WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CHADWICK WESLEY KETCHUM II,
Grievant,

v. **Docket No. 2010-1340-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/WESTERN REGIONAL JAIL and DIVISION OF PERSONNEL,
Respondents

DECISION

Grievant, Chadwick W. Ketchum II, is employed by the Regional Jail and Correctional Facility Authority ("RJA"). He is assigned to the Western Regional Jail as the Director of Inmate Services and is a classified employee. The classification that has been assigned to his position is Corrections Program Specialist, Senior. Mr. Ketchum filed a level one grievance form dated April 9, 2010 in which he stated the following:

> 1. I am currently classified as Corrections Program Specialist Sr. but believe that based on changes to my duties the classification of Corrections Program Manager 1 is the correct classification.
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> 2. I also grieve because I have worked as a Director of Inmate Services since May 2003 and WVRJA hired a Director of Inmate Services at TVRJ[1] Kenny Underwood having less time in grade and paid him higher wages for the same duties performed. He is a pay grade 16 and I was a pay grade 12.

As relief Grievant seeks the following:

> 1. I would like to be reallocated to Program Manager 1 with the appropriate pay increase and with full back pay and benefits for the period of time that I have performed the duties of the higher classification.
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> 2. I want equal pay for performing the same duties as Kenny Underwood and I want back pay and benefits for the period of time that I have performed the duties.

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[1] Tygart Valley Regional Jail

By letter dated May 24, 2010, the level one hearing officer stated that he had no authority to resolve the grievance. With the agreement of Grievant, the matter was referred to level two and the Division of Personnel ("DOP") was joined as a party.

In his appeal to level two, Grievant added the allegation that his position was reclassified but should have been reallocated. He alleges that he should receive a pay increase as a result of the reallocation, in addition to the remedies he previously requested. A level two mediation was held on September 24, 2010, and an Order was entered three days later.

Grievant perfected his appeal to level three and a hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on two days: February 10, 2011 and March 24, 2011. Grievant personally appeared at the hearing and was represented by Jeffery G. Blaydes, Esquire. Respondent RJA was represented by Chad M. Cardinal, Esquire and Respondent DOP was represented by Katherine A. Campbell, Esquire, Assistant Attorney General. The parties submitted Proposed Findings of Facts and Conclusions of Law, the last of which was received on May 2, 2011. This matter became mature for decision on that date.

Synopsis

Grievant argues that the initial placement of his position into the classified service should have been a reallocation rather than a reclassification. This would have resulted in him receiving at least a five percent increase since his position was upgraded one pay grade. Grievant also argues that his position has significant managerial responsibilities which should have resulted in a classification of Corrections Program Manager 1 at pay grade sixteen, rather than Corrections Program Specialist, Senior, at pay grade thirteen.

Finally, he notes that a co-worker who was transferred into a DIS position a year after Grievant started as a DIS, is paid significantly more. Grievant argues this is a violation of the principle of equal pay for equal work.

Respondent DOP demonstrated that positions are brought into the merit classification system for the first time through the reclassification process. A reallocation results from a significant change in the position after it is initially classified. Consequently, the first merit system classification cannot be a reallocation. Respondent DOP took Grievant's supervisory duties into consideration, which resulted in his position being initially upgraded to Corrections Program Specialist, Senior from Corrections Program Specialist. Those duties were not sufficient to warrant a Management classification. Finally, both Grievant and his co-worker are paid in the appropriate pay grade for the classification they hold. Thus, the requirements of pay equity are met.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Prior to his employment with the RJA, Grievant Ketchum served two and a half years in the military as a Combat Engineer and eight years with the Huntington City Police Department.[2] He holds a Bachelors degree from Marshall University in Criminal Justice.

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[2] Grievant's service in the Huntington Police Department included three years as a patrolman, one year undercover in a federal drug task force and four years as a patrol supervisor.

2. In May 2003, Grievant was hired as the Director of Inmate Services[3] ("DIS") for the Western Regional Jail located in Barboursville, West Virginia. All ten regional jails have a DIS who is charged with overseeing the rehabilitative programs offered at each jail.

3. At the time Grievant was employed, all RJA positions were classified exempt and were not part of the classification and merit system under the authority of the DOP. Grievant's position was placed in the Corrections Program Specialist classification for salary purposes and he was paid in pay grade twelve.

4. The Western Regional Jail was still under construction when Grievant was hired. He received one week of training in each of the North Central Regional Jail and the South Central Regional Jail. Grievant also made hiring recommendations for the Corrections Counselors and the Head Chaplain who were employed at the Western Regional Jail.

5. Grievant's main duties and responsibilities include the following:

- Training, evaluating and supervising the correctional counselors, clerical staff and approximately seventy volunteers who assist with the rehabilitative programs;
- Overseeing the five core programs offered at the Jail which include: Life Skills, Parenting, Domestic Violence, Anger Management, and Substance Abuse;
- Overseeing the trustee program to ensure inmate goals are met;
- Overseeing the Library;
- Overseeing the operation of the telephone system;
- Calculating release dates for inmates; and,

[3] "Director of Inmate Services" is the working title for Grievant's position used by the RJA. It is different from the classification title assigned by the DOP classification system.

- Grievant also oversees a Crime Victims Awareness Program which has been instituted at the Jail. [4]

6. During the 2007 legislative session, the West Virginia Legislature enacted W. VA. CODE § 31-20-27 which required all Regional Jail positions to be covered under the classification merit system operated by the DOP. As a result of this legislation, all of the positions in the Regional Jail system had to be reviewed for proper placement in the DOP classification system. This task took a lot of time and effort by the staff of both agencies.

7. Grievant and approximately five other Directors of Inmate Services met with Jennifer Ballard, who was the RJA Director of Programs at that time. This group formed a committee to examine the duties and responsibilities of the DIS position for placement into the classification system.

8. Jennifer Ballard sent a memorandum dated March 8, 2007 to Todd Chafin, who was the RJA Director of Human Resources at that time, recommending that the DIS positions be placed in the Corrections Program Manager 1 ("CPM-1") classification. Attached to the memorandum was a Position Description Form[5] ("PDF") completed by the committee which fully detailed the duties and responsibilities of the DIS position. Grievant's Exhibit 1. The PDF was ultimately forwarded to DOP for consideration on November 13, 2007. Grievant's Exhibit 8.

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[4] The programs offered at the Regional Jails are much more condensed than those offered at the Correctional Facilities because the average stay for inmates at the Jails is approximately 15 days. Terms of confinement at the Correctional Facilities are much longer.

[5] The Position Description Form is a document which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. This document is the basic source of official information utilized by the DOP to allocate the position to the proper classification. *See* 143 C.S.R. 1 § 3.70.

9. The PDF was reviewed for classification in December 2007, by Lowell Basford, who was the Director of the DOP Classification and Compensation Section at that time. Mr. Basford noted that the DIS positions required supervision of the Corrections Counselors[6] who are professional employees. As a result of these supervisory duties Director Basford recommended that the positions be upgraded from the Correction Program Specialist ("CPS") classification to the Corrections Program Specialist, Senior ("CPS-S") classification.[7] Grievant's Exhibit 37.

10. Subsequent to Lowell Basford's examination of the PDF for the DIS positions, the positions were also reviewed by Lisa Dalporto, who was the Assistant Director of the DOP Classification and Compensation Section at the time and by Barbara Jarrell, a Classification Specialist.[8] Both of them agreed with Mr. Basford's classification determination.

11. By letter dated January 21, 2010, the RJA Executive Director, Terry Miller, informed the Directors of Inmate Services that their positions had been placed in the CPS-S classification which was paid at pay grade thirteen. Director Miller also informed these employees that this classification became effective January 20, 2010 and that there would

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[6] Grievant supervises two Corrections Counselors and two clerical staff employees.

[7] Lowell Basford was employed as a manager in the DOP Classification section for over thirty years. When reviewing the DIS PDF he noted that the supervisory duties were the major distinction between the CPS classification and the CPS-S classification. See, Grievant's Exhibit 37.

[8] Ms. Jarrell has been employed by the DOP in the Classification and Compensation section since that agency was created in 1989. She is now the Director of that section.

be no change in the salary they received since their current salaries were within the appropriate pay range.[9]

12. Grievant Ketchum requested a reconsideration of the classification determination on January 5, 2010.[10] He noted in his request that the PDF relied upon in the reclassification process was three years old and that he had received new assignments during that period, specifically the operation of the newly implemented telephone system and the calculation of release dates for inmates. Grievant's Exhibit 7.

13. DOP Director Sara Walker denied Grievant's reconsideration request by letter dated March 17, 2010. She noted that the appropriate transaction for the initial affiliation of the RJA positions under the merit system was a reclassification as opposed to a reallocation. She restated the primary duties and responsibilities outlined in the November 13, 2007, PDF and concluded, "the duties and responsibilities assigned to your position are within the scope and nature of the Corrections Program Specialist, Senior class specification." Director Walker also advised Grievant that if there had been a significant change in his duties and responsibilities since the PDF was submitted he should submit a new PDF and seek a reallocation. Grievant did not pursue that suggestion.

14. The PDF submitted by the DIS committee listed the primary duties and responsibilities for the position and the approximate percentage of time allotted to each as follows:

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[9] Grievant's Exhibit 6 (letter to DIS Donna Kuroski from Executive Director Miller).

[10] Grievant Ketchum was evidently aware of the classification determination before DIS Kuroski was formally informed by Director Miller.

- 10% Calculating release dates;
- 10% Inmate programs – review and research for facility inmate programs;
- 20% Supervision of Counseling Staff, including meetings and training;
- 15% Interact/ meet with Corrections Staff, Legal Officials, and general public;
- 25% Inmate issues: i.e. crisis intervention, special management issues, 1:1 counseling, answer: requests, grievances, coordinate services with other departments and outside agencies;
- 10% Referral and Community Linkage: i.e. Mental Health Court, Workforce WV, DHHR, etc.;
- 5% Develop and review inmate activity schedules for Libraries, Recreation, and Religious Services; and,
- 5% Parole Activities.

15. All treatment programs administered at the Regional Jails are developed at the State level and then implemented at the Jails by the Directors of Inmate Services. All policies and procedures related to the implementation of programs at the Regional Jails are developed at the State level. Grievant is a valued employee and is occasionally called upon to provide input into the development of policies and procedures.

16. The employees who supervise the rehabilitative programs at the State's Correctional Facilities are Associate Wardens. Those positions are placed in the CPM-1 classification. They oversee the program side of their institutions much like the Directors of Inmate Services for Regional Jails. The main difference is that the inmates in the Correction Facilities have been convicted of felonies and are incarcerated for much longer periods than the inmates in the Regional Jails. Consequently, the Associate Wardens for Programs supervise many more Professionals and Counselors, and do not take a hands-on role in the programs like the Directors of Inmate Services.

17. The DOP classification specifications for the CPM-1 classification provide the following:

CORRECTIONS PROGRAM MANAGER 1

Nature of Work

Under general supervision, performs managerial work in coordinating and evaluating operational and special services programs for the Division of Corrections or Regional Jail and Correctional Facility Authority. Programs administered are typically major organizational units at the largest correctional institutions or special services of a comparable size and complexity. Responsibilities include program implementation and evaluation, direction of supervisory, professional and support staff and the maintenance of required records and reports. Performs in accordance with established policies and procedures in the functional area; limited authority to vary work methods and procedures. Performs related work as required.

Distinguishing Characteristics

Positions assigned to this level would typically be responsible for a major unit at the largest correctional facilities or statewide programs or grants of a specialized nature with small staffs.

Examples of Work

Assists in the development of policies and procedures in the area of assignment or program specialty.

Coordinates the program or grant area with agency units and institution and with state, federal and local agencies.

Plans and evaluates the work of subordinate staff.

Develops and implements specialized treatment programs such as drug/alcohol programming on a statewide basis.

Develops and implements specialized staff training in the area of assignment.

Oversees major functional units in correctional facilities such as security, inmate services or equivalent programs.

Assists in the recruitment and selection of staff; recommends discipline, staff development and other personnel matters.

Monitors and evaluates program or unit operations and the services provided to inmates.

Cooperates with educational, social service, health and rehabilitation agencies in program/service delivery.

Develops curricula and training programs for correctional officers and other staff; administers corrections academy budget.

Maintains records in program area; prepares regular and special reports for area of assignment.

Positions in this classification are compensated within pay grade sixteen.

18. The DOP classification specifications for the CPM-S classification provide the following:

CORRECTIONS PROGRAM SPECIALIST, SENIOR

Nature of Work
Under general supervision, performs advanced and lead work in the implementation and evaluation of, and technical assistance for, programs/services characteristic of the Division of Corrections or the Regional Jail and Correctional Facility Authority. Performs work ensuring compliance with federal, state, and local regulations relating to the program or service area. Performs the full range of specialized tasks relating to the program area to include analysis and comprehension of program/service regulations, development and implementation of action plans to achieve desired results, coordination and collaboration with inter- and intra- agency personnel, writing program procedure manuals, compilation of regular and special reports on program status, and the assigning and review of work to support staff or other specialists. Although regulations, methods, and procedures in the program area are available, employee may exercise independent judgement and latitude in the work performed. Performs related work as required.

Distinguishing Characteristics
The Corrections Program Specialist, Senior is distinguished from the Corrections Program Specialist by the broader scope of administrative oversight and responsibility for the planning and operational aspects of a program or technical area. In addition, this level may function in a regularly assigned lead or supervisory capacity over professional, paraprofessional, and clerical classes. The Corrections Program Specialist, Senior is distinguished from the Corrections Program Supervisor by the absence of comprehensive responsibility for a particular program or technical area.

Examples of Work
Interprets federal and state laws, regulations, and guidelines for staff.
Consults with other program or technical area staff, supervisors, or managers concerning projects and priorities.
Develops rules, policies, and legislation regarding specific work projects.
Evaluates program or technical area effectiveness.
Informs director of technical area or program deficiencies and recommends improvements.
Reads, reviews, and responds to correspondence or distributes to appropriate staff.
Develops research, information, or training programs.
Writes, edits, or contributes to policy and procedure manuals.
Has contact with federal, state, local program representatives and officials, Division of Corrections or Regional Jail and Correctional Facility Authority management and staff, and legislature.
Plans and develops budget requests and short-and-long-range work plans.
May lead or supervise professional and support staff.

Positions in this classification are compensated within pay grade thirteen.

19. Kenneth Underwood was employed by the RJA in 1988 as a Correctional Officer 2. He rose through the Correctional Officer ranks to the position of Lieutenant[11] of the Southern Regional Jail. When the Tygart Valley Regional Jail was being constructed in 2002, Mr. Underwood was promoted to the position of Administrator of that facility. In June 2004, Mr. Underwood was demoted to the position of Director of Inmate Services at that facility. The demotion was not disciplinary in nature and Mr. Underwood's salary was not reduced. Even though his position dropped from pay grade sixteen to pay grade thirteen the salary he receives is within pay grade thirteen. Respondent RJA's Exhibit 1.

20. Kenneth Underwood and Grievant perform the same duties at different regional jails. Mr. Underwood has worked for the RJA for fifteen years longer than Grievant, but Grievant has been a DIS for one year longer than Mr. Underwood. Grievant has a college degree and Mr. Underwood does not. Both meet the minimum qualifications for the DIS position. When the positions of DIS were reclassified to the CPS-S classifications, both Grievant and Mr. Underwood were placed in pay grade thirteen and both retained the salary they were making at the time. Grievant's annual salary was $44,513.00 and Mr. Underwood's was $50,952.00. Both employees receive a salary that is within the appropriate pay grade for their positions. Respondent RJA's Exhibit 1.

[11] A lieutenant is classified as a Correctional Officer Five and is the highest ranking security officer at the jail.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's first argument is that the initial placement of his position into the classified service should have been a reallocation rather than a reclassification, which would have resulted in him receiving at least a five percent increase since his position was upgraded one pay grade. The two terms are defined in the DOP Legislative Rules as follows:

> 3.75. Reallocation: Reassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position.
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> 3.76. Reclassification: The revision by the State Personnel Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, pay grade, or minimum qualifications for the classes involved.

143 C.S.R. 1 §§ 3.75 and 3.76.

Respondent DOP states that the placement of the DIS in the classification system for the first time is a reclassification. DOP points out that using this procedure is advantageous to the employees because if anyone does not meet the minimum qualifications for the classification that employee may be grand-fathered into the position.

In a reallocation, if the employee does not meet the minimum qualifications he or she would not be able to keep the job. Additionally, a reallocation is predicated upon a significant change in the duties and responsibilities of the position which would make it a better fit for a different classification. When a position is brought into the classification system for the first time, it is given its initial classification and no change has taken place.

Grievant points out that no revision of class specifications took place in this case. The DIS positions were placed in existing classifications. Therefore, the definition of a reclassification is not a perfect fit for this transaction either. Neither party points to any process that may be more applicable than these two.

It is clear that the DIS positions were placed in the classified service for the first time as a result of the passage of W. VA. CODE § 31-20-27. The DOP has consistently interpreted its rules to require the initial placement into the classified service to be accomplished through reclassification. DOP's interpretation and application of the rules it is charged with applying must be given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981), *appeal dismissed,* 454 U.S. 1131, 102 S. Ct. 986, 71 L.Ed.2d 284. Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588 (1983). Reallocation clearly does not fit in this situation because the positions are being classified for the first time and reallocation is triggered by a significant change in the predominant duties of a position after it has been classified. Grievant has not proven that DOP's interpretation was clearly wrong or arbitrary and capricious.

Next, Grievant argues that Grievant's DIS position was placed in the wrong classification. Grievant points out that he supervises the Corrections Counselors and a large number of volunteers. He notes that the DIS is responsible for implementing all rehabilitative programs at the jail and answers only to the Jail Administrator. Grievant believes these managerial duties make the classification of CPM-1 the best fit for the position.

Respondents do not dispute that Grievant supervises four full-time employees and a number of volunteers. However, they argue that these supervisory duties are not sufficient to justify a management classification. Respondents point out that the programs, policies and procedures that are followed at all of the regional jails are developed on the State level and implemented by the DIS in each facility. Additionally, the programs offered at the jails are much shorter than those offered at correctional facilities due to the short stay of the inmates requiring less program staff at the jails.

All of the DOP Classification and Compensation staff who analyzed the PDF and job descriptions related to the DIS positions believed that the Corrections Program Specialist, Senior classification was the best fit for these positions. Prior to the DIS position being brought into the classification system, they did not carry the "Senior" designation. Director Basford took the supervisory duties of the DIS into consideration and upgraded the positions to the "Senior" classification. This assessment is consistent with the DOP classification specifications for the Corrections Program Specialist, Senior classification. In the "Distinguishing Characteristics" section, the classification specifications state the following:

> The Corrections Program Specialist, Senior is distinguished from the Corrections Program Specialist by the **broader scope of administrative oversight and responsibility** for the planning and operational aspects of a program or technical area. In addition, this level **may function in a regularly assigned lead or supervisory capacity over professional, paraprofessional, and clerical classes.**

(Emphasis added.)

W. VA. CODE § 29-6-10 authorizes the DOP to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as the RJA, which utilize such positions, must adhere to that plan in making their employees' assignments. *Toney v. W. Va. Dep't of Health & Human Res.*, Docket No. 93-HHR-460 (June 17, 1994). "The key to the analysis is to ascertain whether a grievant's current classification constitutes the 'best fit'" for his duties. *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004). In ascertaining which classification constitutes the best fit, DOP looks at the predominant duties of the position in question. These predominant duties are deemed to be "class-controlling." *Carroll , supra* (citing *Broaddus v. W. Va. Div. of Human Serv* ., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990)). *Barrett et al. v. Dept. of Health & Human Res. and Div. of Pers.*, Docket No. 04-HHR-389 (Dec. 6, 2007).

DOP's interpretation and application of the classification specifications are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981), *appeal dismissed,* 454 U.S. 1131, 102 S. Ct. 986, 71 L.Ed.2d 284. Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588(1983). Grievances

contesting a classification are therefore decided under rules of law which give DOP's interpretation of classification specifications great weight unless that interpretation is shown to be clearly erroneous. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Marcum v. Insurance Comm'n. and Div. of Pers.,* Docket No. 2009-0463-DOR (May 24, 2010).

The evidence in this grievance demonstrates that the DOP staff carefully examined the duties performed by Grievant and other employees who were Directors of Inmate Services when those positions were brought into the classified service. Specifically, they analyzed the PDF provided to them by a committee of those employees and compared those duties and responsibilities with the classification specifications. The evidence demonstrates that the supervisory responsibilities of Grievant and his co-workers were taken into consideration when the CPS-S classification was selected as the best fit. Grievant did not prove that the classification determination of the DOP was clearly wrong and not supported by substantial evidence or a rational basis.

Finally, Grievant argues that the difference in pay received by him and his co-worker Kenneth Underwood violates the principle of pay equity. W. VA. CODE § 29-6-10 (2) states:

> The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.

Additionally, the DOP Legislative Rules provide that the pay plan for public employees will be based on the principles of equal pay for equal work among the various agencies. 143 C.S.R. 1 § 5.1.

In *Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994), the West Virginia Supreme Court of Appeals noted that WEST VIRGINIA CODE § 29-6-10 requires employees who are performing the same responsibilities to be placed in the same classification, but a state employer is not required to pay these employees at the same rate. *Largent, supra*., at Syl. Pts. 2, 3 & 4. Pay differences may be "based on market forces, education, experience, recommendations, qualifications, meritorious service, length of service, availability of funds, or other special identifiable criteria that are reasonable and that advance the interest of the employer." *Largent, supra* at 246. It is not discriminatory for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade for their classification. *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366(Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Boothe et al.,* Docket No. 2009-0800-CONS (Feb. 17, 2011); *Laxton v. Dept. of Health & Human Res. and Div. of Pers.,* Docket No. 2009-0686-DHHR (Apr. 14, 2011).

In this case, Grievant is correct that he has served in the DIS position for one year longer than Mr. Underwood and Mr. Underwood does not hold a college degree while Grievant does. On the other hand, Mr. Underwood has been employed by the RJA for fifteen more years than Grievant and has held every level of Correctional Officer position and served as a Jail Administrator. Mr. Underwood's salary was increased while he was

being promoted and reached its apex while he was serving as the Administrator for the Tygart Valley Regional Jail. This is the highest position at the individual jails.

Mr. Underwood was subsequently demoted to the position of DIS at the Tygart Valley Regional Jail. While the specific reason for the demotion was not revealed at the hearing, the testimony demonstrated that it was not disciplinary. The DOP Legislative Rules provide that:

> The appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted if the employee's pay rate is within the pay range of the job class to which the employee is demoted.

143 C.S.R. 1 § 5.6 (a). The agency is only required to reduce the demoted employee's pay if it exceeds the maximum rate of pay for the job classification to which he is demoted. In this instance, Mr. Underwood was demoted to a job classification in pay grade thirteen. Since his salary did not exceed this pay grade, it was not reduced. Ultimately, both Grievant and Mr. Underwood are paid within the pay grade which is required for their position and classification so there is no pay discrimination that violates pay equity principles. *Laxton*, *supra.* Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept

as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. DOP's interpretation and application of the classification specifications are given great weight unless clearly erroneous. *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) *per curiam*; *See also* Syllabus Point 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp., Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981), *appeal dismissed,* 454 U.S. 1131, 102 S. Ct. 986, 71 L.Ed.2d 284. Syllabus Point 1, *Dillon v. Bd. of Ed. of County of Mingo,* 171 W. Va. 631, 301 S.E.2d 588(1983).

3. Grievant did not prove by a preponderance of the evidence that Respondent DOP's utilization of the "reclassification" procedure for the initial placement of Grievant's Director of Inmate Services position into the classified service system was clearly wrong or arbitrary and capricious.

4. Grievances contesting a classification are decided under rules of law which give DOP's interpretation of classification specifications great weight unless that interpretation is shown to be clearly erroneous. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Marcum v. Insurance Comm'n. and Div. of Pers.,* Docket No. 2009-0463-DOR (May 24, 2010).

5. Grievant did not prove by a preponderance of the evidence that Respondent DOP's determination that the Corrections Program Specialist, Senior classification was the best fit for his position was clearly wrong or arbitrary and capricious.

6. It does not violate the pay equity requirements of W. VA. CODE § 29-6-10 for employees in the same classification to be paid different salaries as long as they are paid within the appropriate pay grade for their classification. *Thewes and Thompson v. Dep't of Health & Human Res./Pinecrest Hosp.,* Docket No. 02-HHR-366(Sept. 18, 2003); *Myers v. Div. of Highways*, Docket No. 2008-1380-DOT (Mar. 12, 2009); *Boothe et al.,* Docket No. 2009-0800-CONS (Feb. 17, 2011); *Laxton v. Dept. of Health & Human Res. and Div. of Pers.,* Docket No. 2009-0686-DHHR (Apr. 14, 2011).

7. Since both Grievant and Mr. Underwood are paid salaries within their pay grade and classification, Grievant did not prove by a preponderance of the evidence that Respondents violated the pay equity provisions of W. VA. CODE § 29-6-10. *Laxton v. Dept. of Health & Human Res. and Div. of Pers.,* Docket No. 2009-0686-DHHR (Apr. 14, 2011), *See also: Largent v. West Virginia Division of Health and Division of Personnel*, 192 W. Va. 239, 452 S.E.2d 42 (1994).

Accordingly, 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 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: SEPTEMBER 30, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE