THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRENDA SUE WOLFE,
Grievant ,

v. **DOCKET NO. 2012-0028-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Brenda Sue Wolfe filed a grievance on July 5, 2011, against her employer, West Virginia University, "due to not receiving a pay raise." The relief sought by Grievant was "a pay raise, of pay grade 17." As the grievance progressed, it evolved into a claim of misclassification, and Grievant finally sought at level three that she be placed in a pay grade 18, although she did not specify a classification she believed was more appropriate.

A conference was held at level one on July 21, 2011, and the grievance was denied at that level on November 16, 2011. Grievant appealed to level two on November 23, 2011, and a mediation session was held on May 10, 2012. Grievant appealed to level three on May 18, 2012. Two days of hearing were held at level three before the undersigned Administrative Law Judge on September 7, 2012, and February 19, 2013, at the Grievance Board's Westover office. Grievant appeared *pro se,* and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision on receipt of the parties' Proposed Findings of Fact and Conclusions of Law, on March 22, 2013.

Synopsis

Grievant argued that she was performing the same duties as a co-worker who was in a classification in a higher pay grade than she, and she also asserted that her duties entitled her to a higher degree level in several point factors. Grievant did not demonstrate that she was not properly classified.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by West Virginia University ("WVU") since 1993, and is classified as a Developmental Advising Specialist, pay grade 16.

2. At the time this grievance was filed, Grievant was classified as an Academic Advisor, pay grade 15. After the level one conference, Grievant prepared and submitted a new job summary and duty statement for review. She did not complete a new Position Information Questionnaire ("PIQ"), which would have provided information related specifically to each point factor. Her PIQ was revised, however, apparently by Grievant's supervisor, but Grievant refused to sign it because she disagreed with the organizational chart which her supervisor had attached to the PIQ. The new information was reviewed by Kimberly Kelly, WVU's Assistant Director of Human Resources for the Health Sciences Center, and Grievant was placed in her current classification and pay grade on October 16, 2011. The record does not reflect whether Grievant received back pay to the date the grievance was filed.

3. Grievant's Job Title of Developmental Advising Specialist is assigned the following degree levels in the 13 point factors: Knowledge 7; Experience 1; Complexity and Problem Solving 3.5; Freedom of Action 3.5; Scope and Effect/Impact of Actions 7; Scope and Effect/Nature of Actions 3; Breadth of Responsibility 1; Intrasystems Contacts/Nature of Contact 2; Intrasystems Contact/Level of Contact 2; External Contacts/Nature of Contact 3; External Contacts/Level of Contact 3; Direct Supervision Exercised/Number of Subordinates 1; Direct Supervision Exercised/Level of Supervision 1; Indirect Supervision Exercised/Number of Indirect Subordinates 1; Indirect Supervision Exercised/Level of Supervision 1; Physical Coordination 1; Working Conditions 1; Physical Demands 1.

4. At the request of Ms. Kelly, the Job Evaluation Committee reviewed Grievant's PIQ after this grievance was filed, and prepared a dataline specific to Grievant's duties and responsibilities. The JEC ratings in the point factors were Knowledge 7; Experience 2; Complexity and Problem Solving 3.5; Freedom of Action 3.5; Scope and Effect/Impact of Actions 4; Scope and Effect/Nature of Actions 3; Breadth of Responsibility 1; Intrasystems Contacts/Nature of Contact 3; Intrasystems Contact/Level of Contact 3; External Contacts/Nature of Contact 3; External Contacts/Level of Contact 3; Direct Supervision Exercised/Number of Subordinates 1; Direct Supervision Exercised/Level of Supervision 1; Indirect Supervision Exercised/Number of Indirect Subordinates 1; Indirect Supervision Exercised/Level of Supervision 1; Physical Coordination 2; Working Conditions 2; Physical Demands 1. The total points for this dataline fell within a pay grade 16, and the JEC determined that Grievant was properly classified.

5. Grievant counsels and recruits high school and college students, provides academic advising to students in various health professional programs, and assists these

students in completion of degree requirements, determines whether students meet the eligibility requirements for the physical therapy program, and performs others duties related to admissions.

6. Grievant has six years of experience. Grievant does not have a Master's Degree.

7. Grievant does not supervise any other employee. At certain times of the year she works with two Program Assistants and student workers in the office and assigns them work.

8. Grievant uses computer applications that require hand/eye coordination, she must be accurate in calculating GPA's and the transfer of credits, and she must travel by car on recruiting trips and read maps.

9. Grievant primarily works in an office setting. She is exposed to outside weather conditions only when she is traveling on recruiting trips, going from her car to the offsite location and back. At times the temperature in the event center which is hosting a recruiting event is not at the optimal temperature.

10. Grievant transports boxes when she is on recruiting trips, about ten times a year. She must load them in her car, and move them from the car to the event and back. The boxes generally weigh 30 to 40 pounds. Grievant could use a dolly to move the boxes.

Discussion

Grievant seeks as relief in this grievance that she be placed in a classification in a higher pay grade. The burden of proof in misclassification grievances is on the grievant to prove by a preponderance of the evidence that she is 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 Mercer classification system used by higher education 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 a point factor methodology. The thirteen point factors and the degree levels under each point factor are defined in the Job Evaluation Plan ("the Plan"). Therefore, the focus in Mercer decisions issued by this Grievance Board is on the point factors the grievant is challenging.[1] 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. *Burke, supra*. 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.*

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

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. As such, Respondent's interpretation and explanation of the point factors 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 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 his classification has to overcome a substantial obstacle to establish that she is misclassified.

Grievant initially argued that she performed the same duties as a co-worker who is in a different classification in a pay grade 19, and that she should be in that same pay grade. Grievant's supervisor disagreed that Grievant and the co-worker performed the same duties and testified that the co-worker has been assigned more responsibility in various areas than Grievant. The undersigned explained to Grievant at the first hearing that the Mercer classification system is not whole job comparison, and that she would need to challenge point factors. Moreover, the undersigned could not change Grievant's classifications or pay grade even if she were to demonstrate a co-worker with identical duties had been placed in a Job Title in a higher pay grade, as that employee may well be misclassified.

> "T]he remedy, in a situation involving a grievant's claim that others are enjoying a higher classification and performing the same work that she

performs, is not to similarly misclassify the grievant. *Akers v. W. Va. Dept. of Tax and Revenue*, 194 W. Va. 956, 460S.E.2d 702 (1995)." *Myers v. Dep't of Health and Human Resources*, Docket No. 00-HHR-392D (Mar. 30, 2001).

Bender v. Dep't of Health and Human Res., Docket No. 00-HHR-305 (Apr. 26, 2001).

Stihler v. Div. of Nat'l Res., Docket No. 07-DNR-360D (Feb. 6, 2009).

Application of the Point Factor Methodology

The following table shows the differences between the degree levels assigned Grievant's Job Title in the point factors challenged, the degree levels Grievant argued she should have received, and the degree levels assigned by the JEC after review of Grievant's PIQ.

	EX	CPS	FA	SE NA	IC LVL	EC LVL	DSE NUM	PC	WC	PD[2]
Grievant's Job Title	1	3.5	3.5	3	2	3	1	1	1	1
Grievant's Argument	6	4	4	4	4	4	4	3	3	3
JEC	2	3.5	3.5	3	3	3	1	2	2	1

Each of the point factors challenged by Grievant will be addressed separately below.

1. Experience

The Plan defines Experience as follows:

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

> 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.[3]

Grievant's Job Title is assigned a degree level of 1 in this point factor. Grievant believes a degree level of 6 is more appropriate. The JEC assigned a degree level of 2 when reviewing Grievant's duties. A degree level of 1 is defined as "[n]o experience or up to six months of experience." A degree level of 2 is defined as "[o]ver six and up to twelve months of experience." A degree level of 6 is defined in the Plan as "[o]ver four years and up to six years of experience."

Grievant opined that it takes at least four years of experience to be able to perform her duties, and to learn the programs. Ms. Kelly testified that the experience requirement is the minimum experience necessary for someone to be able to perform the duties of the position after a reasonable training period. She pointed out that the Job Title is assigned a degree level of 7 in the point factor Knowledge, and that this is the equivalent of a Master's Degree, which Grievant does not have.

Nothing in the record shows how long it takes to acquire the skills necessary to perform the duties of the position, other than Grievant's opinion. The record merely reflects a difference of opinion about how much experience is needed to be able to learn to perform Grievant's duties. The minimum amount of experience required to perform the essential duties of a position represents a subjective determination upon which reasonable minds may differ. *Zara v. Bd. of Trustees*, Docket No. 94-MBOT-817 (Dec. 12, 1995). The undersigned cannot conclude from the evidence presented that the JEC was clearly wrong

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[3] This and all subsequent definitions are taken from the Plan, Respondent's Level Three Exhibit Number 3.

or acted in an arbitrary and capricious manner in assigning a degree level of 2 in this point factor.

2. Complexity and Problem Solving

The Plan defines Complexity and Problem Solving as:

> 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.

Grievant's Job Title received a degree level of 3.5 in this point factor, and Grievant argued she should have received a degree level of 4. The JEC review also assigned Grievant's duties a degree level of 3.5 in this point factor. The JEC assigned half-levels (0.5) in this point factor and in Freedom of Action, where the position was performing significant portions of duties and responsibilities in both levels, i.e.: part in 3 and part in 4, hence a 3.5.

A degree level of 3 is defined in the Plan 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.

A degree level of 4 is defined in the Plan as:

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

In applying the definitions in this point factor, the Grievance Board has found that:

> Initially, it is important to point out that this point factor does not evaluate the difficulty of the job itself. One of the key questions in applying this point factor is whether the employee must make decisions about how to solve a problem, and if so, whether the number of possible solutions is limited by some policy, regulation, or procedure. In *Gregg, et al., v. Bd. of Trustees, W. Va. Network for Educational Telecomputing,* Docket No. 94-MBOT-863 (Dec. 18, 1996), in order to identify the source of errors, the grievants had to learn to recognize an error message on the computer screen, determine the computer language used in the error message, and then determine what the message meant. This was not a simple task, and sometimes required the grievants to go through a number of steps. However, a seemingly complex job did not equate to a high degree level in this point factor, because the grievants learned how to perform this task with education and experience, had reference manuals available which provided all the information necessary to determine the source of the problem, and could refer problems they had not encountered before to someone else.

Martin, et al., v. Bd. of Trustees, Docket No. 94-MBOT-658 (March 28, 1997). This discussion is instructive.

Grievant's argument was based on the fact that she must know policies and procedures, and must determine whether the solution she finds to a problem will work within the confines of these policies and procedures. Grievant testified that when she encounters a problem, if she does not know the solution, she knows who to ask. Ms. Kelly testified that a degree level of 4 is normally the supervisor/managerial level, or someone with authority to make changes to the way things are done. Grievant's description of the problem-solving she does involves determining the solution to problems within the confines of policies and procedures which must be followed, which seems to fall more within a degree level of 3 than a 4. Grievant, nevertheless, received credit for some decision-making at a degree level of 4. Grievant has not proven that a degree level of 4 is a better fit for all her duties.

3. Freedom of Action

The Plan defines Freedom of Action as:

> 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.

Grievant's Job Title received a degree level of 3.5, and Grievant argued she should have received a degree level of 4. The JEC assigned Grievant's duties a degree level of 3.5 in this point factor.

The definitions in the Plan show that at a degree level of 3:

> 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:

> 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.

Grievant testified that she does not see her supervisor, and that she knows what is required of her and makes sure deadlines are met. Ms. Kelly testified that although Grievant deals with some unusual situations independently, Grievant's supervisor has the responsibility to plan assignments and modify policy.

"The level of supervision exercised over the employee is not the key issue for measuring this point factor, rather it is whether the employee has the option to make decisions on her own if and when such situations arise." *Kretzmer v. Bd. of Directors,* Docket No. 94-MBOD-751 (Feb. 6, 1997). Further, as noted in *Burke, supra*:

> Across the higher education system, those positions with a degree level of 4.5 or above are directors or deans, for example. They are positions where direct supervision is exercised, and are more responsible jobs. There are more than 6000 higher education employees, and only five degree levels for Freedom of Action. Degree levels of 4.0 and 5.0 would be assigned to positions in the top group, such as the administrative group, the top managers and directors.

Grievant is guided in making decisions by policies and procedures. If she cannot determine what steps need to be taken from the policies and procedures, she testified she knows who to ask for assistance in determining the solution. It appears from the testimony that the reason Grievant does not need supervision is because she knows her job and does not need to be told what to do or how to do it. However, the JEC acknowledged that Grievant's duties do, at times, fall within a degree level of 4.0. Grievant did not demonstrate that the majority of her duties fall within this degree level.

4. Scope and Effect

Scope and Effect is defined in the Job Evaluation Plan as:

> 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 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 point factor consists of two parts, Impact of Actions and Nature of Actions. Grievant is challenging the degree level received in Nature only. Grievant's Job Title received a degree level of 3 in Nature, and Grievant argued she should have received a degree level of 4. The JEC believed 3 was the appropriate level for Grievant's duties.

A degree level of 3 is defined as, "[w]ork 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." A degree level of 4 is defined as "[w]ork 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."

Grievant testified in support of her position that if she provides incorrect information to a student, that student may not graduate on time, resulting in a loss of student funds and damage to the reputation of the University, and ultimately, fewer students applying to the program and the program shutting down. Ms. Kelly testified that Grievant provides guidance to a service that affects individuals, and that she must operate within protocol

and guidelines. She explained that a managerial level, with authority to make decisions about policies, is typically assigned the higher degree level of 4.

In applying this point factor, "interpretation of these similarly-worded provisions involves a subjective value judgment, which is an inherent element of the function of position classification. *Hastings [v. Bd. of Trustees,* Docket No. 94-MBOT-943 (May 28, 1996)]; *Jessen [v. Bd. of Trustees,* Docket No. 94-MBOT-1059 (Oct. 26, 1995)]." *Miller v. Bd. of Directors*, Docket No. 94-MBOD-495 (Oct. 29, 1996). In many Mercer decisions, this Grievance Board has found the JEC application of the point factors to be not inconsistent with the language used, taking into account the hierarchy in the departments. *See Wood v. Bd. of Directors,* Docket No. 94-MBOD-480 (March 11, 1997); *Hughes v. Bd. of Trustees,* Docket No. 94-MBOT-1002 (Jan. 28, 1997); *Gregg, et al., v. Bd. of Trustees*, Docket No. 94-MBOT-863 (Dec. 18, 1996); and *Henry, et al., v. Bd. of Trustees,* Docket No. 94-MBOT-1024 (July 31, 1996). Grievant has merely demonstrated that she has a different opinion than the JEC regarding the interpretation and application of this point factor. This is insufficient to overcome the deference to which the JEC interpretation is entitled.

5. Intrasystems Contacts

Intrasystems Contacts is defined in the Plan as a factor which:

> appraises the responsibility for working with or through other people within the SCUSWV [State College and University Systems of West Virginia] to get results. Consider the purpose and level of contact encountered on a 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.

This point factor consists of two parts, Nature of Contact and Level of Regular, Recurring and Essential Contact. Grievant is challenging the degree level received in Level only. She argued she should have received a degree level of 4, rather than a 2. The JEC review assigned a degree level of 3 to Grievant's duties. A degree level of 2 in Level is defined in the Plan as, "[s]taff and faculty outside the immediate work unit." A degree level of 3 is defined in the Plan as, "[s]upervisors, managers and/or chairpersons, other than own, within an institution, or coordinators within the Systems' Central Office." A degree level of 4 in Level is defined in the Plan as, "Deans or Directors in an institution or Assistant Directors in the Systems' Central Office."

Grievant did not offer any explanation as to why she believed her duties reached a degree level of 4. Her PIQ indicates that her primary contacts on a regular basis are personnel in her own work unit. Grievant did not demonstrate that her regular, recurring and essential contacts meet the definition of a degree level of 4.

6. External Contacts

External Contacts is defined in the Plan as:

> 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 or recurring and essential basis during operations. Consider whether the contacts involve furnishing or obtaining information, influencing others or negotiation.

Like the previous point factor, External Contacts is comprised of Nature of Contact and Level of Regular, Recurring and Essential Contact. Grievant is challenging the degree level assigned in Level of Contact only. She argued she should have received a degree level of 4 in Level, rather than the 3 assigned to her Job Title. The JEC review of Grievant's PIQ agreed that a degree level of 3 fit Grievant's job duties.

A degree level of 3 in Level is defined in the Plan as:

> Students, parents, alumni, faculty of institutions outside the systems, sales engineers, higher-level product representatives, recruiters and/or prospective students.

A degree level of 4 in Level is defined in the Plan as:

> Mid-level representatives of government agencies, professional contacts with other colleges and universities outside the systems.

Grievant testified that she may speak with professors or other professional personnel at other colleges and universities in West Virginia regarding questions about the transfer of college credits for students. While this contact is outside WVU, it is not outside the State College and University Systems of West Virginia, which is what this point factor measures. Grievant's primary contacts are with prospective students, parents, alumni, and faculty. Grievant did not demonstrate that a degree level of 4 was more appropriate for her duties.

7. 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 factor is analyzed in a matrix having two parts, Number of Direct Subordinates, and Level of Supervision. Grievant challenges only the rating received in Number of Direct Subordinates. Grievant's Job Title was assigned a degree level of 1, which is defined as no subordinates. Grievant asserted that she was entitled to a degree level of 4, which is

defined as four to six subordinates. The JEC review of Grievant's PIQ confirmed that a degree level of 1 was appropriate.

Grievant testified that she does not have any supervisory responsibility. Grievant does not supervise any employees, and therefore, cannot be assigned a degree level of anything other than 1.

8. Physical Coordination

The definition of this point factor in the Plan states, "[t]his factor assesses the amount of psychomotor skill involved in performing the job. Consider the complexity of body movements, speed/timing of movements, precision of movements, and need for close visual attention regularly required by the job in performing the work." Grievant's Job Title was assigned a degree level of 1 in this point factor, which is defined in the Plan as, "[w]ork requires normal level of ability common in almost every job, such as writing, sorting, filing/reviewing text materials, and/or occasional use of office equipment without any demand for speed." Grievant asserted that her work rises to the level of a degree level of 3, which is defined in the Plan as, "[w]ork requires some speed and accuracy of hand/eye coordination in the use of somewhat complicated instruments, equipment or hand or power tools requiring some speed and adeptness." The JEC review of Grievant's PIQ assigned her duties a degree level of 2, which is defined in the Plan as, "[w]ork requires simple hand/eye operations and some accuracy and regularity of motions, such as set-up and operation of basic instruments or equipment, and/or the occasional use of standard hand or power tools with minimal speed requirements."

Ms. Kelly testified that employees whose duties rise to the level of a degree level of 3 would be operating complicated instruments, and that Grievant's duties require simple

hand/eye coordination, such as is required in the use of a computer. Both speed and accuracy are prerequisites for a level 3 rating. *Long v. Bd. of Trustees*, Docket No. 94-MBOT-725 (June 30, 1997). Grievant did not indicate that any speed is required in the performance of her duties, and she did not prove that a degree level of 3 is appropriate for her duties.

9. Working Conditions and Physical Demands

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

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

Grievant challenged the ratings in both Working Conditions and Physical Demands, arguing her duties rise to the level of a 3 in both. Her Job Title was assigned a degree level of 1 in both. The JEC review assigned Grievant's duties a degree level of 2 in Working Conditions and 1 in Physical Demands.

A degree level of 1 in Working Conditions is defined in the Plan as, "[n]o major sources of discomfort, i.e., standard work environment with possible minor inconveniences due to occasional noise, crowded working conditions and/or minor heating, cooling or ventilation problems." A degree level of 2 in Working Conditions is defined in the Plan as, "[o]ccasional minor discomforts from exposure to less-than optimal temperature and air conditions. May involve dealing with modestly unpleasant situations, as with occasional exposure to dust, fumes, outside weather conditions, and/or near-continuous use of a video display terminal." A degree level of 3 is defined in the Plan as:

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

Ms. Kelly testified that employees assigned a degree level of 3 would be routinely exposed to cold weather, or work with chemicals. This explanation is consistent with the definition set forth above. Grievant's occasional exposure to outdoor weather conditions during recruiting trips, and less than optimal indoor temperatures at event centers does not fall within the definition of a degree level of 3.

A degree level of 1 in Physical Demands is defined in the Plan as, "[j]ob is physically comfortable; individual is normally seated and has discretion about walking, standing, etc. May occasionally lift very lightweight objects. A degree level of 2 in Physical Demands is defined in the Plan as, "[l]ight physical effort required involving stooping and bending; individual has limited discretion about walking, standing, etc.; occasional lifting of lightweight objects (up to 25 pounds.)" A degree level of 3 which is defined in the Plan as, "[m]oderate physical effort required involving long periods of standing, walking on rough surfaces, bending and/or stooping; periodic lifting of moderately heavy items (over 25 and up to 50 pounds.)"

Ms. Kelly testified that a degree level of 3 is typically reserved for employees who are required to lift heavy items everyday as a central part of their job, such as workers employed in the Physical Plant. She pointed out that Grievant is not required to carry boxes from her car to the area where she will be setting up for an event, rather, she could use a dolly, and, this is not a duty Grievant has on a regular basis. The undersigned would also point out that no testimony was offered as to what is in the boxes Grievant takes to

events, or that they could not be made lighter. Grievant did not demonstrate that the occasional lifting of boxes is sufficient to qualify for a degree level of 3 in this point factor.

In summary, Grievant did not demonstrate that any of the point factors assigned to her Job Title or to her duties by the JEC was incorrect. Grievant is properly classified.

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. *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).

2. The Respondent's interpretation and explanation of the point factors and Generic Job Descriptions or PIQs at issue 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,* Docket No. 94-MBOD-349 (Aug. 8, 1995).

3. Grievant did not demonstrate that she is not properly classified.

4. Grievant was not properly classified from the date this grievance was filed, July 5, 2011, until she was placed in a Job Title in a pay grade 16 on October 16, 2011.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Respondent is **ORDERED** to pay Grievant the difference between what she earned in her pay grade 15 Job Title from July 5, 2011, until October 16, 2011, and the salary increase, if any, that she received on October 16, 2011, when she was placed in a Job Title in a pay grade 16, from July 5, 2011, through October 15, 2011, plus any difference in benefits, if this has not already been done. The remainder of the 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: May 3, 2013