff filed a Motion to Sever her grievance from that filed by Grievant Shaw. This motion was denied on February 3, 1998. Respondent filed a Motion to Dismiss on April 2, 1998, contending that Grievants had failed to timely contest their initial classifications. After receiving written objections from Grievants, the motion was denied, pending resolution of pertinent contested facts on the record at Level IV. Subsequently, following a series of continuances, each of which was granted for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on May 28 and

July 22, 1998, and in SWVCTC's office in Logan, West Virginia, on August 13, 1998. (See footnote 1) This matter became mature for decision on October 8, 1998, following receipt of the parties' post-hearing briefs and reply briefs from Grievants.

DISCUSSION AND ANALYSIS

As previously noted, Respondent seeks to have these grievances dismissed, contending that Grievants did not timely challenge their initial classifications in accordance with specific procedures contained in the Legislative Rule which implemented W. Va. Code § 18B-9-4, 131 C.S.R. 62 (1994). Because this contention is dispositive of Grievant Shaw's claim, and must be addressed before proceeding to the merits of Grievant Burgraff's claim, it will be discussed first. **I. AFFIRMATIVE DEFENSE - TIMELINESS**

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this issue have been determined.

FINDINGS OF FACT

1. Merle Dempsey is employed by SWVCTC as Vice President of Student Services. In that capacity, Vice President Dempsey serves as the immediate supervisor of Grievants Burgraff and Shaw.

2. Patricia Clay is employed by SWVCTC as Director of Human Resources. She is also a voting member of the Job Evaluation Committee ("JEC"), which is responsible for overseeing the classification system developed for higher education classified staff in accordance with the legislative mandate in W. Va. Code § 18B-9-4.

3. In 1993, with the assistance of an outside consultant, SWVCTC developed two separate programs to be funded by federal grants. Ms. Clay and Vice President Dempsey worked together to develop position descriptions for classified positions to be filled with funds from these grants. These positions included the Director of Talent Search position ultimately held by Grievant Burgraff and the Director of Student Support Services position ultimately held by Grievant Shaw.

4. The job descriptions developed to apply for the federal grants were referred to by Ms. Clay when she determined that these positions should be assigned to the Program Manager classification in Pay Grade 17 under the Job Evaluation Plan ("Plan") developed for the Mercer (See footnote 2) classification system. See E Ex 2 at L II.

5. Prior to January 1, 1994, Grievant Burgraff was a member of the faculty at SWVCTC. On January 1, 1994, Grievant Burgraff agreed to temporarily assume the duties of Assistant Dean of Student Services, while continuing to teach some classes at SWVCTC.

6. In late September 1994, SWVCTC's then President, Harry Boyer, asked Grievant Burgraff to take the position of Project Director - Talent Search. She accepted, conditioned upon retaining her current salary, and retaining the services of a particular secretary. Grievant Burgraff held that position from October 1, 1994, to February 13, 1998.

7. The duties of Grievant Burgraff's position did not change significantly from the time she was hired in October 1994, until she left for another position with Marshall University in February 1998.

8. Grievant Shaw is employed by SWVCTC in the capacity of Project Director - Student Support Services. She was hired into that position on November 8, 1993. See Shaw Ex C at L IV.

9. Grievant Shaw was hired at an initial annual salary of $31,000. Shaw Ex C at L IV. Her salary did not change as a result of the Mercer reclassification project. (See footnote 3) 10. At the time Grievant Shaw began working for SWVCTC in November 1993, Vice President Dempsey was concerned that the Student Support Services program was in jeopardy of noncompliance with the terms of the federal grant unless additional personnel were employed in the program, in accordance with the timetable in the approved grant application. Thus, he told Grievant Shaw she did not need to prepare a PIQ at that time, and she did not need to be concerned about the title assigned to her position.

11. Grievant Shaw was more concerned with losing her job, if SWVCTC failed to comply with the terms of the federal grant funding her position, than pursuing the issue of whether her position had been classified properly under the Plan.

12. The duties of Grievant Shaw's position as Project Director - Student Support Services did not change in any substantial or meaningful manner from the time she was first employed in that capacity until she filed this grievance in August 1997.

13. In, or shortly before, October 1996, Vice President Dempsey asked all classified staff in Student Services, including Grievants Burgraff and Shaw, to prepare updated Position Information Questionnaires (PIQs), so that the classifications of their positions could be reviewed.

14. In the course of preparing a PIQ for her position, Grievant Burgraff discovered that other classified employees at other educational institutions performing similar duties involving “Trio”

programs were classified at Pay Grade 19. (See footnote 4) 15. Grievant Burgraff brought this discrepancy to the attention of Grievant Shaw.

16. Grievants Burgraff and Shaw prepared PIQs for their respective positions. These were the first PIQs prepared for their positions.

17. After unsuccessful, informal attempts to resolve their claims that their positions should be classified in Pay Grade 19, Grievants Burgraff and Shaw filed grievances contesting their current classifications on August 19, 1997.

DISCUSSION OF AFFIRMATIVE DEFENSE

Generally, the party asserting an affirmative defense, such as untimely filing, has the burden of establishing that defense by a preponderance of the evidence. Hawthorne v. Bd. of Directors, Docket No. 97-BOD-252 (Nov. 5, 1997); Norton v. Bd. of Directors, Docket No. 96-BOD-369 (Dec. 9, 1996). See also McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995).

Respondent asserts that Grievants are barred from pursuing their grievances over their assigned Mercer classifications because they did not submit a timely appeal from their initial classification determination in accordance with the Legislative Rule which established specific procedures for resolving such disputes. In particular, Respondent relies upon 131 C.S.R. 62 § 18.1 (1994), which states:

> An employee may seek a review of his/her initial classification under the new program implemented pursuant to this rule and may appeal such initial classification through the procedures of W. Va. Code §18-29 after completing such review. Such review or appeal shall be governed by theprovisions of this rule and to the extent these provisions are inconsistent with W. Va. Code §18B-9-7 or W. Va. Code §18B-9-4, those code provisions are deemed null and void pursuant to the authorization contained in W. Va. Code §18B-9-4(c). If an employee does not first seek a review of his/her initial classification through the internal procedures set out herein, they shall be prohibited from grieving that classification under W. Va. Code §18-29. (Emphasis added.)

131 C.S.R. 62 § 18.2 explains the internal procedures referred to in § 18.1 as follows:

> An employee may seek a review of his/her initial classification, job title or pay grade by filing a request for review form after formal notification of his/her title and pay grade under the new program, but no later than January 31, 1994. Request for review forms shall be available at each institution and shall be in a form prescribed by the governing boards.

The regulations continue, explaining the request for review form was to be filed with the president of the institution, or his designee, who would then make a recommendation to the JEC by March 31, 1994.

The general rule for timely grieving classification matters under W. Va. Code § 29- 6A-1, et seq., is stated in Syllabus Point 5 of Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995). There, the Supreme Court of Appeals of West Virginia declared:

> W. Va. Code, 18-29-2 (1992), allows an employee to contest a misclassifica tion at any time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance.

Thus, claims of misclassification may generally be initiated at any point in time while the alleged misclassification remains in effect. This is because such a situation is treated as a “continuing violation,” rather than a discrete event. See W. Va. Inst. of Technology v.W. Va. Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989); Casto v. Kanawha County Bd. of Educ., Docket No. 95-20-567 (May 30, 1996). See also West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 18, 1997); Coddington v. W. Va. Dep't of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994). However, the procedures established in 131 C.S.R. 62 § 18.1 for contesting classifications established under the Mercer reclassification project provide a specific exception to this general rule. Accordingly, this Grievance Board has held that an employee's failure to go through the required internal review procedure for Mercer Plan classification disputes precludes the employee from pursuing a grievance on her reclassification. Hardy v. Bd. of Directors, Docket No. 94-MBOD-963 (Dec. 21, 1995).

Respondent established that Grievant Shaw was on notice of her classification as a Program Manager in Pay Grade 17 in time to file an appeal of her initial classification in accordance with 131 C.S.R. 62 § 18. Moreover, SWVCTC provided Grievant Shaw with ample information regarding the availability of the grievance procedure and the specific limitations applicable to grievances arising under the Mercer reclassification process. See R Exs L, M, N & O at L IV. Beyond inquiring about her title to Vice President Dempsey, Grievant Shaw made no serious effort to appeal her classification prior to August 1997. Although Grievant Shaw points to this conversation as influencing her decision not to file a grievance until over three years later, Vice President Dempsey made no real or

implied threat which would reasonably deter Grievant Shaw from exercising her right to grieve. See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). Indeed, the undersigned Administrative Law Judge is persuaded that Grievant Shaw's failure to pursueher available remedies at the appropriate time was a matter of personal priorities, and not the result of any coercion, confusion, or interference from SWVCTC. Moreover, ignorance of the existence of, or misunderstandings about the requirements of the grievance procedure neither tolls nor excuses the failure to file a timely grievance. Bourgeois v. Bd. of Trustees, Docket No. 93-BOT-268B (Mar. 30, 1994). See Cutright v. Alcohol Beverage Control Admin., Docket No. 90-ABCC-354 (Oct. 11, 1990).

Grievant Shaw's assigned duties have not changed since she began working as the Student Support Services Director in November 1993. In these circumstances, she is barred from pursuing a grievance contesting her current classification as a Program Manager in Pay Grade 17. See Hardy, supra.

On the other hand, no one was working for SWVCTC in Grievant Burgraff's position until after the deadlines for filing a Mercer classification grievance had passed, nor had anyone ever worked in that position. SWVCTC has not provided any cogent explanation as to how the requirements in 131 C.S.R. 62 operate to preclude Grievant Burgraff from pursuing her grievance. (See footnote 5) Indeed, SWVCTC told its employees in July 1994 that it was then too late to initiate a grievance over their new classification under the Plan, if they had not already pursued relief in accordance with the internal review procedure in the Legislative Rule. E Ex 11 at Level II. This information was disseminated to SWVCTCemployees before the position ultimately occupied by Grievant Burgraff was posted for the first time and filled. See R Ex J at L IV. In these circumstances, Grievant Burgraff is not precluded from pursuing a grievance over her classification by any provision in 131 C.S.R. 62 (1994).

To the extent SWVCTC contends that Grievant Burgraff is barred from pursuing a grievance regarding her classification under the statutory time limits contained in W. Va. Code § 18-29-4, Martin, supra, clearly establishes that such a claim relates to a “continuing violation” which may be addressed at anytime. (See footnote 6) Thus, Grievant Burgraff's claim is not time-barred. However, Martin further provides that, should Grievant Burgraff prevail on the merits of her claim, she may only recover back pay from 15 days preceding the filing of this grievance.

II. GRIEVANT BURGRAFF'S MISCLASSIFICATION CLAIM

Having determined that Grievant Shaw is barred from pursuing her grievance for failure to follow the specific procedures for contesting her classification under the Mercer Plan contained in 131 C.S.R. 62, and that Grievant Burgraff's grievance is not time-barred by either that Legislative Rule or W. Va. Code § 18-29-4, the merits of Grievant Burgraff's claims will be addressed. In this regard, the following additional Findings of Fact are appropriately made.

ADDITIONAL FINDINGS OF FACT

18. The Talent Search Program at SWVCTC is an educational outreach program completely funded by a grant from the United States Department of Education. The program is designed to keep certain at-risk students in high school, to return certain high school dropouts to school to complete their GED, and to encourage both groups of students to continue with their post-secondary education.

19. Although 35 percent of the students in West Virginia's secondary schools go on to college, or other post-secondary education program, approximately 75 percent of the students participating in SWVCTC's Talent Search Program proceed to college.

20. The Talent Search Program administered by Grievant Burgraff serves approximately 600 students in 22 schools in 3 West Virginia counties.

21. On September 30, 1997, after these grievances were heard at Level II, Ms. Clay conducted a desk audit of Grievant Burgraff's position. See R Ex C at L IV. In a desk audit, a human resources professional normally goes to the employee's work area, conducts a structured interview with the employee regarding his or her job duties, and may review examples of the employee's work, or observe the employee performing certain assigned duties.

22. On March 5, 1998, the JEC reviewed Grievant Burgraff's revised PIQ (R Ex A at L IV) in a telephone conference call, and determined, by majority vote, that she was properly classified as a Program Manager in Pay Grade 17. See Burgraff Ex D at L IV. This review was conducted in compliance with the Level II decision in this grievance. 23. As a result of Ms. Clay's desk audit and the JEC review described in Findings of Fact Numbers 21 and 22, above, the position occupied by Grievant Burgraff was assigned the following degree levels in each of the thirteen point factors: (See footnote 7) 7.0 in Knowledge; 4.0 in Experience; 4.0 in Complexity and Problem Solving; 4.0 in Freedom of Action; 2.0 in Scope and Effect, Impact of Actions; 3.0 in Scope and Effect, Nature of

Actions; 1.0 in Breadth of Responsibility; 2.0 in Intrasystems Contacts, Nature of Contact; 2.0 in Intrasystems Contacts, Level of Contact; 2.0 in External Contacts, Nature of Contact; 3.0 in External Contacts, Level of Contact; 4.0 in Direct Supervision Exercised, Number; 5.0 in Direct Supervision Exercised, Level; 1.0 in Indirect Supervision Exercised, Number; 1.0 in Indirect Supervision Exercised, Level; 1.0 in Physical Coordination; 1.0 in Working Conditions; and 1.0 in Physical Demands. Burgraff Ex D at L IV.

24. The original grant proposal submitted to the United States Department of Education for the Talent Search position ultimately held by Grievant Burgraff specified that the director of the program should have a minimum of five years experience.

25. Grievant Burgraff, Vice President Dempsey, and SWVCTC President Kirkland believe three to five years experience is required for the Talent Search position at issue. See R Ex A.

26. The Talent Search position was posted in 1994 as requiring “two to five years relevant work experience.” See R Ex J at L IV. Ms. Clay's job audit determined that the minimum essential functions of the Talent Search position could be performed by a newly-hired employee with a relevant Master's Degree and two to three years of job-related experience. The JEC agreed with Ms. Clay's assessment. See Burgraff Ex D at L IV.

27. Grievant Burgraff has regular and recurring intrasystems contacts with the Administrative Secretary and Educational Outreach Counselors under her supervision, the Vice President of Student Affairs, who is her immediate supervisor, and monthly contact with the Talent Search Coordinator at the Central Office for the College and University Systems of West Virginia.

28. Grievant Burgraff has regular and recurring external contacts with teachers, students, and principals in the county school systems, as well as parents.

29. Grievant Burgraff directly supervises three Educational Outreach Counselors and an Administrative Secretary. See R Ex A at L IV.

30. The Educational Outreach Counselors hire and oversee the work of a number of tutors, who are employed on a part-time, temporary basis. The tutors are paid an hourly wage, and are not eligible for fringe benefits extended to regular employees. These tutors are not classified employees covered by the Plan. Thus, their supervisors are not required to follow the policies and procedures applicable to regular classified employees in their working relationships with the tutors.

31. Unlike SWVCTC , some other higher education institutions in West Virginia employ full-

time regular employees who are classified as Tutors in Pay Grade 15. See R Ex B at L IV at 5. 32. Prior to the time this grievance was filed, the Educational Outreach Counselors did not sign the time cards for the tutors employed in SWVCTC's Talent Search Program. These time cards were routinely signed by Grievant Burgraff.

33. Grievant Burgraff is responsible for drafting and submitting an application to renew the federal grant covering SWVCTC's Talent Search Program every 4 years.

34. Vice President Dempsey recommended that Grievant Burgraff's position be upgraded to a Pay Grade 19 position, comparable to a similar position at Potomac State College.

35. The Director of the Upward Bound Program at West Virginia Institute of Technology is classified in Pay Grade 19. Burgraff Ex B1 at L IV. Likewise, the Director of the Upward Bound Program at Potomac State College is classified in Pay Grade 19. Burgraff Ex B2 at L IV. Similarly, the Director of Student Support Services at Potomac State College is classified in Pay Grade 19. Burgraff Ex B3 at L IV.

36. At the time the JEC initially classified the positions described in Finding of Fact Number 35, above, in 1994, there were five employees in the state college and university systems working in the capacity of Director of Student Support Services, and three employees working as Directors of Upward Bound. See E Ex 5 at L II.

37. At the time the positions described in Finding of Fact Number 35, above, were classified, the JEC averaged the numerical data reported in the incumbents' PIQs. See E Ex 6 at L II. As a result, these positions were credited with providing direct supervision over first-line supervisors (Level F or 6) and with supervising from 4 to 6 direct subordinates (Level 4). Cf. E Exs 2 & 5 at L II. Similarly, these positions were creditedwith providing indirect supervision over non-supervisors who are under the position's line of authority (Level B or 2), as well as indirectly supervising between 16 and 30 employees (Level 5). Cf. E Exs 2 & 5 at L II.

38. Since completing the initial classification process in 1994, the JEC has discontinued the practice of averaging when classifying new positions or reviewing the classification of existing positions. Instead, the point factor methodology in the Plan is applied to the specific position under review in isolation from other positions holding the same job title.

DISCUSSION

In a grievance alleging misclassification, the grievant has the burden of proving 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 v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant asserting misclassification must identify the job she feels she 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 higher education grievant is not likely to meet her burden of proof merely by showing that the grievant's job duties better fit one job description than another, because the Mercer classification system does not use "whole job comparison". 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 adjudicating a classification dispute under the Mercer system is upon the specific point factors thegrievant is challenging. A grievant may challenge any combination of point factor degree levels, so long as she clearly identifies the point factor degree levels she is challenging, and this challenge is consistent with the relief sought. See Jessen v. Bd. of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995); Zara v. Bd. of Trustees, Docket No. 94-MBOT- 817 (Dec. 12, 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 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.

Finally, whether a grievant is properly classified is almost entirely a factual determination. As such, the JEC's interpretation and explanation of the point factors and PIQ's at issue will be given great weight unless clearly erroneous. See Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995); Burke, supra. 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. Dep't of Health and Human Resources, 195 W. Va. 430, 465 S.E.2d 887 (1995). Thus, a higher education employee challenging her classification will have to overcome a substantial obstacle to establish that she is misclassified.

SWVCTC demonstrated that Grievant Burgraff's position was classified using the same process that was employed in classifying other employees in the state college anduniversity systems. That

classification process involves application of a point factor methodology contained in the Plan. Because certain factors in the Plan are evaluated according to specific relationships, such as the number of employees an employee directly supervises, and whether those directly supervised employees supervise subordinate employees, it is possible for an employee responsible for a particular activity at one institution of higher education to be classified at a different grade level from an employee who is responsible for a comparable activity at another institution. Grievant Burgraff has not demonstrated that the JEC's methodology violates the mandate for a uniform system of classification in W. Va. Code § 18B-9-4.

Grievant Burgraff similarly contends that she is being discriminated against because other employees in the state college system with similar job responsibilities over Trio programs are classified and compensated at a higher level. Respondent submits that any such similarities are superseded by differences in the number of employees supervised and similar objective factors which are calculated under the Mercer classification process to result in the higher classification level which the other employees enjoy.

In order to resolve this dispute, it will be necessary to examine each point factor where Grievant Burgraff contends that she should have received higher ratings under the Plan, in accordance with the standards of review discussed above. The ratings at issue involve the following point factors contained in the Plan: Experience; Scope and Effect, Impact of Actions; Scope and Effect, Nature of Action; Breadth of Responsibility; Intra- systems Contacts, Nature of Action; Intra-systems Contacts, Level of Contact; External Contacts, Nature of Contact; External Contacts, Level of Contact; Direct SupervisionExercised, Level of Supervision; and Indirect Supervision Exercised, Number of Subordinates and Level of Supervision.

III. 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). Grievant Burgraff agrees that the JEC correctly evaluated the Knowledge requirement for her position at a degree level of 7.0, equating to a relevant Master's Degree. However, she disagrees with the JEC's evaluation of the Experience requirement at level 4.0, equating to "over two years and up to three years of experience." Grievant Burgraff argues that her position should have been rated at a degree level of 5.0, which requires "over three years and up to four 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. Margaret Buttrick, Human Resources Director for the College and University Systems of West Virginia, and Chairperson of the JEC, and Ms. Clay, testified from their perspective as experienced human resources professionals, professing that a new employee with a relevant Master's Degree and a minimum of two years experience could perform the essential duties of the Talent Search position. Grievant Burgraff's immediate supervisor, Vice President Dempsey, prefers a minimum of three years experience. The federal government was promised a Talent Search Director with five years experience in the grant application. (See footnote 8)

In considering these conflicting arguments, it is noted this was the first time this position was filled at SWVCTC . Obviously, Grievant Burgraff had more than five years experience when she started. However, position classification is directed toward the knowledge, skills and abilities required to perform the duties of a job, not the attributes of the employee who occupies the position. The JEC witnesses noted their familiarity with a number of similar jobs throughout the college and university systems, providing expert opinion evidence that two years experience is adequate. Indeed, the Director of Upward Bound and Director of Student Support Services positions at Pay Grade 19, to which Grievant Burgraff referred as the impetus for her claims, were likewise rated by the JECas requiring only two to three years of experience. Cf. Burgraff Exs B1, B2 and B3 at L IV and R Ex B at L IV.

Therefore, the undersigned finds that Grievant Burgraff did not establish by a preponderance of the evidence that a newly hired employee with a relevant Master's Degree, and two years of directly related experience, would not be able to perform the essential functions of the position. See Long v. Bd. of Trustees, Docket No. 94-MBOT-725 (June 30, 1997); Hastings v. Bd. of Trustees, Docket No. 94-MBOT-943 (May 28, 1996). Consequently, Grievant Burgraff has not shown that the JEC's evaluation of her position on this factor was clearly wrong.

B. 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 Grievant Burgraff at level 2.0 on Impact of Actions and level 3.0 for Nature of Action. Grievant Burgraff argues that she 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. Clay noted that this factor was primarily intended to accommodate the differences inherent

among positions at large and small institutions governed by the Plan. See E Ex 6 at L II. Respondent's witnesses emphasized that the program Grievant Burgraff oversees is an educational outreach program directed toward individuals who are not current SWVCTC students. Although the persons who participate in the program are all potential students at SWVCTC, and a majority who pursue post-secondary education do so at SWVCTC, this does not represent the kind of direct impact on the institution contemplated in the Plan. The Plan indicates that this factor is intended to measure theemployee's scope of responsibility “within the institution.” Therefore, to the extent the language in the plan is ambiguous, the undersigned will defer to the JEC's reasonable interpretation of the Plan. See Hastings, supra; Jessen, supra. See generally, 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)

Further, the JEC's application of this factor to Grievant Burgraff reflects a value judgment that the work she performs is incidental to the overall mission of her employer. 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 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.

Grievant asserts 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, Grievant Burgraff has 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 her position under the Nature of Action element of Scope and Effect. See Burke, supra.

C. BREADTH OF RESPONSIBILITY

According to the Job Evaluation Plan:

> This factor describes the variety of specific functional areas in which the job may have formal and ongoing accountability. In reviewing this factor, consider the level of in-depth knowledge required as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations. [Examples of some functional areas within the following divisions would include: (1) Student Services - Housing, Admissions, Financial Aid, Counseling; (2) Business and Finance - Purchasing, Auditing, Grants and Contracts, Bursar.]

Grievant Burgraff is responsible for the Talent Search Program at SWVCTC. Ms. Buttrick testified that the JEC considers Student Services at SWVCTC to be a functional area, and the Talent Search Program is seen as an activity within that functional area. As a result, the JEC rated Grievant Burgraff, and the Program Manager job title, at Level 1, which is “accountable for only immediate work assignments but not for a functional area.” In her desk audit, Ms. Clay rated Grievant Burgraff's position at Level 2, which is “in-depthknowledge and accountability for one functional area as measured by the incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations.”

Certainly, Grievant Burgraff has the ability to answer detailed and complex questions relating to her duties. The controlling issue is whether the Talent Search program is a separate functional area. Obviously, reasonable minds may differ, as do Ms. Clay and Ms. Buttrick, over this issue. Unfortunately, the Plan only provide examples of functional areas and no explanation of what does and does not constitute a functional area versus a program or activity. Although this is a close question given the available facts in this grievance, the undersigned is unable to conclude that the JEC's determination that the Talent Search Program is not a separate functional area under the Plan is either clearly wrong or represents an arbitrary interpretation of the Plan. See Burke, supra.

D. INTRASYSTEMS CONTACTS

In regard to Intrasystems Contacts, the Job Evaluation Plan offers the following guidance:

> This factor appraises the responsibility for working with or through other people within the SCUSWV [State College and University System of West Virginia] to get results. Consider the purpose and level of contact encountered on a regular, recurring and essential basis during operations. Consider whether the contacts involve furnishing or obtaining information, explaining policies or discussing controversial issues. This factor considers only those contacts outside the job's immediate work area. (Emphasis in original.)

The Plan evaluates these contacts under two elements, Level of Contact and Nature of Contact. Grievant Burgraff contests her ratings on both elements. The JEC evaluated Grievant's position as involving regular, recurring and essential contact at Level 2: "Staff and faculty outside the immediate work area." Grievant Burgraff argues that her Level of Contact is better reflected by Level 5: "Associate/Assistant Vice Presidents or Systems' Central Office Directors that report to the Senior Administrator." According to Grievant Burgraff's current PIQ, she has daily contact with her Administrative Secretary, weekly contact with her Educational Outreach Counselors, and monthly contact with the Vice President of Student Affairs and the Talent Search Coordinator at the Central Office. She only lists “periodic” contact with the Vice President of Business Affairs, other Associate Vice Presidents, the Foundation Institutional Representative, and the Public Relations Director. See R Ex A at L IV.

Ms. Buttrick explained that the JEC does not consider any contacts which occur less frequently than monthly, such as quarterly, annual or periodic contacts, to be “regular and recurring” within the meaning of the Plan. Therefore, Grievant Burgraff's “periodic” contacts were not considered in her rating. Further, she noted that the Plan does not consider people within an employee's immediate work area, thus excluding Grievant's direct subordinates and her supervisor, Vice President Dempsey. Consequently, Grievant Burgraff has no regular and recurring contact with any individual at Level 5 as defined in the Plan.

Although Grievant Burgraff has monthly contact with the Talent Search Coordinator in the Central Office, a position which falls within Level 3 of the Plan, Ms. Buttrick noted that the vast majority of her contacts fall at Level 2 or below, rather than Level 3. Thus, the JEC determined that Level 2 was the appropriate rating for the level of GrievantBurgraff's intrasystems contacts. Ms. Clay reached the same conclusion after a desk audit of the position.

This Grievance Board has previously determined that such averaging of contacts which are otherwise essential, regular and recurring is contrary to the plain language of the Plan. Carlton v. Bd.

of Directors, 94-MBOD-430 (July 15, 1997). See Watts, supra. Accordingly, the undersigned concludes that the Level 2 rating assigned by the JEC for Level of Contact was clearly wrong. Grievant has established by a preponderance of the evidence that she should have received a Level 3 rating for this element under Intrasystems Contacts, entitling her to an additional 24 points under the Plan. (See footnote 9)

Grievant also complains that she was not properly evaluated by the JEC in regard to the second element of Factor 7, Nature of Contact. The JEC rated Grievant's duties under Nature of Contact at Level 2. The Plan defines this level as:

> 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.)

Grievant contends that the proper Nature of Contact for her duties is reflected by Level 3:

> Substantial sensitivity and cooperation required; discussions are frequently controversial and require some delicacy (.e.g., project interactions, interpretation of complex policies, resolution of somewhat difficult problems.)

Unlike the Level of Contact element, the Nature of Contact element involves a subjective determination regarding the amount of tact and sensitivity required to perform the essential duties of a particular position. Miller v. Bd. of Directors, Docket No. 94- MBOD-495 (Oct. 29, 1996). Grievant Burgraff contends that the Talent Search Program requires substantial sensitivity because she is dealing with a high risk student population who are only eligible for participation because they are considered “disadvantaged” under federal guidelines. However, she does not explain why discussions about these students with other individuals within the college and university systems would be either controversial or difficult. Grievant Burgraff failed to establish that more than moderate tact and cooperation is required to accomplish her regular and recurring intrasystems contacts. Therefore, the JEC's determination on this factor was not shown to be clearly wrong. See Hastings, supra; Zara, 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. Grievant Burgraff disagrees with the level 2.0 rating assigned by the JEC under Nature of Contact, as well as the level 3.0 rating assigned for Level of Contact. She proposes that her ratings should have been 3.0 and 4.0, respectively. The Plan defines the 2.0 level assigned Grievant Burgraff's position for Nature of Contact as:

> 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.)

As under the previous factor, Grievant Burgraff contends that the proper Nature of Contact for her duties is reflected by Level 3:

> Substantial sensitivity and cooperation required; discussions are frequently controversial and require some delicacy (.e.g., project interactions, interpretation of complex policies, resolution of somewhat difficult problems.)

The primary emphasis of Grievant's position involves encouraging certain “disadvantaged” individuals from age 11 to 27 to remain in school, return to school, or complete their GED. See R Ex A at L IV. Although substantial sensitivity may well be involved during the initial contact with school officials when the program is being offered to a particular school system or school, Grievant Burgraff did not adequately explain why “substantial sensitivity and cooperation” would be required for her regular and recurring contacts with such people outside higher education. Although the participants must meet certain financial criteria to establish their “disadvantaged” status for inclusion in the program, the JEC's conclusion that moderate tact and sensitivity is normally adequate for such contacts is not unreasonable in the circumstances presented.

Under Level of Contact, the Plan indicates the 3.0 rating assigned Grievant Burgraff's position by the JEC requires regular, recurring and essential contact with "students, parents, alumni, faculty of institutions outside the systems, sales engineers, higher-level product representatives, recruiters and/or prospective students." Level 4.0, which Grievant Burgraff seeks, requires such contact with

"mid-level representatives ofgovernment agencies, professional contacts with other colleges and universities outside the system."

Grievant has weekly contacts with public school principals and teachers, and monthly contact with middle or high school students. See R Ex A at L IV. The JEC gave Grievant credit for these contacts. However, the JEC determined that such people fall within Level 3 under the Plan. Grievant also claims monthly contact with county school superintendents. See R Ex A at L IV. The JEC agrees that such persons constitute "mid- level representatives of government agencies" as defined by Level 4 of the Plan. However, as Ms. Buttrick explained in her testimony, the JEC determined that monthly contact with such officials did not appear essential to accomplishing the duties of Grievant Burgraff's job as described in her PIQ. Ms. Buttrick noted that she was familiar with the duties of the Talent Search Director in the Central Office who manages a comparable program. Based on that information, it was her opinion that only infrequent and periodic contact with county school superintendents would be necessary to perform Grievant Burgraff's duties. She further maintained that most counties would delegate responsibility to oversee such matters as are covered by the Talent Search Program to an Assistant Superintendent.

Grievant established that she has monthly contact with one or more county school superintendents. Further, it is accepted that some contact with the superintendent may be essential to the success of Grievant's program. However, the Plan unambiguously requires not only that such contacts be regular and recurring, but they must also be essential. Ms. Buttrick explained the JEC's specific rationale for concluding that thesecontacts were not essential. While reasonable minds may differ on this point, it was not demonstrated why the JEC's conclusion was improper. 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 Grievant performs. See Braniff v. Bd. of Trustees, Docket No. 94-MBOT-865 (Sept. 30, 1996); Long, supra: Hastings, supra.

F. DIRECT SUPERVISION EXERCISED:

> 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. (emphasis in original)

Factor 9 is broken down into two elements: (1) Level of Supervision; and (2) Number of Direct Subordinates. Grievant Burgraff was rated at Level 4 under Number of Direct Subordinates and agrees with that rating. However, she disagrees with the Level 5 rating assigned by the JEC under Level of Supervision, defined in the Plan as:

> Direct supervision over exempt employees (and non-exempt employees, if applicable). Responsible for results in terms of costs, methods, and personnel. In a position to hire/fire or strongly recommend such personnel actions.

Grievant Burgraff seeks a Level 6 rating: “Manages the operation of a unit, including general supervision over first-line supervisors (and non-supervisors, if applicable).“ Resolution of this dispute over rating levels hinges on whether Grievant Burgraff supervises subordinate employees who, in turn, supervise subordinate employees. It is apparent that the Educational Outreach Counselors under Grievant Burgraff's supervision“supervise” tutors who work in the Talent Search Program at SWVCTC. However, SWVCTC correctly notes that these tutors are not full-time employees covered by the Plan. According to the testimony of Ms. Buttrick and Ms. Clay, the JEC requires an employee to supervise classified employees, or essential student employees who represent at least the equivalent of one full-time employee, in order to receive credit for “supervision” in accordance with the Plan.

The record indicates that some of the tutors in the Talent Search Program at SWVCTC are students and some are not. Grievant Burgraff failed to establish that the students were essential to the operation of the program, or that such students, independent of other part-time employees, constitute the equivalent of at least one full-time employee. Respondent properly notes that supervising part-time employees does not entail the same level of responsibility as supervising regular, classified employees who require formal evaluations, may only be disciplined in accordance with established procedures, and may file grievances over their terms of employment and working conditions. Thus, the JEC's differentiation between these two categories under the Plan is not arbitrary and capricious or unreasonable. Consequently, Grievant Burgraff did not prove that she qualified for a Level 6 rating under Level of Supervision.

G. INDIRECT SUPERVISION EXERCISED:

The Plan explains this factor as follows:

> This factor measures the job's responsibility for the indirect supervision of subordinates. Only the formal assignment of such responsibility to a job should be considered; informal work relationships should not be considered. Indirect supervision takes into account the number of subordinates under the position's line of authority but who do not directly report to it. The number of subordinates should be reported in full-time equivalents (FTEs).

Like Direct Supervision Exercised, this factor has two elements, Level of Supervision and Number of Indirect Subordinates. The JEC rated Grievant Burgraff at Level 1 for Number of Indirect Subordinates, indicating that she had no responsibility for indirect subordinates. Similarly, the JEC rated Grievant Burgraff's Level of Supervision at Level 1, which the Plan describes as: “No indirect supervisory responsibility; has formal authority over lead and/or non-supervisory personnel only.” Grievant Burgraff contends that she should receive Level 2 ratings in each element based upon her supervision over the Educational Outreach Counselors who supervise the full-time equivalent of at least one employee (the tutors).

This factor employs the same terminology in the Plan as the previous factor involving Direct Supervision Exercised. For the reasons previously discussed, the JEC properly excluded part-time tutors from consideration in applying this factor to Grievant Burgraff's position in the Talent Search Program at SWVCTC. Therefore, no change in the ratings assigned is warranted.

In summary, Grievant Burgraff failed to demonstrate that she was entitled to a higher rating on any of the factors in the Plan which she challenged in this grievance except for Intrasystems Contacts, Level of Contact. Correcting her rating under that element of the factor would add an additional 24 points to her data line, giving her a total of 2372 points. Because Grievant Burgraff would need at least 2408 points to be assigned to the next higher pay grade under the Plan, she is not entitled to any relief as a result ofthis error by the JEC. See Zara, supra. Accordingly, Grievant Burgraff did not establish that she was misclassified by the JEC at any time while employed to manage the Talent Search Program at SWVCTC.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. The burden of proof in a misclassification grievance is on the grievant to prove by a

preponderance of the evidence that she is not properly classified. 156 C.S.R. 1 § 4.19; Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

2. Generally, the party asserting an affirmative defense, such as untimely filing, has the burden of establishing that defense by a preponderance of the evidence. Hawthorne v. Bd. of Directors, Docket No. 97-BOD-252 (Nov. 5, 1997); Norton v. Bd. of Directors, Docket No. 96-BOD-369 (Dec. 9, 1996). See also McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995).

3. The specific procedures for filing grievances under the Mercer reclassification process promulgated in 131 C.S.R. 62 (1994) are not applicable to Grievant Burgraff's grievance. Therefore, Grievant Burgraff is not barred from pursuing her grievance for failure to comply with those procedural prerequisites. Likewise, because claims of misclassification are considered “continuing violations” which may be addressed at any time, Respondent failed to establish that Grievant Burgraff's grievance challenging her classification as a Program Manager in Pay Grade 17 was barred by W. Va. Code § 18-29- 4. See Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). 4. “A higher education employee must demonstrate that h[er] duties have changed in a meaningful, identifiable manner since January 1, 1994, in order to pursue a grievance over h[er] classification, as grievants were required to grieve their initial classification under the Mercer system by certain deadlines in 1994, proceeding through the internal review procedure.” Rush v. Bd. of Directors, Docket No. 97-BOD-369 (Apr. 3, 1998); 131 C.S.R. § 18.1. See Hardy v. Bd. of Directors/W. Va. Institute of Technology, Docket No. 94-MBOD-963 (Dec. 21, 1995). Grievant Shaw failed to demonstrate that her duties have changed in a meaningful, identifiable manner since January 1, 1994. Therefore, she may not pursue her grievance.

5. 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 Tennant v. 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).

6. 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).

7. Grievant Burgraff failed to prove by a preponderance of the evidence that the JEC's interpretation and application of the Plan in regard to classifying her position as a Program Manger in Pay Grade 17, or the evaluations assigned to the challenged point factors of Experience, Scope and Effect, Impact of Actions, Scope and Effect, Nature of Action, Breadth of Responsibility, Intrasystems Contacts, Nature of Contact, External Contacts, Nature of Contact, External Contacts, Level of Contact, Direct Supervision Exercised, Level of Supervision, Indirect Supervision Exercised, Number of Subordinates, and Indirect Supervision Exercised, Level of Supervision, was clearly wrong or otherwise unsupported by the available evidence.

8. Grievant Burgraff established by a preponderance of the evidence that the JEC's decision to assign her to Level 2 under the challenged point factor of Intrasystems Contacts, Level of Contact, was clearly wrong because it is inconsistent with the plain language of the Plan. See Carlton v. Bd. of Directors, 94-MBOD-430 (July 15, 1997). See generally, Watts v. Dep't of Health and Human Resources, 195 W. Va. 430, 465 S.E.2d 887 (1995). However, awarding Grievant Burgraff the correct number of points for this factor does not the total number of points awarded under the Plan to the minimum of 2408points required to be advanced to the next pay grade. See Zara v. Bd. of Trustees, Docket No. 94-MBOT-817 (Dec. 12, 1995).

Accordingly, these grievances are **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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: November 25, 1998

Footnote: 1

Grievant Burgraff was represented by counsel, Jane Moran. Grievant Shaw appeared pro se. Respondent was represented by Senior Assistant Attorney General Mary Roberta Brandt.

Footnote: 2

This name is derived from the name of the company which assisted higher education in developing the classification system, William M. Mercer, Inc.

Footnote: 3

As of January 1, 1994, the starting salary for a classified employee in Pay Grade 17was $22,800. The starting salary for Pay Grade 19 was $26,088. 131 C.S.R. 62 (1994).

Footnote: 4

Trio programs refer to a group of federally-funded programs for disadvantagedstudents. The term is derived from the fact that, originally, there were three closely related programs. However, there are now a number of programs which fall under this nomenclature.

Footnote: 5

The constitutionality of a rule which explicitly prohibits an employee from grieving their classification, based upon events which took place before they were hired, is highly suspect. However, this Grievance Board, as an administrative agency, is without authority to overturn a policy which has been established as a Legislative Rule. Wilson v. W. Va. Dept. of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dept. of Transp., Docket No. 89-DOH-605 (May 22, 1990).

Footnote: 6

For this reason, it will not be necessary to analyze Grievant Burgraff's position that she did not "discover" the existence of her grievance until she began researching the classifications of other employees performing similar duties. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Footnote: 7

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

Footnote: 8

There was no persuasive evidence that the federal grant would be jeopardized by employing a Program Manager to direct the Talent Search Program who holds only the minimum qualifications for that classification as determined by the JEC.

Footnote: 9

Under the Plan, a Level C or 3 rating for Level of Contact and a Level 2 rating for Nature of Contact equates to an overall rating of 7 for Intrasystems Contacts. In accordance with the Point Factor by Level chart adopted by the JEC, this gives Grievant another 24 points on her data line. Cf. E Exs 2 & 3 at L II. See Zara, supra.