THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

FRANK PACK and
GARRY SMITH,
Grievants,

v. **DOCKET NO. 2012-1497-CONS**

WEST VIRGINIA UNIVERSITY,
Respondent.

DECISION

Frank Pack and Garry Smith filed grievances on December 16, 2011, against their employer, West Virginia University. The statements of grievance for the two grievances were nearly identical, alleging that the Grievants, both of whom are classified as a Trades Specialist, pay grade 13, "have been performing the duties of a pay grade 15," and "have not been properly compensated." The relief sought by both Grievants "is to be compensated at the level of a pay grade 15 and to be paid the difference between a pay gr[ade] 15 and 13 . . . (with interest)."

Separate conferences were held on the grievances at level one on December 20, 2011, and the grievances were both denied at that level on February 6, 2012. Grievants appealed to level two on February 13, 2012, and a joint mediation session was held on June 5, 2012. Grievants appealed to level three on July 10, 2012, where the grievances were consolidated. A level three hearing was held before the undersigned Administrative Law Judge on January 9, 2013, at the Grievance Board's Westover office. Grievants were represented by Mary Snelson, West Virginia Education Association, 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 February 19, 2013.

Synopsis

Grievants argued that when the Trades Specialist Leads each had been working under vacated their positions, Grievants had assumed all the duties of the positions, and that they should have been compensated in the higher pay grade. Grievants did not challenge any point factors. Neither Grievant leads any full-time employee on a regular basis. Grievants believed they had been discriminated against, pointing to other employees who had been placed in a Lead position when the Lead they were working under vacated the position, and pointing to some employees classified as Trades Specialist Lead who had no employees working under them. The employees to whom Grievants compared themselves were not similarly situated to Grievants. Further, the relief sought, that Grievants be placed in the higher pay grade, could not be granted because Grievants failed to challenge any point factors assigned to their classification, and did not demonstrate they were misclassified.

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

Findings of Fact

1. Grievants are employed by West Virginia University ("WVU") as Trades Specialists, pay grade 13.

2. Grievant Pack worked under the direction and supervision of Scott Savage, a Trades Specialist Lead, pay grade 15, assigned to Zone 5 Maintenance, until Mr. Savage left this position in early 2010.[1] Grievant Smith worked under the direction and supervision of Greg Malvito, a Trades Specialist Lead, until August 1, 2011.

3. When Mr. Savage vacated his position, it was not posted. Grievant Pack assumed the following duties that Mr. Savage had been performing: ordering materials, meeting with building and zone supervisors, and obtaining authorization to shut a building down for maintenance.

4. When Mr. Malvito vacated his position, it was not posted. Grievant Smith assumed the following duties that Mr. Malvito had been performing: ordering materials, setting up jobs, and researching products online.

5. When the Grievants asked to be paid at a pay grade 15 level, both were directed to complete new Position Information Questionnaires ("PIQ's) to be submitted for review, detailing their duties and responsibilities, and they did so.

6. Neither of the Grievants has any other full-time employee assigned to work with them on a daily basis, and the PIQ's submitted by Grievants reflect this. When Grievants need assistance, they request that another worker be assigned to help them, but this request is not always granted. When someone is assigned to help one of the Grievants, it is not always another full-time employee, and it is not necessarily the same employee who worked with them last.

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[1] Grievant Pack moved to a different work area on September 23, 2012, and is not seeking back pay beyond that date.

7. Karry DeWitt is employed at WVU. He was a Trades Specialist until sometime during the summer of 2012. When the Trades Specialist Lead he worked under resigned in June 2012, WVU management made a decision to post the position as an Interim Trades Specialist Lead. Mr. DeWitt applied for the posted position, was interviewed, and was the successful applicant. He signed a new PIQ when he was placed in the position, but did not recall whether that PIQ stated that he supervised any employees. The person who had previously held this position supervised one or two employees at all times. Mr. DeWitt is no longer in the Interim Trades Specialist Lead position. He did not supervise any employees while he was in that position.

8. Chad Lyons was formally placed in an Interim Trades Specialist Lead position, based on the operational needs of the department in which he worked.[2]

9. The Benchmark for the Trades Specialist Lead indicates that a Lead supervises four to six employees. However, the Job Evaluation Committee, which is responsible for proper implementation of the higher education classification system (commonly referred to as the Mercer classification system), has determined that a Trades Specialist Lead may supervise only one employee, and any number of employees.

Discussion

Grievants seek as relief in this grievance that they be placed in a classification in a higher pay grade. In order to achieve this, Grievants must demonstrate they are not properly classified. The burden of proof in misclassification grievances is on the grievants to prove by a preponderance of the evidence that they are not properly classified. *Burke,*

[2] The record does not reflect whether Mr. Lyons applied for a posted position, but there was evidence that he submitted a resume.

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

A grievant is not likely to meet his 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. Therefore, the focus in Mercer decisions issued by this Grievance Board is on the point factors the grievant is challenging.[3] 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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[3] 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 and Generic Job Descriptions or PIQs 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 he is misclassified.

Grievants were advised by the undersigned prior to the level three hearing of the need to identify the point factors they were challenging. Grievants declined to challenge any point factors. Grievants chose instead to argue that other employees received what they referred to as a pay differential almost immediately after they assumed the duties of a Trades Specialist Lead when the Lead vacated the position, and that this was discriminatory treatment by management. This is insufficient to meet Grievants' burden of demonstrating that they are not properly classified. *Boyce, et al., v. W. Va. Univ.*, Docket No. 2008-0369-CONS (July 10, 2009); *Crockett, et al., v. Bd. of Trustees/Marshall Univ.*, Docket No. 94-MBOT-970 (Apr. 30, 1997). However, since Grievants believe that they have been treated differently by management, their discrimination/favoritism claim will be further analyzed.

For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants have not demonstrated that they are similarly situated to the employees to whom they compared themselves. First, a management decision was made to post the Lead position into which Mr. DeWitt was placed, and to also fill in some manner the Lead position into which Mr. Lyons was placed. While Grievants believe that they should have a helper at all times, management apparently disagrees with this. No evidence was placed in the record which would allow the undersigned to compare the situation of Grievants' areas of assignment to those of Mr. Lyons and Mr. DeWitt.

Second, Grievants did not place the PIQ's of the persons to whom they compared themselves into evidence for the undersigned's review. Accordingly, the undersigned cannot determine what information was relied on in classifying these individuals, and cannot compare the classification decisions. *Black, supra.* Moreover, the undersigned could not change Grievants' classifications or pay grades even if they were to demonstrate a co-worker with identical duties had been placed in a Trades Specialist Lead position, 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).
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> *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).

Grievants also asserted that at the level one conference WVU representatives stated that in order to be classified as a Trades Specialist Lead, an employee must supervise four to six employees, and presented evidence that several Trades Specialists Lead employed at WVU supervise only one employee. Indeed Grievant Smith's level one decision contains a finding of fact to this effect. No evidence was taken under oath at the level one conference, so the undersigned cannot evaluate the origin of this finding of fact. Even were the undersigned to accept this finding of fact, and that many employees classified as Trades Specialists Lead supervise only one employee, this alone is insufficient to meet Grievants' burden of proof, particularly when Grievants supervise no employees.

However, the finding that an employee must supervise four to six employees to be classified as a Trades Specialist Lead is not supported by the evidence placed into the record at level three. Maria Witt, WVU's Human Resources Manager assigned to support Facilities and Services, testified under oath at the level three hearing that while the "Benchmark" used by the Job Evaluation Committee for the Trades Specialist Lead classification indicates supervision of four to six employees, it is not a requirement for placement in this classification that the employee supervise this many employees. She testified that an employee may supervise only one employee and still be classified as a Trades Specialist Lead, but that the major distinction between a Trades Specialist and a Trades Specialist Lead is that the Lead supervises at least one employee who is assigned to him or her on a regular, recurring basis. Grievants do not have any full-time employees assigned to them on a regular, recurring basis.

Ms. Witt's testimony regarding the formal assignment of supervisory responsibility is consistent with the definitions in the Job Evaluation Plan of each point factor, and each degree level of each point factor, and with the case law. The Grievance Board has found that the point factor Direct Supervision Exercised "by definition, measures only the formal assignment of supervisory responsibility." *Nelson v. Bd. of Trustees, W.Va. Univ.*, Docket No. 94-MBOT-727 (June 30, 1997). Where an employee has different employees assigned to help him from day to day, the employee does not have any employee formally assigned to him. *Black v. Bd. of Trustees, Marshall Univ.*, Docket No. 94-MBOT-423 (Jan. 31, 1997). Further, the definition of direct supervision exercised "precludes an employee from receiving any supervisory credit for supervision of temporary workers, when it refers to supervision over 'subordinate jobs in the organization.' *Hardee [et al., v. Bd. of*

Directors, Concord College, et al., Docket No. 94-MBOD-373 (Jan. 10, 1997)]." Grievants did not demonstrate that they are not 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 he 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 he feels he is performing. Otherwise the complaint becomes so vague as to defy an adequate rebuttal or analysis. *Elkins v. Southern W. Va. Community College*, Docket No. 90-BOD-124 (Mar. 4, 1991).

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. In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

> 4. "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).
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Stihler v. Div. of Nat'l Res., Docket No. 07-DNR-360D (Feb. 6, 2009).

5. Grievants did not prove their claims of discrimination or favoritism.

6. Grievants did not demonstrate that they are not properly classified.

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 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: April 2, 2013