THEODORE JACKSON,

Grievant,

v. **Docket No. 94-MBOT-893**

BOARD OF TRUSTEES, WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

This is a grievance by Theodore Jackson (Grievant) challenging his classification as an Asbestos Abatement Worker (AAW) by the Respondent Board of Trustees (BOT) under the Job Evaluation Plan for the State College and University Systems of West Virginia developed jointly by the Respondent's Job Evaluation Committee (JEC) and William M. Mercer, Inc. (Mercer Plan). Grievant alleges that he should be classified as an Asbestos Abatement Worker - Lead (AAW - Lead) in Pay Grade 14. This grievance was initiated on June 30, 1994, in accordance with specific procedures established in § 18 of the Legislative Rule for Personnel Administration promulgated by the BOT on May 5, 1994. 128 C.S.R. 62. In October 1994, BOT waived this grievance to Level IV. (See footnote 1) Inaccordance with W. Va. Code § 18-29-5(b), this grievance was consolidated with the related grievances of nine other employees by Orders dated November 3 and 15, 1994. An extensive Level IV evidentiary hearing was conducted in Morgantown, West Virginia, on June 29-30, and September 27-28, 1995, and February 1, 1996. (See footnote 2)

On July 9, 1996, Grievant indicated in writing that he was withdrawing that portion of his grievance which related to being placed in Pay Grade 13 as an AAW. On July 25, 1996, the other employees whose grievances had been consolidated with this grievance withdrew their individual

grievances in their entirety and were dismissed as grievants by Order dated July 30, 1996. (See footnote 3) This matter became mature for decision on August 1, 1996, upon receipt of timely post-hearing arguments.

The process under which Grievant was reclassified, effective January 1, 1994, began with completion of a Position Information Questionnaire (PIQ). PIQs are highly-structured documents, 17 pages in length, on which individual employees describe the duties of their position, as well as certain minimum qualifications required to carry out their duties. (See footnote 4) Employees were also asked to rate various aspects of their position, under a scale set forth in the Mercer Plan. R Ex 1. The mechanics of this Job Evaluation Plan are generally referred to as the "Point Factor Methodology." PIQs were reviewed by the immediate supervisor and one level of management above the immediate supervisor, before being considered by the Job Evaluation Committee (JEC).

The JEC, consisting of representatives from human resources and classified staff, is responsible for "review of classification decisions across the system." § 11.5, 128 C.S.R. 62 (1994). Once all PIQs were completed, the JEC met to review the PIQs, assign employees to the appropriate classification, and evaluate each classification factor by factor. In the course of this process, the JEC applied the Point Factor Methodology (R Ex 1), interpreting the various factors as required to assign scores for all factors to each classification. After reviewing all PIQs submitted by those employees classified as AAW's, the JEC assigned points for each listed category as shown:

Knowledge	4.0
Experience	3.0
Complexity and Problem Solving	2.5
Freedom of Action	2.5
Scope and Effect - Impact of Actions	1.0
Scope and Effect - Nature of Actions	2.0
Breadth of Responsibility	1.0
Intrasystems Contact - Nature of Contact	1.0
Intrasystems Contact - Level of Contact	2.0
External Contacts - Nature of Contact	1.0
External Contacts - Level of Contact	2.0
Direct Supervision - Number of Direct Subordinates	1.0

Direct Supervision - Level of Supervision	1.0
Indirect Supervision - Number of Indirect Subordinates	1.0
Indirect Supervision - Level of Supervision	1.0
Physical Coordination	4.0
Working Conditions	4.0
Physical Demands	5.0

See R Ex 2.

Using a mathematical formula not at issue, the foregoing levels were calculated to award this job title 1,753 total points, equating to Pay Grade 12. (See footnote 5) The job title Grievant is seeking, AAW - Lead, was similarly evaluated by the JEC with higher ratings assigned to the following point factors as indicated:

Experience	4.0 vs. 3.0
Complexity and Problem Solving	3.0 vs. 2.5
Freedom of Action	3.0 vs. 2.5
Direct Supervision - Number of Direct Subordinates	3.0 vs. 1.0
Direct Supervision - Level of Supervision	3.0 vs. 1.0

See R Ex 2.

As a result of these higher ratings, the AAW - Lead job title was awarded a total of 1,974 points, placing it in Pay Grade 14. (See footnote 6) At the time Grievant was reclassified on January 1, 1994, the annual starting pay for Pay Grade 13 was $17,460, while the annual startingpay for Pay Grade 14 was $18,780. See 128 C.S.R. 62 (1994). As of that same date, Grievant's annual salary was $18,528. J Ex 2a.

According to Grievant's PIQ (J Ex 1I), dated October 23, 1991, his primary duties and responsibilities involve conducting asbestos abatement activities in the Health Sciences Center, and

other facilities at West Virginia University. Grievant is required to follow methods and procedures approved by the United States Environmental Protection Agency while employing basic carpentry, electrical, plumbing and HVAC (heating, ventilation and air conditioning) skills. Asbestos abatement generally involves removal of asbestos-containing materials from ceilings, pipe lagging, and floor tiles. Grievant is responsible for constructing and dismantling the appropriate containment and decontamination facilities at the work site, and is required to wear protective clothing and an approved respirator while working around asbestos. The PIQ contains no specific reference to performing duties as a lead worker. See J Ex 1I.

Neil Wilson, Grievant's immediate supervisor, testified that Grievant was one of the three most senior AAW's who took turns filling in for him while he was absent, but none of them had ever been given formal lead worker responsibilities. HT, 9/28/95, at 7, 77- 78. Grievant indicated in his testimony that he performed the same supervisory duties as another AAW, Barry Arnold. HT, 9/28/95, at 237. Mr. Arnold testified that he was one of three employees who filled in periodically for Mr. Wilson. HT, 9/28/95, at 137-138. Mr. Arnold filled in for Mr. Wilson approximately fifteen days during 1994. HT, 9/28/95, at 146. Another AAW, Edward Thomas, testified similarly regarding filling in for Mr. Wilson. HT, 2/1/96, at 5-6. However, Mr. Arnold explained that when he was not filling in for Mr.Wilson, such as when called out at night to respond to an emergency, he had no authority to call out additional personnel to assist with the problem. HT, 9/28/95, at 144.

Teresa Crawford, a Senior Compensation Analyst in the Department of Human Resources at WVU, testified for the Respondent. Ms. Crawford has handled classification and compensation matters at WVU for over ten years. Her areas of responsibility for classification matters include the Physical Plant and Health Sciences Center. Ms. Crawford has a Masters in Business Administration and has achieved recognition as a "certified compensation professional" from the American Compensation Association.

Ms. Crawford defined a "lead" position as follows:

> A Lead position is someone who would be overseeing one or more crews of workers of the same classification as them, at a lower level. They would be somebody who would get the team or the crew started, they may actually leave and go off and start another crew and come back and check on the progress of the initial crew. They were to ensure that all of the materials were available at the time the project was to begin. They would provide training to the new employees that would be hired. They could give some input to the supervisor as far as performance but they were not responsible for actually conducting performance appraisals or making hiring decisions or firing decisions or dealing with disciplinary issues, that would be the supervisor. HT, 6/29/95, at 218-19.

She further explained that "lead" work would normally be performed on a daily basis and that simply filling in for the supervisor during his absence did not constitute "lead" work in the context of the Mercer Plan. HT, 2/1/96, at 21-22. In Ms. Crawford's opinion, Grievant was properly classified by the JEC as an AAW. HT, 2/1/96, at 22.

DISCUSSION

Because grievances challenging pay and classification are not disciplinary in nature, Grievant has the burden of proving by a preponderance of the evidence that hehas been misclassified. 156 C.S.R. 1 § 4.17 (1989). See W. Va. Code § 18-29-6 ¶ 5; Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995). Whether Grievant is properly classified is substantially a factual determination that must be made on a case-by-case basis. Burke, supra. See Snider v. W. Va. Bureau of Environment, Docket No. 95-DEP-306 (Sept. 29, 1995).

Determinations of the JEC regarding application of the Mercer Plan's point factor methodology are essentially questions of fact. In that regard, the JEC's interpretation and explanation of the point factors and PIQs at issue will be given great weight unless clearly erroneous. Burke, supra. See generally, Tennant v. Marion Health Care Found., 459 S.E.2d 374 (W. Va. 1995). Likewise, subjective determinations of the JEC regarding application of the Mercer Plan's point factor methodology to an employee or group of employees are entitled to deference when being reviewed by this Grievance Board. However, such subjective determinations may nonetheless be found to be arbitrary and capricious if not supported by a rational basis, or found to be clearly wrong if there is no substantial evidence in the record supporting the finding or, a review of the evidence of record makes it clear that a mistake has been made. Jessen v. Bd. of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995). See Frymier-Halloran v. Paige, 458 S.E.2d 780, 788 (W. Va. 1995); Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989).

A grievant may challenge his initial classification under the Mercer process by demonstrating that another specific job classification constitutes the "best fit" for the duties he is assigned. Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29,1996). See Campbell-Turner v. Bd. of Trustees, Docket No. 94-MBOT-1035 (Jan. 31, 1996). Here, Grievant contends that he should have been assigned to the classification of AAW - Lead rather than AAW. The only credible evidence regarding

the duties expected of an AAW - Lead comes from the testimony of Ms. Crawford. (See footnote 7) Her description of a lead worker as someone with formal responsibility for overseeing the work of one or more crews of journeymen was clear and unambiguous. Grievant has not been formally assigned such duties and filling in for his absent supervisor on a rotating basis does not equate to functioning as an AAW - Lead. Moreover, Grievant's evidence, taken as a whole, falls well short of demonstrating that he should have received the same degree levels under the Mercer Point Factor Methodology as were given to the AAW - Lead position. See Campbell-Turner, supra. Accordingly, Grievant failed to demonstrate by a preponderance of the evidence that the AAW - Lead classification was the "best fit" under the Mercer Plan for the duties he actually performs.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant is employed by West Virginia University (WVU) and is assigned to the Health Sciences Center. He was initially classified under the Mercer Plan as an Asbestos Abatement Worker (AAW) in Pay Grade 12. 2. Grievant submitted a timely request for review of his classification by the Respondent's Job Evaluation Committee (JEC), seeking a higher pay grade.

3. Under the Mercer Plan positions are evaluated under a "point factor methodology" wherein point values are assigned to thirteen "job evaluation factors:" (1) knowledge; (2) experience; (3) complexity and problem solving; (4) freedom of action; (5) scope and effect; (6) breadth of responsibility; (7) intrasystem contacts; (8) external contacts; (9) direct supervision exercised; (10) indirect supervision exercised; (11) physical coordination; (12) working conditions and (13) physical demands. R Ex 1.

4. Grievant "fills in" for his immediate supervisor on the average of ten to fifteen days per year. While serving in this capacity, Grievant does not have authority to hire, fire, or render formal employee evaluations.

5. Except when filling in for an absent supervisor, Grievant does not have formal authority or responsibility for overseeing the work of other AAW's.

CONCLUSIONS OF LAW

1. The governing boards are required by W. Va. Code § 18B-9-4 to establish and maintain an equitable system of job classifications for all classified employees in higher education. Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

2. The burden of proof in a misclassification grievance is on the grievant to prove by a preponderance of the evidence that he is not properly classified. 156 C.S.R. 1 § 4.17; Burke, supra. 3. Determinations of the JEC regarding application of the Mercer Plan's point factor methodology are essentially questions of fact. In that regard, the JEC's interpretation and explanation of the point factors and PIQs at issue will be given great weight unless clearly erroneous. Burke, supra. See generally, Tennant v. Marion Health Care Found., 459 S.E.2d 374 (W. Va. 1995). Likewise, subjective determinations of the JEC regarding application of the Mercer Plan's point factor methodology to an employee or group of employees are entitled to deference when being reviewed by this Grievance Board. However, such subjective determinations may nonetheless be found to be arbitrary and capricious if not supported by a rational basis, or to be clearly wrong if there is no substantial evidence in the record supporting the finding or, review of the evidence of record makes it clear that a mistake has been made. Jessen v. Bd. of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995). See Frymier-Halloran v. Paige, 458 S.E.2d 780, 788 (W. Va. 1995); Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989).

4. A grievant may challenge his initial classification under the Mercer process by demonstrating that another specific job classification constitutes the "best fit" for the duties he is assigned. Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996). See Campbell-Turner v. Bd. of Trustees, Docket No. 94-MBOT-1035 (Jan. 31, 1996).

5. Grievant failed to prove by a preponderance of the evidence that the JEC's interpretation and application of the Mercer Job Evaluation Plan to his position 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 or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board

nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 22, 1996

Footnote: 1

This grievance was among over 540 grievances waived to Level IV at the same time by the BOT and the Board of Directors for the State College System of West Virginia. For a more detailed recitation of the procedural history involving these grievances, seethe "background" section of this Board's decision in Burke v. Bd. of Directors, Docket No. 94-MBOD-349 (Aug. 8, 1995).

Footnote: 2

At the first day of the Level IV hearing on September 29, 1995, Respondent objected to Grievant's request for relief in the form of reclassification as an AAW - Lead, noting, that in his original appeal to Respondent's Job Evaluation Committee, he only requested additional compensation for performing hazardous duties. W. Va. Code § 18- 29-3(k) provides that such a change in the relief sought at Level IV may be granted "in the discretion of the hearing examiner." See Burke v. Bd. of Directors, Docket No. 94- MBOD-349 (Aug. 8, 1995). The undersigned deferred ruling on this request to change relief, pending development of the evidence on this particular issue. HT, 6/29/95, at 28. Respondent did not address this requested change in its post-hearing brief. In any event, the undersigned finds that the change in requested relief at Level IV is reasonable and hereby grants Grievant's request to change the relief sought. See Burke, supra.

Footnote: 3

This matter was previously styled Franklin Lawrence, et al., v. Board of Trustees, Docket No. 94-MBOT-461.

Footnote: 4

PIQs are essentially position descriptions developed to facilitate the job evaluation process.

Footnote: 5

Subsequent to completion of the Level IV hearing in this matter, the JEC re- evaluated one or more of these point factors upward, resulting in Grievant's position being placed at Pay Grade 13. Pay Grade 13 spans a range from a minimum of 1756 points to a maximum of 1865 points. See R Ex 1.

Footnote: 6

Pay Grade 14 spans a range from a minimum of 1866 points to a maximum of 1984 points. See R Ex 1.

Footnote: 7

As of the time the hearing was closed in this matter, the JEC had not approved a "generic job description" for AAW - Lead. Likewise, there were no incumbent AAW - Leads who completed PIQ's during the Mercer reclassification process. Indeed, it appears that the AAW - Lead classification was created in anticipation of some future need by an employer covered by the Mercer Plan.