WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEPHANIE CAROL SMITH
Grievant,

v. **Docket No. 2010-0874-MU**

MARSHALL UNIVERSITY,
Respondent.

D E C I S I O N

Grievant, Stephanie Carol Smith, filed a grievance against Marshall University ("Marshall"), Respondent, on December 17, 2009, protesting the classification of the position she holds. Grievant is employed as a Purchasing Agent. Grievant disagrees with this designation and desires to be upgraded to the position of Contract Specialist. Grievant seeks reclassification and back pay with interest, back to the date of the original review.

A level one conference commenced on January 7, 2010. Subsequent to review of Grievant's Position Information Questionnaire ("PIQ") by the Job Evaluation Committee ("JEC") the grievance was denied at that level on March 10, 2010. Grievant appealed to level two on March 22, 2010, and a mediation session was held on May 4, 2010. Grievant appealed to level three on May 13, 2010. A level three hearing was held before the undersigned Administrative Law Judge on August 25, 2010, in the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by its appointed legal counsel, Jendonnae L. Houdyschell, Senior Assistant Attorney General.

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about September 24, 2010. Both parties submitted fact/law proposals.

Synopsis

Grievant is employed in a position designated as a Purchasing Agent, pay grade 16. Grievant seeks to have the position recognized as a Contract Specialist, pay grade 18. The factors used to determine the classification of a higher education position via the West Virginia Higher Education Job Classification System (formerly known as *Mercer* classification), were reviewed and assessed with regard to Grievant's position.

The Job Evaluation Committee evaluates a job title by analyzing specific characteristics termed "factors," assigning a rating or "degree level" to each factor, and applying a weighted equation to the assigned levels to arrive at a numerical total, which determines the job title's pay grade. In accordance with the applicable "point factor methodology," it was demonstrated that Grievant's position was properly designated as a pay grade 16, Purchasing Agent. It was not established that the decision process was arbitrary and capricious or clearly wrong. Nor was it established that the determination reached was done in an arbitrary or capricious manner. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. These Findings of Fact are made based upon a preponderance of the relevant evidence contained in the record developed.

Findings of Fact

1. Grievant is an employee at Marshall University. Grievant currently performs duties in a position classified as a Purchasing Agent, pay grade 16.

2. In January 1994, the West Virginia Higher Education System implemented a new job classification system, known as the *Mercer* reclassification project. This later

became known as the West Virginia Higher Education Job Classification System or the *Mercer* classification system.

3. Under the West Virginia Higher Education Job Classification System, the Job Evaluation Committee ("JEC") is the body charged with job evaluation and classification decisions and with implementing the legislative mandate of an equitable and uniform system of job classification throughout higher education. 133 C.S.R. 8 §11 *et seq.*

4. The composition of the JEC is a cross selection of human resource administrators and representatives of classified employees from all over the State of WV. The JEC, as a group, is responsible for maintaining the titles and classifications of the position titles of the Higher Education Classification System. *Id*.

5. When reviewing and/or evaluating a position's classification, the JEC employs a "point factor methodology" which evaluates each job title by analyzing specific characteristics termed "factors," assigning a rating or "degree level" to each factor, and applying a weighted equation to the assigned levels to arrive at a numerical total, which determines the job title's pay grade. The thirteen point factors and the degree levels under each point factor are defined in the Job Evaluation Plan.[1]

6. Under the West Virginia Higher Education Job Classification System, a significant amount of the data utilized for job evaluation and classification decisions are based upon the information provided on a Position Information Questionnaire ("PIQ").

7. The PIQ is a detailed description of an employee's job and duties performed.

8. Grievant prepared a PIQ for review in June 2009. Both her first-level and second-level supervisors signed Grievant's PIQ routing sheet in July of 2009. Gr. Ex. 2.

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[1] A complete copy of the Job Evaluation Plan for Colleges and University Systems of West Virginia as revised June 1993 is Respondent's Exhibit 4.

9. Grievant's first-level Supervisor is Charles H. Racer. As such, Supervisor Racer signed Grievant's PIQ routing sheet on July 22, 2009.

10. By memorandum dated September 9, 2009, Dennis Meadow, Chief Procurement Officer, Office of Purchasing, (Grievant's second-level supervisor) submitted additional information and clarification regarding Grievant's PIQ. This document was addressed to Anita Lockridge, Vice President of Administration and Finance.

11. On or about October 23, 2009, classification review documentation was submitted, initiating a review of Grievant's position.

12. On December 17, 2009, Grievant filed the instant grievance wherein she requested to be reclassified as a "Contract Specialist."

13. There are established equity levels for identified pay grades assigned to higher education classified positions. *See* Job Evaluation Plan, Resp. Ex. 3. Also, *see* "Classified Staff Minimum Equity Step and Entry Rates" at 133 C.S.R. 8 §12.2 (2001). The minimum salary for pay grade 16 is $21,348. The minimum salary for pay grade 18 is $24,372.

14. The point score range for pay grade 16, as specified by the Job Evaluation Plan ("JEP"), revised 5/93, is 2114-2254. Resp. Ex. 3.

15. The point score range for pay grade 17, as specified by the JEP, is 2255-2407. Resp. Ex. 3.

16. The point score range for pay grade 18, as specified by the JEP, is 2408-2573. Resp. Ex. 3.

17. During the Level 1 conference held on January 7, 2010, it was agreed that Grievant would submit her PIQ to the JEC for review.

18. Subsequent to January 7 but prior to February 4, 2010, Grievant's PIQ, Meadow's memorandum and additional addendum information were submitted to be considered in reviewing Grievant's position.

19. Eight of the JEC members evaluated and voted on Grievant's position via a conference call on February 4, 2010. [2]

20. Grievant's position point total, as reviewed and evaluated by the JEC, was 2224. Resp. Ex. 5.

21. The JEC determined that the position Grievant presently holds was properly classified as pay grade 16, a Purchasing Agent. Gr. Ex. 2.

22. Upon notification of the JEC's decision, Respondent, by letter dated March 10, 2010, issued its level one decision denying the instant grievance.

23. Grievant disagrees with the JEC's assessment of her job classification. [3] Grievant challenges the final conclusion of the JEC regarding her classification, in that the JEC determined the position was properly classified as a pay grade 16 position.[4]

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[2] Generally, evaluation of a position entails review of the material received in the classification review process; e.g., position duties, employee's PIQ, Supervisor's notations, minimum qualification requirements, etc.

[3] At the Level 3 Hearing, Grievant was supplied with documentation that attested to the JEC assessment of her position. Gr. Ex. 2. While Grievant altered her argument to challenge specific factors, it was clear that Grievant was unaware of the precise numbers the JEC had assigned her position, prior to being supplied the data at the level three hearing on August 25, 2010.

[4] Grievant identified and challenged the points her position was assessed in the factors of; Experience; Complexity and Problem Solving; Freedom of Action; Scope and Effect; Breadth of Responsibility; Intrasystem Contacts; External Contacts; Direct Supervision, and Indirect Supervision (factors 2 through 10). Each contested factor will be discussed individually. *Infra.*

Discussion

I. BURDEN OF PROOF AND STANDARD OF REVIEW:

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). Grievant seeks as relief in this grievance that she be placed in a classification in a higher pay grade. In order to achieve this, Grievant must demonstrate she is not properly classified. The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that they are not properly classified. *Burke, et al., 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 grievant is not likely to meet her burden of proof in a higher education classification grievance merely by showing that the grievant's job duties better fit one job description than another, because the classification system used by higher education does not use "whole job comparison." The relevant classification system is largely a "quantitative" system. The Job Evaluation Committee employs a "point factor methodology" which evaluates each job title by analyzing specific characteristics termed "factors," assigning a rating or "degree level" to each factor, and applying a weighted equation to the assigned levels to arrive at a numerical total, which determines the job title's Pay Grade. The point factor degree levels are not assigned to the individual, but to

the job title. *Burke, et. al., v. Bd of Directors, Fairmont State College*, Docket No. 94-MBOD-349 (Aug. 8, 1995). The thirteen point factors and the degree levels under each point factor are defined in the Job Evaluation Plan. *See* Resp. Ex. 2 and 3.

The focus in grievances challenging classification determinations under this system is upon the point factors which the grievant is challenging.[5] A higher education grievant may prevail by demonstrating the decision on her classification was made in an arbitrary and capricious manner. *See Kyle v. W. Va. State Bd. of Rehabilitation, Div. of Rehabilitation Services,* Docket No. VR-88-006 (Mar. 28, 1989). Finally, whether a grievant is properly classified is almost entirely a factual determination. Accordingly, JEC/Respondent's interpretation and explanation of the point factors and Generic Job Descriptions or Position Information Questionnaires (PIQ) at issue will be given great weight unless clearly erroneous. *See Gregg v. Board of Trustees,* Docket No. 94-MBOT-863 (Dec. 18, 1996); *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 459 S.E.2d 374 (1995); *Burke, supra*; *See also Snider v. W. Va. Bureau of Environment*, Docket No. 95-DEP-306 (Sept. 29, 1995). However, no interpretation or construction of a term used in the *Mercer* classification system is necessary where the language is clear and unambiguous. *Watts v. Dep't of Health and Human Res.*, 195 W. Va. 430, 465 S.E.2d 887 (1995). The higher education employee challenging her classification has to overcome a substantial obstacle to establish that she is misclassified.

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[5] 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, et al., v. Bd. of Trustees*, Docket No. 94-MBOT-1059 (Oct. 26, 1995); and *Zara, et al., v. Bd. of Trustees,* Docket No. 94-MBOT-817 (Dec. 12, 1995).

In this grievance, Grievant seeks a different job title, asserting that the JEC erroneously valued the duties of her position through its application of the point factor methodology. Grievant identified and challenged the points her position was assessed in the factors 2 through 10.[6] Grievant disagrees with the JEC's determinations. Grievant contends that her position's duties were undervalued when the JEC rated the identified factors using the point factor methodology. In order to determine if the position in discussion is misclassified, the challenged point factors and ratings will be discussed, *infra.*

Grievant's burden is to prove by a preponderance of the evidence that the JEC's decision regarding her classification was clearly wrong or was made in an arbitrary and capricious manner. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration and, in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

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[6] *See* Overview Chart, *infra*. Any ratings which were not specifically contested or argued against are considered abandoned and will not be discussed.

II. POINT FACTOR ANALYSIS

The following chart supplies an overview of the factors, scores, benchmarks and concepts in discussion. Grievant avers that the points attributed to identified factors do not accurately reflect the duties performed by the position currently identified as a pay grade 16, Purchasing Agent.

FACTORS			Purchasing Agent	Contract Specialist	Gr # **JEC**	Gr's # Proposed
	sub-category		Benchmark	Benchmark	Feb 9,2010	
1. Knowledge		(KN)	6	6	6	uncontested
2. **Experience**		(EX)	4	5	**4**	**6**
3. **Complexity and Problem Solving**		(CPS)	4	4	**3.5**	**5**
4. **Freedom of Action**		(FA)	3.5	4	**3.5**	**4**
5. **Scope and Effect**	Impact	SE IA	5	7	**4**	**8**
	Level	SE NA	3	3	**4**	**4**
6. **Breadth of Responsibility**		(BR)	1	1	**1**	**4**
7. **Intrasystem Contacts**	Nature	IC NC	2	3	**2**	**3**
	Level	IC LVL	2	4	**4**	**6**
8. **External Contacts**	Nature	EC NC	2	3	**2**	**3**
	Level	EC LVL	2	3	**3**	**5**
9. **Direct Supervision**	Number	**DSE NUM**	1	3	**1**	**2**
	Level	**DSE LVL**	1	4	**1**	**4**
10. **Indirect Supervision**	Number	**ISE NUM**	1	1	**1**	**4**
	Level	**ISE LVL**	1	1	**1**	**3**
11. Physical Coordination		(PC)	1	1	2	uncontested

12. Working Contacts		(WC)	2	1	2	uncontested
13. Physical Demand		(PD)	1	1	1	uncontested
Total			2163	2541	2224	??
PAY GRADE			16	18	16	18

Grievant identified and challenged the points the position was assessed in the factors of: Experience; Complexity and Problem Solving; Freedom of Action; Scope and Effect; Breadth of Responsibility; Intrasystem Contacts; External Contacts; Direct Supervision, and Indirect Supervision (Identified above as factors 2 through 10). Each contested area will be discussed individually. Grievant contends she should be classified as a Contract Specialist, pay grade 18.

A. Experience (Factor 2)

This factor measures the amount of prior directly related experience required **before** entering the job. *See* Job Evaluation Plan, Resp. Ex. 3. The JEC assessed Grievant's position with a degree level of "4" for this factor. Grievant contends she is entitled to a degree level of "6." [7]

Ms. Patricia Clay, a member of the JEC, testified at the level three grievance hearing held on August 25, 2010. As a long standing member of the JEC, Ms. Clay's testimony supplied insight and explanation regarding the evaluation process of the instant job classification review. Ms. Clay has been a member of the JEC since its inception, that being approximately 1994. Ms. Clay's testimony is deemed reliable and relevant. Other

[7] It is not clear that Grievant is aware that the JEC classification review encompasses what is evaluated to be the minimum amount of Experience level perceived necessary to perform the duties of the position not her individual level of experience.

than Grievant's opinion in opposition to the JEC's analysis, generally no information or evidence of record contradicts the information provided by this JEC member.

Relevant to the Experience Factor, Ms. Clay testified that based upon the information provided in Grievant's PIQ, there is nothing which would have supported a degree of "6" for this factor and this position. The overall consensus and agreement of the JEC members regarding classification of this position was degree level "4" which is '[o]ver two and up to three years of experience' (Previous experience or training should not be credited under this factor if credited under Knowledge - Factor 1), *citing* Job Evaluation Plan, Resp. Ex. 3. Grievant's different types of experiences listed: four years for work experience and contract negotiation; one year using computer; working with public – three years; and one year of public speaking (Experience ranging from one to four years). Ms. Clay testified the JEC evaluation and analysis of the applicable principles relevant to Experience and this position is consistent with other similar PIQs which have been evaluated with these levels of responsibilities and job duties. When examining the Experience point factor, the degree level in the Knowledge point factor must also be considered. In addition, the minimum experience requirement does not displace the need for some amount of on-the-job training. *See Nelson v. Bd. of Trustees,* 94-MBOT-727 (June 30, 1997); *Jones, et al., v. Bd. of Trustees*, Docket No. 94-MBOT-978 (Feb. 29, 1996). Further, "[t]he minimum amount of experience required to perform the essential duties of a position represents a subjective determination upon which reasonable minds may differ. *Zara v. Bd. of Trustees, W. Va. Univ.*, Docket No. 94-MBOT-817 (Dec. 12, 1995)." *Bee v. Bd. of Trustees,* Docket No. 94-MBOT-946 (June 30, 1997).

Grievant presented no persuasive evidence from which the undersigned can determine how much experience is required in order to be able to perform her duties. Grievant's disagreement with the JEC's determination is not sufficient to outweigh the deference to which the JEC determination is entitled. Grievant disagreed with the JEC's determination on this Factor but presented no credible evidence by which the undersigned could determine that the JEC was clearly wrong or acted in an arbitrary and capricious manner in assigning a degree level of "4" in this factor when evaluating Grievant's PIQ.

B. Complexity and Problem Solving (Factor 3)

> This factor measures the degree of problem-solving required, types of problems encountered, the difficulty involved in identifying problems and determining an appropriate course of action. Also considered is the extent to which guidelines, standards, and precedents assist or limit the position's ability to solve problems.

(Job Evaluation Plan – Factor 3; Complexity and Problem Solving). Grievant received a degree level "3.5" from the JEC for Complexity and Problem Solving. Grievant contends that she should have received a "5." The Job Evaluation Plan defines the Complexity and Problem Solving point level "3" as:

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

The Job Evaluation Plan further defines the Complexity and Problem Solving at the point level "4" as follows:

> Problems encountered are complex and varied due to incomplete and/or conflicting data. General policies, procedures, principles, and theories of specific professional disciplines are available as guidelines; however, these guides may have gaps in specificity or lack complete applicability to work assignments. Employee must utilize analytical skills in order to interpret policies and procedures, research relevant information, and compare alternative solutions.

Grievant disagrees with the JEC assessment. Grievant testified and submitted disjointed argument that she is of the opinion that a degree level "5" is more appropriate. The Job Evaluation Plan defines the Complexity and Problem Solving at point level "5" as:

> Problems encountered involve unusual circumstances, variations in approach, and incomplete or conflicting data. Employees exercise considerable analytical, valuative and reasoning skill in researching information and developing new methods to perform work assignments or optimum solutions to problems. The development of new programs, procedures or methods are typical end results of the problem-solving process. Determination of the effectiveness of a policy or practice may be involved at this level.

It is important to understand what the factor 'Complexity and Problem Solving' evaluates. Ms. Clay testified that, "[with complexity and problem solving there are five, actually 6, levels available for assignment to PIQs when you are evaluating them. And, if you consider all the jobs in the higher education system that are classified and if you can kind of rank [them]. A level six is for the highest level possible problem solving position in our organization. Of course, a level 1 would be very routine . . . simple types of issues that people deal with. Most people fall around 3 and 4. The complexity and problem-solving answer provided in the PIQ talks about 'the necessity of determining the nature of the interaction that is to occur with vendors and administration. . . . [C]onstantly requires the development/enhancement of innovative and complex methods of procurement. . . .'

however, when you look back to the PIQ duty statements and you read what the duty statements say, what this position does; and you look at the exhibits that were presented . . . [including] the addendum that was presented." The JEC believed that a 3.5 was appropriate for this position. JEC member, Clay, added insight into the rationale for the committee's actions. Ms. Clay testified that a level 5 was not appropriate because "[t]he position of purchasing agent is a very structured position and typically when there are a lot of rules and guidelines, the extent to which guideline standards and precedents assist or limit the position's ability to solve problems. . . . The higher regulated a job is, typically the lower level of complexity and problem-solving score the position gets. This factor typically has higher ratings for those jobs where there are no regulations, there [are] no guidelines, there [are] no AIA standards, there [are] no purchasing standards. . . . There [are] no rules and regulations that govern what you have, and what you need; and how it should be ordered or processed. So, given this information provided in the PIQ and the knowledge that the JEC has of the purchasing processes, a "3.5" was determined to be correct and a "5" was determined to be too high for this particular PIQ.

Grievant did not establish that the JEC's evaluation of her position at a point level of "3.5", as opposed to a "5," was arbitrary or capricious. Further, it is not demonstrated that the "3.5" assessment was inappropriate. Half-levels are not defined in the Plan; however, the JEC may assign a half-level for duties which are not within the higher level, but are more complex than the lower level. It is perceived that the JEC credited the position with performing a number of coordinated duties and attempted to recognize the knottiness of the position, by awarding a half a level point value to the recognized complexity. Grievant has failed to demonstrate that the JEC's evaluation of her position at point level of "3.5" for 'Complexity & Problem Solving' was a clearly wrong determination.

C. Freedom of Action (Factor 4)

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

(Job Evaluation Plan, Resp. Ex. 3. – Factor 4: Freedom of Action). Grievant received a degree level of "3.5" from the JEC for Freedom of Action. Grievant disagrees with this assessment, she contends that she should have received a "4". The Job Evaluation Plan defines the Freedom of Action point level "3" as follows:

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

The Job Evaluation Plan further defines the Freedom of Action point level "4" as follows:

> 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 objections of the unit.

There is a difference of .5 between the JEC assessed degree level for this factor and the degree level presented by Grievant. Gr. Ex. A2. Grievant indicated at the hearing she

waived this factor but presented a counter degree number in her proposed FOF/COL document. Thus, there seems to be a subtle difference of opinion relevant to Freedom of Action.

The undersigned is aware that Grievant works with and actively participates in the bidding process of large construction projects with what has been described to be little supervision. Grievant is of the belief that this action, coupled with her assistance with contracts, translates to a higher degree level than recognized by the JEC. The amount of true freedom of action is at issue.

The Freedom of Action Factor only has five levels. The JEC, in evaluating this position, determined Grievant's position does not exhibit the independent degree of authority attributable to a level "4" position. The position organizes and carries out most of the work assignments in accordance with standard practices, policies, instructions or previous training. The position readily does a number of duties which are instrumental to various processes; however, as noted *supra*, these actions are highly regulated. Review of construction contracts, purchase orders, change orders and open end contracts; disseminating information at bid conferences, making sure that all the essential documents and forms that are required are there, is an oversight process. But, these duties do not necessarily empower the employee with the degree of freedom to truly decide what can be done, what is needed, and is unnecessary, such determinations are regulated. There is positional influence, but not a great deal of true freedom in this particular job.

Grievant has failed to prove that the JEC's allocation of a degree level "3.5" for Freedom of Action was clearly wrong or arbitrary and capricious. Grievant's opinion alone is not sufficient to demonstrate that the JEC's analysis is wrong. Unless clearly erroneous,

the distinction of .5 (the difference between "3.5" and "4") is a subtlety best left to the experts. There exists a rational basis for the JEC's evaluation and assessed degree level.

D. Scope and Effect (Factor 5)

This factor is split into two separate components for scoring purposes, impact and level. Scope and Effect is a matrix factor that allows the JEC or the Plan to consider the differences in sizes of organizations. A position is scored on "Impact of Actions" and by "Nature of Actions." This is abbreviated on the data line as "SE:IA" and "SE:NA," respectively and is reflected separately. The Job Evaluation Plan provides;

> 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 system, 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. . . .

(Job Evaluation Plan, Resp. Ex. 3., Factor 5: Scope and Effect). The JEC evaluated Grievant's position at "4" for both "Impact" and "Nature of Actions" relevant to Scope and Effect, factor 5. Grievant indicated at the Level III hearing that she should have received a degree level of 8-Impact. *Also see* Gr. Ex. A2. Grievant contends that she should have received an "8" "because of the [w]ork affects the entire operation of a doctoral level institution with an operating budget of more than $200 million." Gr. Ex. A2.

The JEP defines Scope & Effect - Impact of Actions degree level “4” as:

> Work affects the entire operations of a specialized school, branch campus, community college or baccalaureate-level institution with an operating budget of < $13M; more than one school of division of a graduate or baccalaureate-level institution with an operating budget of $13 - $18M; a school or division of a graduate or baccalaureate-level institution with an operating budget of $19 - $25M; several departments within a graduate-level institution with an operating budget of more than $50M; or a major department within a doctorate-level institution with an operating budget of more than $200M.

The Job Evaluation Plan defines level “8” for Scope – Impact as follows:

> Work affects the entire operations of a doctoral-level institution with an operating budget of more than $200M; or several institutions within the West Virginia higher education systems.

Ms. Clay testified that “[s]cope and effect is the factor that delineates between the size of the organization. It measures the impact of the work product of that particular job on that department; on that unit; on that school; on the higher education system; or the several schools in one University; . . . on the state as a whole and beyond the higher education system. So a level 8 is the highest possible level that you can be scored with scope and effect . . . . A job scored with a level 8 typically would be one of the higher administrative positions that are in the classification system . . . . Their work product impacts the entire higher education system of West Virginia. When we are talking about this impact we are talking affecting all the functions or the mission of the organization. . . . Every department within the organization is affected. Most positions in our system received a 1 or a 2 on scope impact and then the nature of their action is variable. It is a matrix factor. It measures the impact of the action and the nature of the action. This PIQ received a 4, which shows that it does have . . . pretty high impact within the organization.

It is half way through the entire system. So it does show that this position has impact. The work product of this position affects several departments within a graduate level institution, . . . major departments within a doctoral level institution; and this position does have impact on major functions and major departments and units within Marshall University. . . . The impact of this job is more with the processes of the bidding and the purchasing. This job doesn't have the authority to make the purchase, so they aren't actually spending the money. This job is making sure the process is valid in the spending of the money by the department heads across the organization. This position does have oversight, in that, if there is an error or a problem it can be stopped."

It is the undersigned's understanding that degree levels 7 and 8 are reserved for or applied to positions that have impact across all of higher education or all of the State of West Virginia. Grievant received a level "4" on impact. Grievant's position is one of two responsible for buying, processing, bidding, et cetera, for Marshall University. Further, the undersigned is aware that Grievant is of the opinion her activity with the AIA Committee, whose decisions effect higher education, justifies a higher impact level number for her position at Marshall University. The JEC does not concur with Grievant with regard to how this translates to an increased degree level for her position. The JEC assigns the degree levels according to the duties of the position, not to the individual holding the position. *Burke, supra.* Further, Grievant is but one member of this regulatory organization, not the decision maker.

Grievant's actions do not have the immediate impact indicative of a higher degree level in this factor. There are a number of review levels after Grievant's position. This lowers a position's impact of action degree level. So, the JEC believed or felt, that based

on the job duties, the Scope and Effect answers, and the attachments provided, that this position fits at level 4 on Impact of Actions. Grievant has not presented any compelling rationale to support a finding that the JEC either abused its discretion or was clearly wrong in assigning a level "4" rating to her position's Scope and Effect-Impact level. The JEC's reasonable interpretation of the Plan is given deference. *See Tennant, supra*; *Burke, supra*; *See also Snider, supra*. An administrative law judge may not simply substitute his judgment for that of the JEC. *See generally, Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001)*; Hattman v. Bd. of Directors*, Docket No. 98-BOD-439 (Apr. 30, 1999)*; 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). The undersigned is not persuaded that the JEC's determination was either arbitrary and capricious or clearly wrong.

E. Breadth of Responsibility (Factor 6)

> 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.]

(Job Evaluation Plan, Resp. Ex. 3; Factor 6: Breadth of Responsibility). For Breadth of Responsibility the JEC scored Grievant at a level of "1." Grievant asserts that a level of "4" is more appropriate. Gr. Ex. A2. Grievant's justification highlights the various depths of knowledge needed of rules, policies, jurisdictions, and statutes, state and federal. The position must be familiar with and balance among competing interests, the applicable

collection of regulations. Further, Grievant notes that she is responsible for advising others regarding these constraints, highlighting that the nature of the position makes her accountable to numerous departments, and individuals of authority.

The Job Evaluation Plan defines the Breadth of Responsibility point level "4" as follows:

> In-depth knowledge of and accountability for <u>three</u> functional areas as measured by the Incumbent's ability to answer detailed and complex questions relative to policies, procedures, laws and regulations.

Of all the Factors challenged by Grievant, this is the example upon which this ALJ tended to share in Grievant's confusion. Without explanation, it was not readily clear why the position in discussion did not qualify for a higher degree level.

Ms. Clay testified that Breadth of Responsibility measures the budget authority – the management authority. This [factor] is reserved for management level positions . . . What it does is give credit to those jobs . . . who wear multiple hats. . . . [Further], the functions [that] these jobs are over have to be unrelated functions. . . . [Therefore], that factor does not apply to Ms. Smith's PIQ or the position that she holds." Ms. Clay explained the position was assessed a 1 because, "1 is the default that is accountable for only the immediate work assignments, but not for a functional area."

This explanation is enlightening, but such understanding was not readily discernable from the wording defining Breadth of Responsibility. It is provided in the clarification section of the Plan. Breadth of Responsibility: "Must have management level responsibility to receive credit." Grievant's position has no such responsibility. Thus, the undersigned does not find that the JEC, in evaluating Grievant's position, was clearly wrong or acted in an arbitrary and capricious manner in assigning a degree level of "1" for this factor.

F. Intrasystem Contacts (Factor 7)

Intrasystem Contacts, Factor 7 also has two separate components for scoring purposes; Nature and Level. Each position is rated for the Nature of the Contact, which is shown on the data line as "IC:NC," along with a rating regarding the Level of Regular, Recurring and Essential Contact, which is reflected on the data line as "IC:LVL".

> This factor appraises the responsibility for working with or through other people within the SCUSWV to get results. Consider the purpose and level of contact encountered and a regular, recurring and essential basis during operations. Consider whether the contact involves furnishing or obtaining information, explaining policies or discussing controversial issues. This factor considers only those contacts outside the job's immediate work area.

(Job Evaluation Plan, Resp. Ex. 3. (Emphasis in original)). Grievant received a degree level "2" from the JEC for Intrasystem Contacts - Nature of Contact (IC:NC), and a degree level of "4" for Intrasystem Contacts - Level (IC:LVL). Grievant contended that she should have received a level "3" for IC:NC and a level "6" for IC:LVL.

i. Nature of Contact

Intrasystem Contacts under Nature of Contact has four different levels that can be assigned to nature. A "2" is the most common assignment for this particular factor for Nature. A level "2" is described as requiring moderate tact and cooperation; communication is largely of a non-controversial nature and handled in accordance with standard practices and procedures. *See* Job Evaluation Plan, Resp. Ex. 3. A significant portion of Grievant's duties includes knowing and explaining rules and regulations by which others must govern their actions. Ms. Clay testified the JEC felt that Grievant's PIQ supported a level "2" on the nature of contacts, and that a "3" would not be appropriate because the nature of the position's contact, with others, is not controversial and requiring

delicacy. The amount of substantial sensitivity and cooperation required for a "3" IC:NC is not present in Grievant's position. Such positions don't have a lot of the rules and guidelines as discussed in complexity and problem solving.

ii. Level of Regular, Recurring and Essential Contact

The JEC evaluated Grievant's position as involving regular, recurring and essential contact at Level 4. Grievant did not establish any fact or evidence that demonstrates the JEC's evaluation of IC:LVL and her position is erroneous. Respondent established reasonable justification for the JEC's analysis. A significant portion of this position's duties are about making sure that modifications are processed properly and that the appropriate rules and guidelines are followed. However, appropriate contact with individuals who possess budgetary responsibility is acknowledged. Grievant has failed to prove that the JEC's allocation of degree level for either component, Nature or Level was clearly wrong.

G. External Contacts (Factor 8)

> 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 and a regular, recurring and essential basis during operations. Consider whether the contact involves furnishing or obtaining information, influencing others or negotiation.

(Job Evaluation Plan, Resp. Ex. 3. - Factor 8: External Contacts) (Emphasis in original).

This factor is scored by rating the Nature of the Contact, which is shown on the data line as "EC:NC" along with the Level of Regular, Recurring and Essential Contact, which is reflected on the data line as "EC:LVL." The JEC evaluated Grievant's position at a degree level "2" for Nature and at "3" for Level. The external contact is applied much the

same way as internal contacts, but it is applicable to persons outside of the higher education systems of West Virginia, including students. Grievant contended that she should have received a level "3" for EC:NC and a level "5" for EC:LVL.

i. Nature of Contact

The JEP defines External Contacts - Nature of Contact degree level "2" 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, coordinating/scheduling complex meeting or conference arrangements.)

Credible testimony provided that external contacts has four levels of nature. The majority of the positions do get a level 2 because most of the employees are explaining policies, rules and procedures. Grievant does this activity on a regular basis with institutions, sales, engineers, high level product representatives, governmental officials and contractors. The undersigned is not convinced the JEC's evaluation is in error or arbitrary and capricious.

ii. Level of Regular, Recurring, and Essential Contacts.

Ms. Clay testified and explained that Grievant's PIQ did not support a level 5, but did support the level 3 as assessed by the JEC. Ms. Clay testified, "[o]n external contacts, Level 5 is the highest possible level of contact that a classified employee in all of higher education in West Virginia can have with external persons outside the higher education system. . . . The JEC applies this factor for persons who communicate regularly and work regularly with judges, school superintendents and persons like that. . . . The level of contacts described under external contacts [in Grievant's PIQ] 'procurement requirements, problems with bidding requirements, procedures, terms and conditions, revisions of construction, architectural, [and] AIA documents' and plus the duty statements do not

support a Level 5 on external contacts." Grievant challenges the JEC's score but doesn't provide a persuasive alternative score. A degree level of "3" for Level of Regular, Recurring and Essential Contact is not clearly erroneous.

H. Direct Supervision (Factor 9)

> 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.

(Job Evaluation Plan, Resp. Ex. 3. - Factor 9: Direct Supervision Exercised). Pursuant to this factor a position is rated for the Number of Direct Subordinates, which is shown on the data line as "DSE:NUM". Further, the position is rated regarding the "Level of Supervision", which is reflected on the data line as "DSE:LVL". Grievant's position received a point level of 1 for Direct Supervision in both number and level of supervision. Grievant indicated that she believed a level 2 for Direct Supervision – Number and a 4 for Direct Supervision – Level would be appropriate. Gr. Ex. A2.

The PIQ, in review, indicates that Grievant supervises a temporary assistant. However, it was explained that student workers, temporary workers or employees who are hired through a contract through a temporary agency, do not establish supervision degree credit in this factor. With respect to level of supervision, Ms. Clay testified that a degree of 4 DSE:LVL would be indicative of direct supervision over a unit of non-exempt employees or lead over exempt employees and this position doesn't have such supervisory responsibility.

Certain factors 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 has not demonstrated that the JEC's determination in the instant case is a violation of the mandate for a uniform system of classification. Grievant does not directly supervise another classified employee as a duty or responsibility associated with her current position. Consequently, Grievant did not prove that she qualified for a higher rating under Direct Supervision, Factor 9.

I. Indirect Supervision Exercised (Factor 10)

> 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 (FTE's).

(Job Evaluation Plan, Resp. Ex. 3 - Factor 10: Indirect Supervision Exercised). Grievant's position received a point level of "1" for Indirect Supervision in both number and level of supervision. Grievant challenges this assessment, she contends that a degree level of "4" would be appropriate. Gr. Ex. A2.

Again, Ms. Clay testified, " [i]n order to get any credit at all for indirect supervision you have to supervise people who supervise other people. Training, giving advice, directing processes is not supervision. You've got to supervise people. You've got to do effective recommendations on hiring and firing. You've got to sign time reports, time cards.

You've got to do performance appraisals. You've got to deal with work assignments, the whole gambit of being a supervisor. Being responsible for a function does not provide any indirect supervision credit in our classification program."

Grievant's position does not perform any of the identified supervisory functions deemed Indirect Supervision. Grievant did not prove that she qualified for a higher rating under Indirect Supervision, Factor 10.

III. SUMMARY

The point factor degree levels are not assigned to the individual, but to the job title. *Burke, supra.* The JEC assigns the degree levels according to the minimum degree level required to perform the duties of the position, not to the individual holding the position. Grievant's position point total as reviewed and evaluated by the JEC was 2224. Gr. Ex. 2. This equates to a pay grade 16 position. *See* Job Evaluation Plan, Resp. Ex. 3. Grievant failed to establish by a preponderance of the evidence that Respondent, through the JEC, interpreted or applied the applicable point factor methodology to the duties and responsibilities of her position in a manner that was arbitrary and capricious. Grievant doesn't agree with the JEC's ultimate determination regarding her position; however, Grievant has not demonstrated that the point factor degree levels attributed to her position were clearly wrong.

_____It has not been established that Grievant is misclassified. Grievant did not meet her burden of proof regarding the point factors she challenged. In accordance with the applicable methodology used by the Higher Education Job Classification System, it was determined that Grievant's position was properly designation as a pay grade 16.

The following Conclusions of Law support the Decision reached.

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 § 3 (2008); *Burke, et al., v. Board of Directors*, Docket No. 94-MBOD-349 (Aug. 8, 1995).

2. Within the West Virginia Higher Education Job Classification System, the Job Evaluation Committee is charged with job evaluation and classification determinations following an evaluation system, formerly known as *Mercer*. Accordingly, the JEC is empowered with the authority to review Position Information Questionnaires and assign degree levels under each point factor for positions in review. *See* WEST VIRGINIA CODE § 18B-9-1 *et seq*; 133 C.S.R. 8 *et seq*.

3. Whether a grievant is properly classified is almost entirely a factual determination. Accordingly, Respondent's interpretation and explanation of the point factors and Generic Job Descriptions or PIQs at issue will be given great weight unless clearly erroneous. *See Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995); *Burke, et al., v. Board of Directors*, Docket No. 94-MBOD-349 (Aug. 8, 1995).

4. A higher education grievant may prevail by demonstrating the decision on her classification was made in an arbitrary and capricious manner. *See Kyle v. W.Va. State Board of Rehabilitation, Div. of Rehabilitation Services*, Docket No. VR-88-006 (March 28, 1989).

5. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. The JEC assigns the degree levels according to the minimum degree level required to perform the duties of the position, not to the individual holding the position.

7. The undersigned Administrative Law Judge’s review is limited to determining whether the JEC was clearly wrong or acted in an arbitrary and capricious manner.

8. The JEC’s determination that Grievant’s position was appropriately classified at the level of pay grade 16 was not clearly erroneous or arbitrary and capricious.

9. Grievant 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 Purchasing Agent in pay grade 16, was clearly wrong or otherwise unsupported by the available evidence.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: May 20, 2011

Landon R. Brown
Administrative Law Judge