THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CINDY MARIE WILLIAMS,
Grievant,

v. **DOCKET NO. 2010-1592-DHHR**

DEPARTMENT OF HEALTH & HUMAN RESOURCES,
MILDRED MITCHELL-BATEMAN HOSPITAL, and
WEST VIRGINIA DIVISION OF PERSONNEL,
Respondents.

DECISION

Grievant, Cindy Marie Williams, filed this grievance on June 10, 2010, against Respondent, Department of Health and Human Resources ("DHHR"), Mildred Mitchell-Bateman Hospital, challenging her employer's determination that she was not qualified to fill a posted Nurse III/Nurse II position for which she timely applied. On June 28, 2010, Respondent DHHR dismissed the grievance on the basis that Grievant did not have standing to grieve the selection for the position because she did not meet the minimum qualifications for a Nurse II or Nurse III under the West Virginia Division of Personnel's classification specifications. Grievant appealed to Level Two of the grievance procedure on July 6, 2010. On July 23, 2010, Acting Chief Administrative Law Judge William B. McGinley issued an Order joining the West Virginia Division of Personnel ("DOP") as an indispensable party respondent in this matter.

After mediation was completed at Level Two on October 22, 2010, Grievant appealed to Level Three on November 5, 2010. Following a series of continuances, a Level Three hearing was held before the undersigned Administrative Law Judge on

October 31, 2012, in Charleston, West Virginia. Grievant appeared *pro se* at the hearing, obtaining post-hearing representation from Gordon Simmons, Steward with UE Local 170 of the West Virginia Public Employees Union. Respondent DHHR was represented by Assistant Attorney General James "Jake" Wegman, while Respondent DOP was represented by Assistant Attorney General Karen O'Sullivan Thornton. This matter became mature for decision on December 3, 2012, upon receipt of post-hearing arguments from all parties.[1]

Synopsis

Grievant was employed by Respondent DHHR as a Nurse I at Mildred Mitchell-Bateman Hospital in Huntington, West Virginia. Grievant made application for a posted position to be filled as a Nurse II or Nurse III serving as the Bar Code Medication Administration (BCMA) trainer and coordinator for the hospital. Grievant was not considered for the position because she did not then have one year's nursing experience, the minimum requirement to fill a Nurse II position. Under the Division of Personnel's classification specifications for a Nurse II, an applicant with a baccalaureate degree in nursing from an accredited four-year college does not require any specific amount of experience. An employee with a baccalaureate degree in nursing from an accredited four-year college only requires two years' experience as a nurse to fill a Nurse III position. However, the Division of Personnel does not consider Grievant's Regent's Bachelor of Arts ("RBA") degree from Marshall University to be a "baccalaureate degree in nursing,"

[1] Prior to the Level Three Hearing, Respondent DHHR moved to dismiss this grievance as moot because Grievant had resigned her employment. This motion was denied at a pre-hearing conference because if Grievant was able to demonstrate that she should have been allowed to compete for a Nurse II or III position, she might have also established an entitlement to back pay or other monetary relief. DHHR renewed this motion in its post-hearing argument and the motion is again denied on the same grounds.

because an RBA does not have a specific major or minor, and where a particular course of study (nursing) is required in the classification specification, the Division of Personnel will not review the course work leading to award of an RBA to determine if the degree has a particular focus, such as nursing or health sciences. Because the Division of Personnel's interpretation and explanation of the training requirements in its classification specification for Nurse II and III are not clearly erroneous, this grievance must be DENIED.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level Three hearing.

Findings of Fact

1. At the time of the events which are the subject of this grievance, Grievant was employed by the West Virginia Department of Health and Human Resources ("DHHR") as a Nurse I at Mildred Mitchell-Bateman Hospital ("MMBH") in Huntington, West Virginia.

2. On or about May 28, 2010, Respondent posted a position vacancy for a Nurse III at MMBH to serve as a facility leader at certain times, and as the facility's Bar Code Medication Administration ("BCMA") trainer and coordinator. *See* R Ex 3. The position could also be filled at the Nurse II level.

3. Grievant submitted a timely application for the position described in Finding of Fact Number 2, above.

4. On June 8, 2010, Kieth Anne Worden, Director of Human Resources for MMBH, wrote to Grievant advising her that she did not meet the minimum qualifications for a Nurse II or Nurse III position. *See* R Ex 1.

5. After Grievant filed a level one grievance regarding Respondent DHHR's failure to consider her for the Nurse III position, Ms. Worden contacted the West Virginia Division of Personnel ("DOP"), asking for a review of Grievant's application, and a determination as to whether she met the minimum qualifications for a Nurse II or Nurse III position. *See* DOP Ex 1.

6. Lynn M. Schillings, Senior Personnel Specialist in the West Virginia Division of Personnel's Internal Employee Placement Unit of the Staffing Services Section, reviewed Grievant's application, and responded to Ms. Worden in writing on June 25, 2010, advising that Grievant did not qualify for either a Nurse II or Nurse III position because she did not have the required amount of work experience. *See* DOP Ex 1; R Ex 2.

7. Ms. Schilling determined that Grievant would meet the requirements for Nurse II on August 24, 2010, if she remained in her current position. *See* R ex 2.

8. DOP's classification specification for the Nurse III classification states the following minimum qualifications:

> **Training:**
>
> Baccalaureate degree in nursing from an accredited four-year college or university and **two years** of full-time or equivalent part-time paid experience as a registered professional nurse.
>
> **OR**

> Successful completion of an associate degree in nursing from an accredited college or university or a diploma program and **three years** of experience as a registered professional nurse.
>
> **OR**
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> Professional certification from a recognized national nursing certifying organization as a nurse or nurse practitioner in the area of assignment plus **two years** of full-time or equivalent part-time paid experience as a registered professional nurse.
>
> **OR**
>
> Successful completion of an associate degree in nursing from an accredited college or university or a diploma nursing program; plus baccalaureate degree in the health sciences or behavioral sciences and **two years** of full-time or equivalent part-time paid experience in nursing.
>
> **OR**
>
> Master's degree in nursing from an accredited four-year college or university.

R Ex 4 (emphasis in original).

9. As of June 6, 2010, when the posted position vacancy for which Grievant applied closed, Grievant had an Associate's Degree in Nursing from Saint Mary's School of Nursing/Marshall University, a one year diploma in computers from Huntington Junior College, a Regent's Bachelor of Arts ("RBA") from Marshall University, and one year completed toward a Master of Science in Nursing. Like most RBA degrees, Grievant's RBA was not awarded with a major or minor in any specific field.

10. At the time she applied for the BCMA position at issue, the successful applicant, Deborah Frazier, had been a Registered Nurse for over 20 years with a diploma in nursing from Saint Mary's School of Nursing in 1989. Ms. Frazier had no

formal training in computers and technology, other than the training she received at MMBH on the BCMA program.

11. The successful applicant for the BCMA position, Deborah Frazier, already held the Nurse III classification when she applied for the position. Thus, her assignment involved a lateral transfer within the same personnel classification.

12. Where the class specification requires a bachelor's degree in a particular discipline, such as a "baccalaureate degree in nursing," the West Virginia Division of Personnel does not look beyond a Regent's Bachelor of Arts degree to determine if an applicant has completed sufficient hours in a particular discipline to obtain a major in that discipline.

13. Grievant was promoted to Nurse II, effective October 20, 2010, after she met the minimum one year experience requirement for a Nurse II position. See DOP Ex 2.

14. Grievant was promoted to Nurse III, effective March 23, 2012, after completing a Master of Science Degree in Nursing. *See* DOP Ex 3.

15. On March 24, 2012, Grievant resigned from employment with DHHR, effective April 7, 2012. *See* R Ex 5 & DOP Ex 4.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

W. Va. Code § 29-6-10 authorizes the West Virginia Division of Personnel to establish a position classification plan for all positions in the classified service through the legislative rule-making process. *See* W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 (2012). When the DOP interprets the job specifications which it developed in accordance with this legislative mandate, its interpretation and explanation of the minimum qualification requirements contained therein is entitled to considerable deference unless clearly wrong. *Shelton v. W. Va. Div. of Corrections*, Docket No. 96-DOP-353 (July 9, 1997). *See W. Va. Dep't of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 347, 431 S.E.2d 681, 686 (1993). Under the "clearly wrong" standard of review, an agency's actions are valid so long as the decision is supported by substantial evidence or by a rational basis. *See Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001); *Farley v. Dep't of Health & Human Res*., Docket No. 07-HHR-161 (June 10, 2008).

Grievant applied for a posted Bar Code Medication Administration ("BCMA") Coordinator position at Mildred Mitchell Bateman Hospital. This position could be filled by someone as a Nurse II or Nurse III. At the time of her application, Grievant was employed as a Nurse I, and held an Associate's Degree in Nursing, a one year diploma in

computers, a Regent's Bachelor of Arts ("RBA") without a major assigned in any particular field, and had completed one year of coursework toward a Master of Science in Nursing. However, Grievant had not yet worked a full year since obtaining her nursing license.

Grievant was not considered for the BCMA position because she did not have at least one year's nursing experience, and she did not have a baccalaureate degree in nursing. When the classification specification calls for a baccalaureate degree in a particular field of study, such as nursing, the Division of Personnel does not look beyond an RBA degree to determine if the particular courses taken and passed to obtain the degree are focused on a particular subject or field of study. However, if the classification specification calls for a baccalaureate degree in one or more specified fields and goes on to state "or in a related field," DOP will then review the applicant's official RBA transcript to determine if there is a sufficient focus on the required related field to match the training requirement.

There is nothing arbitrary or irrational about DOP's approach. The classification specification may properly require a baccalaureate degree in nursing, recognizing that accredited colleges and universities which grant such degrees ordinarily specify the required and elective courses a student must complete in order to receive this particular degree. On the other hand, DOP may consider that an RBA provides greater flexibility, particularly for non-traditional students, often allowing them to obtain a degree by designing their own course of study to match their interests and experience. If the established standard is not followed in order to allow Grievant to compete for this

position, what is to keep others, with far less impressive academic accomplishments than her, from similarly demanding an opportunity to compete because they have some job-related experience in another field, such as computer technology?

The record in this matter indicates that after Grievant met the established experience requirement, she was promoted to Nurse II. After Grievant obtained a Master of Science in Nursing, she was promoted to Nurse III. The Division of Personnel and her employer consistently treated her in accordance with the established classification specifications, and the Division of Personnel's interpretation and application of those standards.

Because the focus of the position for which Grievant applied involved serving as a BCMA Coordinator, Grievant also suggested that her qualifications were superior to the successful applicant who had less training in information technology and computers. This argument is simply not relevant because Grievant did not meet the minimum requirements for either the Nurse II or Nurse III position under the classification specifications established by DOP. Therefore, DHHR could not have hired Grievant to fill the position, even if it agreed that she was the best qualified applicant based solely on comparative technology training credentials.

The Grievance Board's role is not to act as an expert in matters such as classification of positions, or to simply substitute its judgment in place of DOP. *See Moore v. Dep't of Health & Human Res.*, Docket No. 94-HHR-126 (Aug. 26, 1994). Instead, the Grievance Board's role is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. In this

case, DOP's rationale and explanation for its interpretation of the training and experience requirements in the controlling classification specifications for Nurse II and III were logical and reasonable, and there was no credible evidence presented to suggest that the determinations at issue resulted from the mere exercise of unfettered discretion.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

2. The West Virginia Division of Personnel is charged with establishing classification plans for state employees, pursuant to the provisions of W. Va. Code § 29-6-1, *et seq*. *Sharifpour v. W. Va. Div. of Highways*, Docket No. 99-DOH-186 (July 28, 1999). The Division of Personnel is also vested with authority to determine the minimum qualifications for each job classification. *See* W. Va. Division of Personnel Administrative Rule, 143 C.S.R. 1 (2012).

3. Employers are obligated to select applicants who qualify under the terms established by DOP classification and specifications. *Farley v. Dep't of Health & Human Res*., Docket No. 07-HHR-161 (June 10, 2008).

4. The Division of Personnel's interpretation of its own regulations and classification specifications is entitled to substantial weight, and a grievant challenging such must demonstrate that the Division of Personnel's decision was arbitrary and capricious or an abuse of discretion. *Farber v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-052 (July 10, 1995).

5. 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. *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995).

6. DOP's interpretations of the minimum qualifications contained in the classification specifications for the positions of Nurse II and Nurse III are not clearly erroneous and, therefore, should be accorded great weight. *See W. Va. Dep't of Health & Human Res. v. Blankenship*, 189 W. Va. 342, 347, 431 S.E.2d 681, 686 (1993); *Carovillano v. W. Va. Div. of Environmental Protection*, Docket No. 93-EP-343 (Dec. 14, 1993).

7. Grievant failed to establish by a preponderance of the evidence that she possessed the required education and experience stated in the minimum qualifications for Nurse II or Nurse III at the time she applied for a posted vacancy for a Bar Code Medication Administrator Trainer and Coordinator at Mildred Mitchell Bateman Hospital.

Therefore, Respondent did not act improperly when it failed or refused to consider Grievant for the position, or afford her an interview for the position.

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).

DATE: December 10, 2012

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LEWIS G. BREWER
Administrative Law Judge