DELBERT RUSH,

Grievant,

v. **DOCKET NO. 97-BOD-369**

BOARD OF DIRECTORS/

FAIRMONT STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant Delbert Rush alleges he is misclassified as a Bookstore Assistant ("Assistant"), pay grade 10. Grievant seeks as relief classification as a Bookstore Supervisor ("Supervisor"), pay grade 14, and backpay. (See footnote 1) This grievance was filed on May 27, 1997, after Stephen Leach, Director of Human Resources at Fairmont State College, had determined that Grievant was not a Supervisor and had asked the Job Evaluation Committee ("JEC") to create a new Job Title for Grievant's position in pay grade 13 (Bookstore Lead), based upon a revised Position Information Questionnaire ("PIQ") anddata line devised by Mr. Leach, and that recommendation was denied by the JEC. (See footnote 2)

The following Findings of Fact are properly made from the record developed at Levels II and IV.

Findings of Fact

1. Grievant is employed at Fairmont State College ("FSC"), as a Bookstore Assistant, pay grade 10. He was classified in this Job Title in the Mercer reclassification, effective January 1, 1994, and did not grieve his classification.

2. The only changes in Grievant's job duties since January 1, 1994, are that he spends more time entering data into the computer and researching textbook information on the computer, he has more supervisory responsibility and spends more time supervising, he no longer unloads or shelves books, unless no shipping and receiving clerks are working, and he no longer travels to satellite locations to sell books. His supervisory duties take40% of his time now, and on January 1, 1994, they

took 10% of his time.

3. Grievant and his supervisor decide how many texts to order for a class. He is responsible for administering the policies and procedures of the book buyback each semester, he decides whether to make refunds, following standard policies, is responsible for making sure textbooks and other course materials reach satellite campuses, and is responsible for ordering, shipping and receiving texts.

4. Grievant has no budgetary responsibility, nor is he formally accountable for a functional area.

5. The bookstore employs four part-time shipping and receiving clerks, and three to five work study students, at 15 hours per week each. Grievant gives the shipping and receiving clerks and the work study students assignments and direction on how to receive, price, bar code, shelve, and return texts, and on how to get the necessary books to satellite locations.

6. Grievant sits with the work study students while they enter data and tells them what to enter and where to enter it. He decides which work study students he wants to hire.

7. Grievant directs and oversees the work of 15 to 16 student workers during finals week, two times a year.

8. Grievant does not evaluate any employee, nor does he approve annual leave or keep track of the number of hours they work. He tells his supervisor when the bookstore needs to hire more employees and when they can be laid off. He has maderecommendations on who to hire or not hire.

9. The Assistant Job Title received 1486 total points from the following degree levels in each of the thirteen point factors (See footnote 3): 3.0 in Knowledge; 3.0 in Experience; 2.0 in Complexity and Problem Solving; 1.5 in Freedom of Action; 2.0 in Scope and Effect, Impact of Actions; 2.0 in Scope and Effect, Nature of Actions; 1.0 in Breadth of Responsibility; 1.0 in Intrasystems Contacts, Nature of Contact; 2.0 in Intrasystems Contacts, Level of Contact; 1.0 in External Contacts, Nature of Contact; 3.0 in External Contacts, Level of Contact; 3.0 in Direct Supervision Exercised, Number; 3.0 in Direct Supervision Exercised, Level; 1.0 in Indirect Supervision Exercised, Number; 1.0 in Indirect Supervision Exercised, Level; 2.0 in Physical Coordination; 1.0 in Working Conditions; and 2.0 in Physical Demands. Respondent's Exhibit 2.

10. The Supervisor Job Title received 1949 total points from the following degree levels in each of the thirteen point factors: 5.0 in Knowledge; 2.0 in Experience; 2.5 in Complexity and Problem

Solving; 3.5 in Freedom of Action; 2.0 in Scope and Effect, Impact of Actions; 3.0 in Scope and Effect, Nature of Actions; 2.0 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; 3.0 in Direct Supervision Exercised, Number; 4.0 in Direct Supervision Exercised, Level; 1.0 in Indirect SupervisionExercised, Number; 1.0 in Indirect Supervision Exercised, Level; 2.0 in Physical Coordination; 1.0 in Working Conditions; and 2.0 in Physical Demands. Respondent's Exhibit 2.

Discussion

A. Burden of Proof and Standard of Review

Grievant argued generally that Respondent acted in an arbitrary and capricious manner by not accepting the degree levels marked by Grievant and his supervisor on the PIQ, and that the burden of proof was upon Respondent to prove the degree levels marked by Grievant and his supervisor were wrong. Grievant also questioned the purpose of the PIQ if the degree levels marked by the employee and his supervisor were not accepted as accurate. Grievant is mistaken as to who has the burden of proof. The burden of proof was set forth in numerous decisions issued by the Grievance Board in grievances challenging the Job Title assigned in the Mercer reclassification.

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, et al., v. Bd. of Directors, Fairmont State College, Docket No. 94-MBOD-349 (Aug. 8, 1995). The grievant asserting misclassification must identify the job he feels he is performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttal or analysis. Elkins v. Southern W. Va. Community College, Docket No. 90-BOD-124 (Mar. 4, 1991).

A higher education grievant is not likely to meet his burdenof 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 (See footnote 4) is largely a "quantitative" system, in which the components of each job are evaluated using the point factor methodology. Therefore, the focus in Mercer Decisions issued by this Grievance Board is upon the point factors the grievant is challenging. A grievant may challenge any combination of point factor degree levels, so long as he clearly identifies the point factor degree levels he is challenging, and this

challenge is consistent with the relief sought. See Jessen, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-1059 (Oct. 26, 1995); and Zara, et al., v. Bd. of Trustees, W. Va. Univ., 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'sinterpretation and explanation of the point factors and Generic Job Descriptions or 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 Job Evaluation Plan (which provides the definitions of point factors and degree levels) is necessary where the language is clear and unambiguous. Watts v. Dept. of Health and Human Res., 195 W. Va. 430, 465 S.E.2d 887 (1995). The higher education employee challenging his classification thus will have to overcome a substantial obstacle to establish that he is misclassified.

A higher education employee must also demonstrate that his duties have changed in a meaningful, identifiable manner since January 1, 1994, in order to pursue a grievance over his classification. In 1993 the West Virginia Legislature amended W. Va. Code § 18B-9-4 to provide, among other things, "an equitable system of job classifications" for classified employees of the University System of West Virginia Board of Trustees and the Board of Directors of The State College System of West Virginia (collectively "the governing boards"). As amended, W. Va. Code § 18B-9-4 required the governing boards to establish by rule and to implement a system establishing uniform classifications in all institutions of higher education within West Virginia. This reclassification is commonly referred to as the "Mercer reclassification."

The Legislative Rules promulgated by the governing boards setforth identical procedures for a classified employee to seek review of his initial classification under the new system. 131 C.S.R. § 18.1 makes it clear that failure on the part of an employee to go through the internal review procedure precludes the employee from pursuing a grievance on his reclassification. Hardy v. Bd. of

Directors/W. Va. Institute of Technology, Docket No. 94-MBOD-963 (Dec. 21, 1995). (See footnote 5)

Accordingly, now that the Mercer reclassification grievances have all been processed and decided by this Grievance Board, a higher education grievant must demonstrate that his job has changed since January 1, 1994, in order to pursue a misclassification grievance. A comparison of Grievant's 1993 PIQ to his 1996 and 1997 PIQ's reveals that Grievant's duties have changed somewhat, and the percentage of time Grievant spends training and supervising has changed from 10% to 40%, and he now performs the remainder of his duties using the computer, entering data and running reports. Grievant demonstrated that his duties have changed in a meaningful, identifiable manner since January 1, 1994, and he may pursue this grievance.

As to Grievant's question regarding the purpose of the PIQ, the purpose is not to allow an employee to choose his own classification and pay grade by choosing the degree levels in the point factors which will place him in a higher pay grade. "The purpose of the PIQ was to collect information on the duties and responsibilities of the employee. The employee's role was to describe his duties and responsibilities, and to answer the questions asked on the PIQ truthfully." Gregg, et al., v. Bd. of Trustees, W. Va. Univ., Docket No. 94-MBOT-863 (Dec. 18, 1996). The information regarding which degree level the employee and his supervisors believe best describes the employee's position is simply a part of this information gathering process. Id. It is the role of the JEC to determine the appropriate degree levels to be assigned, so that the point factor methodology is uniformlyapplied across the higher education system.

B. Application of the Point Factor Methodology

The following table shows the differences between the degree levels assigned Grievant's Job Title of Assistant and the degree levels assigned the Supervisor Job Title, as well as the degree levels assigned both Job Titles in other point factors challenged by Grievant, and the degree levels Grievant argued he should have received.

	KN	EX	CPS	FA	NA	BR	SE NC	IC NC	EC NUM	DSE LVL	DSE PC	WC	PD
Assistant	3	3	2	1.5	2	1	1	1	3	3	2	1	2
Supervisor	5	2	2.5	3.5	3	2	2	2	3	4	2	1	2
Rush Argument	4	4	2	4	2	2	1	1	4	4	3	2	1

(See footnote 6)

Respondent's Exhibit 2.

Except for his argument that he should have received higher degree levels in Direct Supervision Exercised/Number of Subordinates and Level of Supervision, (See footnote 7) Grievant did not identify the point factors he believed should have been assigned a differentdegree level in the evaluation of his position, until he submitted his post hearing written argument. Grievant argued at the hearing, and in his grievance statement, that he should have been classified as Supervisor, pay grade 14; therefore, he must prove by a preponderance of the evidence that he should have received the same degree level in each point factor, except Direct Supervision Exercised, as a Supervisor. Grievant is held to this standard because he did not identify the point factors he was challenging at the hearing. Campbell-Turner, et al., v. Bd. of Trustees, Marshall Univ., Docket No. 94-MBOT-1035 (Jan. 31, 1996).

The undersigned will not consider any new challenges raised for the first time in Grievant's post-hearing written submission. The Grievance Board does not allow this type of tactic, as Respondent was not on notice that Grievant was challenging other point factors, and had no opportunity to respond. It would not be fair to allow this post-hearing argument. See Montgomery v. Greenbrier County Bd. of Educ., Docket No. 97-13-427 (Mar. 18, 1998); Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996); Elkins, supra. Therefore, Grievant's arguments that he should have received a degree level of 4.0 in Experience, a 3.0 in Physical Coordination, and a 2.0 in Working Conditions will not be addressed. (See footnote 8) Grievant conceded in his post-hearing written argument that the degree levels assigned his Job Title in Complexity and Problem Solving, Scope and Effect/Nature of Actions, Intrasystems Contacts/Nature of Contact, and External Contacts/Nature of Contact were appropriate for his duties, and these point factors will not be addressed. Likewise, the lower degree level accepted by Grievant in Physical Demands need not be addressed. Each of the other point factors challenged by Grievant will be addressed separately below.

1. Knowledge

The Job Evaluation Plan ("the Plan") defines Knowledge as:

> 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.

Grievant argued he should have received a degree level of 4.0 rather than a 3.0. The Supervisor Job Title received a degree level of 5.0. A degree level of 3.0 is defined in the Plan as:

> Job requires basic knowledge of grammar, spelling, punctuation, and simple mathematical functions like percentages, ratios, etc., as might normally be acquired through attainment of a high school diploma or GED.

A degree level of 4.0 is defined in the Plan as:

> Job requires basic knowledge in a specific area typically obtained through a business, technical or vocational school as might normally be acquired through up to 18 months of education or training beyond high school.

Grievant argued in his post-hearing written argument that vocational training is required in order to perform the computer work Grievant performs, which consists of data entry, running reports, and setting up a machine which has been moved. None of the witnesses specifically addressed this point factor. No evidence was offered of Grievant's educational background, or of how long it took Grievant to learn to perform these duties. The undersigned finds no facts in the record which support Grievant's conclusion that the minimum education needed to perform these duties is 18 months of vocational training.

Grievant also argued that the 1993 PIQ had a degree level of 4.0 marked; therefore, it must have been an error when a degree level of 3.0 was marked on the 1996 PIQ. No testimony was elicited to support this bald assertion, and it is rejected. Even if such testimony had been elicited, standing alone it would represent the opinion of Grievant and his supervisor. "Such [opinion] statements standing alone merely show disagreement with Respondent's conclusion, but offer no reason to accept Grievant's position rather than Respondent's." Riggs v. Bd. of Trustees, Marshall Univ., Docket No. 94-MBOT-711 (Apr. 29, 1996). Grievant failed in meeting his burden of proof on this point factor.

2. Freedom of Action

The Plan defines Freedom of Action as:

> This factor measures the degree to which the position isstructured 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.

Grievant's Job Title received a degree level of 3.0, and Grievant argued in his post-hearing written

submission that he should have received a degree level of 4.0. The Supervisor Job Title received a degree level of 3.5. As Grievant failed to provide notice that he was asserting his duties fell within a higher degree level than even the Supervisor Job Title's duties, he is limited to arguing for the 3.5.

The definitions in the Plan show that at a degree level of 3.0:

> 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.

The definitions in the Plan show that at a degree level of 4.0:

> 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.A degree level of 3.5 was assigned by the JEC to a Job Title when the duties fell partially within a degree level of 3.0, and partially within a degree level of 4.0. See Gregg, supra.

Grievant pointed to his freedom to determine how many texts to order for a class. Indeed, Grievant at first testified at Level IV that he makes this decision based upon experience and information available to him on the computer. However, on cross-examination he explained that he and his supervisor sit down together and make this decision. Grievant also pointed out that he is responsible for the policies and procedures of the book buyback each semester, he makes decisions regarding refunds, is responsible for making sure textbooks and other course materials reach satellite campuses, and is solely responsible for ordering, shipping and receiving texts.

Grievant's Freedom of Action is limited. He "organizes and carries out most of the work assignments in accordance with standard practices, policies, instructions or previous training," and his duties are squarely within a degree level of 3.0.

3. Breadth of Responsibility

Grievant argued he should have received a degree level of 2.0, rather than a 1.0 in Breadth of Responsibility, because of his financial responsibility with regard to the buyback of textbooks, and because his PIQ says so. "The definition of this point factor makes it clear that each position or job duty does not constitute a functional area, but rather the Library would be one functional area, as was decided in Burke supra. See also, Jordan, et al., v.Bd. of Trustees, Marshall Univ., Docket No. 94-

MBOD-983 (Nov. 25, 1996)." Carlton v. Bd. of Directors, Southern W. Va. Community College, Docket No. 94-MBOD-430 (July 15, 1997). Likewise, the bookstore is one functional area. Grievant has no budgetary responsibility, nor is he formally accountable for a functional area. His duties fall within a degree level of 1.0. See Burke, supra; and Floyd v. Bd. of Trustees, W. Va. Univ., Docket No. 94- MBOT-932 (June 14, 1996).

4. 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.

This point factor consists of two parts, Number of Subordinates and Level of Supervision. Grievant is challenging the degree level received in both parts, arguing he should have received a degree level of 4.0, rather than a 3.0 in Number, and a degree level of 4.0 rather than a 3.0 in Level.

A degree level of 3.0 in Number is defined as two to three direct subordinates, and a degree level of 4.0 is defined as four to six direct subordinates. Grievant pointed to the 15 to 16 student workers whose work he directs and oversees during finals week, two times a year.

These student workers are the same as the temporary andstudent workers who were supervised during registration by the grievants in the Bursar's Office in Martin, et al., v. Bd. of Trustees, W. Va. Univ., et al., Docket No. 94-MBOT-658 (Mar. 28, 1997). In that case, it was determined that grievants could not receive credit for supervision of these workers. "The definition of this point factor states that it measures the formal assignment of direct supervision over persons in subordinate jobs in the organization. Temporary workers are not persons in subordinate jobs in the organization, and therefore, by definition, are not considered in applying this point factor. Hardee [, et al., v. Bd. of Directors, Concord College, et al., Docket No. 94-MBOD-373 (Jan. 10, 1997)]. Student workers are considered non-essential." Martin, supra. (Emphasis in original.) Grievant's supervisory duties over the temporary student workers during finals week twice a year are not considered in determining the appropriate degree levels in this point factor.

Finally, in determining whether students are considered,

> the crucial characteristic for receiving credit in this point factor is that the students are "essential" to the operation of the work unit.

. . .

> The Grievance Board has previously recognized that, regarding the issue of whether students are essential, the appropriate test is "[i]f the goals and objectives would be met without the students, even if completion by regular employees required a longer period of time, the student workers are deemed non-essential." Deavers [v. Bd. of Trustees, Docket No. 94-MBOT-914 (Dec. 10, 1996), at page 27 (emphasis added).

Kretzmer, et al., v. Bd. of Directors, Fairmont State College, et al., Docket No. 94-MBOD-751 (Feb. 6, 1997). Grievant failed toprove the temporary student workers are essential. See Deavers, supra.

The student workers who work daily in the bookstore under Grievant's supervision clearly are not essential. As were the student workers in the library in Kretzmer, while they are helpful in assuring that the data is entered into the computer, they do not perform functions which could not be completed by full-time or part-time bookstore employees, including Grievant. This conclusion is borne out by Grievant's own testimony that he sits beside the students and watches them while they enter data.

A degree level of 3.0 in Level is defined in the Plan as:

> Lead control over non-exempt employees performing the same work as this job. Lead responsibility includes training, assigning tasks, checking the work of others, and insuring supplies and tools are provided at the work site.

A degree level of 4.0 in Level is defined in the Plan as:

> Direct supervision over a unit of non-exempt employees or lead responsibility over a group of exempt employees. Most of the time is spent assigning, reviewing, and checking work or eliminating normal difficulties involving standard policies, procedures, or work practices. Input would be significant in subordinate employees' performance appraisal, hire or fire decisions.

The percentage of time Grievant spends training, assigning tasks, and overseeing the work of the part-time employees and student workers has changed from 10% on January 1, 1994, to 40%, (See footnote 9) and his responsibility has changed from jointly supervising their work with his supervisor, to total responsibility. Grievant does not perform the same duties as the part-time employees unless no one is on hand to perform these duties. Grievant admits he does not complete any performance appraisals, or approve leave, but the part-time employees do not receive leave benefits. Grievant's supervisor completes performance appraisals for the part-time employees. No evidence was offered that Grievant provides any input into the performance appraisals. Grievant's supervisor relies upon

him to tell her when more workers need to be hired, and when they no longer need them, and he makes recommendations on who to hire, and who should not be hired again.

Grievant pointed to his supervision of work study students, and argued they are exempt employees over which he has lead responsibility. Whether work study students, or other student workers are exempt or non-exempt need not be addressed as it has no impact on whether Grievant should receive a degree level of 3.0 versus 4.0 for two reasons. First, Grievant failed to prove the students are essential, and second, supervision of student workers falls squarely within the definition of a degree level of 2.0:

> Responsible for directing and monitoring the work of student workers essential to the operations of the unit.

As to Grievant's supervision of the part-time employees, Margaret Robinson Buttrick, Human Resources Administrator for the State College and University Systems, and JEC Chair, explained that someone who has direct supervisory authority has ultimate authority to hire, fire, complete performance appraisals, and sign leaveforms. She described Grievant's supervisory duties as lead supervision. She stated he directs and assigns tasks, which is within a degree level of 3.0.

Grievant does not supervise any exempt employees. Thus to fall within a degree level of 4.0, he must exercise direct supervisory authority. The degree level 4.0 definition is vague in that it is unclear whether the descriptive part of the definition relates to direct supervision or lead responsibility, or both. The descriptive part of the definition can be read, as Ms. Buttrick's testimony would indicate, to apply to lead responsibility over exempt employees, as the descriptive part is similar to the definition of lead responsibility found in degree level 3.0. The undersigned must give deference to the JEC's interpretations, and cannot determine that the JEC interpretation of degree level 4.0, and what constitutes direct supervision, is clearly wrong. Grievant has failed in proving he should have received a degree level of 4.0 in this point factor.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The governing boards are required by W. Va. Code § 18B-9- 4 to establish and maintain an equitable system of job classifi cations for all classified employees in higher education.

2. The burden of proof in a misclassification grievance is on the grievant to prove by a preponderance of the evidence that he is not properly classified. 156 C.S.R. 1 § 4.17. The grievant asserting misclassification must identify the job he feels he isperforming. 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 should also identify the point factors he is challenging; otherwise, his challenge will be limited to those point factors where the degree level assigned the Job Title sought differs from the degree level assigned to grievant's Job Title. Campbell- Turner, et al., v. Bd. of Trustees, Marshall Univ., Docket No. 94- MBOT-1035 (Jan. 31, 1996).

3. The Job Evaluation Committee's interpretation and explanation of point factors 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, et al., v. Bd. of Directors, Fairmont State College, Docket No. 94- MBOD-349 (Aug. 8, 1995).

4. A higher education employee must demonstrate that his duties have changed in a meaningful, identifiable manner since January 1, 1994, in order to pursue a grievance over his 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. 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 demonstrated his duties have changed in a meaningful, identifiable manner since January 1, 1994, and he may pursue this grievance. 5. The Grievance Board does not allow new arguments raised for the first time in a grievant's post-hearing written submission, as Respondent was not on notice that Grievant was challenging other point factors, and had no opportunity to respond. It would not be fair to allow this post-hearing argument. See Montgomery v. Greenbrier County Bd. of Educ., Docket No. 97-13-427 (Mar. 18, 1998); Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996); Elkins, supra.

6. The Job Evaluation Committee's decision that Grievant is a Bookstore Assistant, pay grade 10, is not clearly wrong or arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marion 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.

BRENDA L. GOULD

Administrative Law JudgeDated: April 3, 1998

Footnote: 1

In his post-hearing written submission, Grievant, for the first time, requested that attorney fees be awarded. W. Va. Code § 18-29-3(k) provides that "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." Respondent did not consent to the change in relief sought. Aside from the fact that Grievant should have stated any change in relief sought at the hearing at the latest, the undersigned has no authority to award attorney fees. Chafin v. Boone County Health Dept., Docket No. 95-BCHD-362 (June 21, 1996). See e.g., Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Footnote: 2

Grievant's Supervisor responded on June 17, 1997, that she had no authority to grant the grievance. A hearing was held at Level II on July 9, 1997, and a decision issued on July 22, 1997, which stated that the College had no authority to create the new classification within the Mercer classification system at pay grade 13 recommended by Mr. Leach. It recommended that a revised PIQ be submitted to the JEC, with a request that an additional classification be created for Grievant in a pay grade 11 or 12. Grievant appealed the Level II decision to Level IV on July 30, 1997, bypassing Level III. A conference call was held on September 11, 1997, and an Order entered on September 12, 1997, by Administrative Law Judge V. Denise Manning, finding the grievance was timely appealed to Level IV, and denying Respondent's Motion to Dismiss. A Level IV hearing set for October 29, 1997, was continued for administrative reasons to December 4, 1997, and this matter was subsequently reassigned to the undersigned. The hearing was held as scheduled, and this matter became mature for decision on January 5, 1998, upon receipt of the last of the parties' post- hearing written arguments.

Footnote: 3

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

Footnote: 4

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

Footnote: 5

131 C.S.R. § 18.1 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 the provisions 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. § 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.

Footnote: 6

These headings are shorthand for the following point factors: KN is Knowledge; EX is Experience; CPS is Complexity and Problem Solving; FA is Freedom of Action; SE/NA is Scope and Effect/Nature of Actions; BR is Breadth of Responsibility; IC/NC is Intrasystems Contacts/Nature of Contact; EC/NC is External Contacts/Nature of Contact; DSE/NUM is Direct Supervision Exercised/Number of Subordinates; DSE/LVL is Direct Supervision Exercised/Level of Supervision; PC is Physical Coordination; WC is Working Conditions; and PD is Physical Demands.

Footnote: 7

Although Grievant did not identify at the hearing the specific degree level he believed he should have received, it was clear to Respondent and to the undersigned that he was challenging the degree levels received in this point factor, and Respondent was able to adequately respond to Grievant's evidence on this point.

Footnote: 8

Further, Grievant presented no facts to support the opinion of Grievant and his supervisor that he should have received a higher degree level in Experience. This opinion evidence alone would be insufficient to meet his burden of proof. Riggs v. Bd. of Trustees, Marshall Univ., Docket No. 94-MBOT-711 (Apr. 29, 1996). He relied upon his increased use of the computer to support his argument that he should have received a higher degree level inPhysical Coordination and Working Conditions. However, he did not demonstrate any speed is required in performing his data entry duties, so that a higher degree level would not be appropriate in Physical Coordination, Barber, et al., v. Bd. of Trustees, W. Va. Univ., et al., Docket No. 94-MBOT-872 (Oct. 31, 1996), nor did he demonstrate his use of a video display terminal is nearly continuous so that a higher degree level would be appropriate in Working Conditions. See Morasco, et al., v. Bd. of Trustees, W. Va. Univ., et al., Docket No. 94-MBOT-777 (May 13, 1997).

Footnote: 9

At the hearing Grievant estimated he spends 60 to 65% of his time supervising, but his supervisor testified that he spends most of his time entering data into the computer. The PIQ submitted to the JEC, and signed by Grievant and his supervisor, listed that he spends 40% of his time supervising. It is unknown how much time is spent supervising students not essential to the unit, and how much time is spent supervising the part-time workers.