

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**WILLIAM ALLEN PRUE**  
Grievant,

v.

**Docket No. 2017-1400-MAPS**

**DIVISION OF CORRECTIONS/CHARLESTON  
CORRECTIONAL CENTER and  
DIVISION OF PERSONNEL,  
Respondents, and**

**LESLEY J. HILL,**  
Intervenor.

## **DECISION**

William Allen Prue, Grievant, filed this grievance against his employer the West Virginia Division of Corrections (“DOC” or “Corrections”), Respondent, protesting the agency’s failure to interview him for the vacant position of Correctional Program Manager II. The original grievance was filed on December 9, 2016, and the grievance statement provides, “I feel that I was overlooked and not interviewed for the job of CORRECTIONS PROGRAM MANAGER II POSTING NUMBER #CSV170009.” The relief requested, “I want to be granted fair and equal consideration for the job that was posted.”

A hearing was held at level one on January 3, 2017, and the grievance was denied at that level on or about January 12, 2017. Grievant appealed to level two on February 3, 2017. Lesley J. Hill filed an intervention form in this matter and was granted intervenor status pursuant to Order dated February 10, 2017. A mediation session was held on March 30, 2017. Subsequently, the West Virginia Division of Personnel (“DOP” or “Personnel”) was joined as a responding party of this grievance by a Public Employees

Grievance Board Order dated March 31, 2017. Grievant appealed to level three on April 4, 2017. A level three hearing was held before the undersigned Administrative Law Judge on August 25, 2017, at the Grievance Board's Charleston office. Grievant appeared *pro se*.<sup>1</sup> The West Virginia Division of Corrections, Respondent, the employing state agency, appeared by counsel John Boothroyd, Assistant Attorney General. The West Virginia Division of Personnel, a joined Respondent, was represented by Teresa Morgan and its counsel Karen O'Sullivan Thornton, Assistant Attorney General. Intervenor, Lesley J. Hill, appeared *pro se*. The parties were provided the opportunity to submit written "Proposed Findings of Fact and Conclusions of Law," and this matter became mature for decision on September 25, 2017, the assigned mailing date for the submission of the parties' fact/law proposals. Not all parties presented fact/law proposals.

### **Synopsis**

Grievant applied for a vacant position and submitted an application to his employer, the West Virginia Division of Corrections. Grievant was advised he did not meet the professional experiences qualification for the position of Corrections Program Manager II. Grievant is of the opinion he has sufficient qualifying experience.

In the circumstance of this grievance matter, there is disharmony as to the appropriate delineation of professional work experience. The West Virginia Division of

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<sup>1</sup> "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Personnel develops and manages the State's Classification/Compensation Plan. At the time of the employing agency's ruling that Grievant was ineligible to interview for the position, the determination was in accordance with the then governing authoritative agency's interpretation and application of professional work experience. Grievant avers that the interpretation was wrong and highlights that subsequently the applicable interpretation has been altered, or is inconsistently being applied. Respondent's interpretation of the prerequisites for the Corrections Program Manager II in discussion and Grievant's qualifications was reasonable at the time of the interviewing for the position. It is not established that Grievant, as a matter of law, is entitled to the Corrections Program Manager II position in discussion or the salary of the job classification. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. On November 4, 2016, Grievant applied for the vacant Corrections Program Manager II position with the West Virginia Division of Corrections ("DOC" or "Corrections").
2. The Corrections Program Manager II position in discussion was for the position of Director of Classification for Corrections. The Director of Classification "performs managerial work in developing, implementing, coordinating and evaluating the

classification for all Division of Corrections inmates.” See W. Va. Code § 62-13-4 (f).

There is only one Director of Classification within Corrections.

3. The Minimum Qualifications for the posted Corrections Program Manager II position were listed as:

Training: Graduation from an accredited four-year college or university with a degree in criminal justice, corrections, social work or related behavioral science field.

Substitution: Full-time or equivalent part-time paid experience as described below may substitute for the required training on a year-for-year basis.

Experience: Five years of full-time or equivalent part-time paid professional experience in a corrections, probation/parole, law enforcement, social work, or related behavioral science field, one year of which must have included responsibility for program administration.

Substitution: Master's degree from an accredited college or university in criminal justice, corrections, social work or related behavioral science field may substitute for the required experience on a year-for-year basis.

Job Classification Spec, DOC Ex 1

4. The West Virginia Division of Personnel establishes the State's classification plan. Included in that are the classification specifications and characteristics of what is considered professional experience.<sup>2</sup>

5. An applicant must meet the minimum qualifications for a State classified position, before he or she can be approved for the position. If the West Virginia Division of Personnel finds that an applicant is found to lack any of the requirements established

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<sup>2</sup> DOP develops and manages the State's Classification/Compensation Plan and assigns Occupation Group, EEO Codes, and Exam Codes. The EEO Codes are those which are assigned, detailing which group a classification belongs to: Official/Administrators, Professional, Technicians, Protective Services, Para Professionals, Administrative Support, Skilled Crafts, and Service/Maintenance.

for the position, it may deny the applicant's promotion. W. Va. D.O.P., Administrative Rules, 143 C.S.R. 1, § 6.4.a.1.

6. Corrections' Policy Directive 132.00 (Non-Correctional Officer Promotion Guidelines), Section V, Subsection F sets forth that:

All applicants must meet the minimum qualifications established by the Division of Personnel for any vacancy. The division's Director of Human Resources, will conduct a preliminary review to determine eligibility. The Division of Personnel will make a final determination on qualifying, in accordance with applicable requirements.

As a general rule, job applications are initially reviewed by the Human Resources Department at Corrections to determine whether an applicant meets the minimum educational and experience requirements for the position based upon their listed, known education and work history. As a general matter, applications are not reviewed by Personnel until after an applicant is selected for the position.<sup>3</sup> If the applicant passes the preliminary review by Corrections' Human Resources, he or she may interview for the position. If the applicant is selected for the position, Personnel will make a final determination on the applicant's qualifications. If Personnel determines that the applicant is not qualified, the applicant's promotion will be rejected.

7. Grievant's application was reviewed by the Human Resources Department at the Central Office of Respondent Corrections. The Human Resources Department determined that the Grievant lacked the required training and experience to be eligible for the Corrections Program Manager II position.

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<sup>3</sup> Personnel does not have the staff and time to review every single application for every single posted classified position.

8. On November 16, 2016, Respondent Corrections informed Grievant that he did not meet minimum qualifications and that he would not be able to interview for the Corrections Program Manager II position. G Ex 5

9. Corrections held interviews with four to six candidates for the Corrections Program Manager II position. Under Corrections' Policy Directive 132.00, the interview process is an evaluation of relevant factors, but with no set scoring system. No applicant has a right to be selected in the process. See DOC Ex 12 and L-3 testimony.

10. Intervenor, Lesley Hill was selected as the successful candidate and took over the position of Director of Classification/Corrections Program Manager II, effective January 7, 2017. G Ex 6

11. Grievant has a four-year degree in Computer Management. Grievant does not have a college or university degree in criminal justice, corrections, social work or related behavioral science field.<sup>4</sup>

12. Grievant's application set forth his work history or experience as:

August 2011 to present [November 4, 2016 at the time of the application]:  
Case Manager full time at the Charleston Correctional Center

June 2001 to August 2011:  
Correctional Officer III (Corporal) full time at the Charleston Work Release Center, now Charleston Correctional Center, and at the Mt. Olive Correctional Complex.

April 2001 to June 2001:  
Correctional Counselor I full time at the Mt. Olive Correctional Complex.

April 1995 to April 2001:  
Correctional Officer II full time at the Mt. Olive Correctional Complex.

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<sup>4</sup> To make up for the lack of one of the necessary educational degrees, Grievant needed four years of relevant professional work experience for "Training" as substitution, in addition to the required five years of professional work experience for "Experience," in order to meet the minimum requirements for the Corrections Program Manager II position.

13. Grievant's experience as a Correctional Counselor I and as a Case Manager was considered by Corrections as professional work experience. This experience totaled approximately five years and seven months.<sup>5</sup>

14. Grievant's experience as a Correctional Officer III and as a Correctional Officer II were not considered by Corrections to count for required professional work experience.

15. Grievant has ten years and three months of experience as a Correctional Officer III. Had Grievant's experience as a Correctional Officer III been considered by Corrections as professional work experience, Grievant would have had more than the required nine years of professional work experience and would have been qualified to be interviewed and considered for the Corrections Program Manager II position.

16. Corrections' Human Resources Department's review of applicant qualifications pursuant to Policy Directive 132.00 is intended to mirror the interpretations and criteria used by Personnel to evaluate training and work experience.

17. At the time Grievant applied for the Corrections Program Manager II position in November 2016, Corrections' Human Resources Department understood that Personnel was not accepting Correctional Officer III experience as professional work experience. Just prior to the Grievant's application, there had been three other employee promotions, which had been rejected by Personnel because Personnel did not

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<sup>5</sup> Grievant's application does not specify the exact date he started each classified position within Corrections. For purposes of calculation, Respondent DOC double count overlapping months.

count those employees' Correctional Officer III experience as professional work experience.

18. Teresa Morgan, Assistant Director of the Personnel Review section of DOP verified at the level three hearing that, at the time of Grievant's application, Personnel did not consider Correctional Officer III experience to be professional work experience. See Nathan Garnes' L-3 testimony.

19. Corrections' November 2016 determination that Grievant's Correctional Officer III experience was not professional work experience, was consistent with the interpretation of Personnel in such matters.

20. Personnel's definition of "professional" is:

work which requires the application of theories, principles and methods typically acquired through completion of a baccalaureate degree or higher or comparable experience; requires the consistent exercise of discretion and judgment in the research, analysis, interpretation and application of acquired theories, principles and methods to work product.

DOC Ex 7

21. Personnel's classification specifications for Correctional Officer III describe the "Nature of Work" for this position as:

Under direct supervision, serves as a first-line supervisor of Correctional Officers. The officer is responsible for enforcing or supervising the enforcement of the rules, regulations and state law necessary for the control and management of offenders and the maintenance of public safety. The officer supervises and reviews the work of subordinates to ensure facility security or the functioning of a specialized post or unit. Performs related work as required.

G Ex 2

22. Corrections has sought to convince Personnel to consider Correctional Officer III experience as professional work experience.



23. On March 30, 2017, based upon discussions with Corrections, Personnel announced that it had changed its interpretation of professional work experience to include Correctional Officer III experience. This change occurred well after the Director of Classification position in association with this grievance had been posted and filled by Corrections.

24. Respondent Corrections informed Grievant that he would not be able to interview for the Director of Classification/Corrections Program Manager II position on November 16, 2016 approximately four months prior to March 30, 2017. The successful candidate Intervenor, Lesley Hill was selected and took over the position effective January 7, 2017, approximately two months prior to an official change in the interpretation of professional work experience to include Correctional Officer III experience.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Grievant maintains that he had sufficient training and experience to be eligible for promotion to the Corrections Program Manager II position posted by Respondent DOC and that Respondents DOC and DOP erred by not considering his Correctional Officer III experience as professional work experience. Respondent DOC avers that Grievant was properly denied the opportunity to be interviewed and considered for the Corrections Program Manager II position, as he did not meet minimum requirements for the position, which had been established by DOP at the time of Grievant's application.

Grievant applied for a posted position, Corrections Program Manager II located in the central office of the West Virginia Division of Corrections, Respondent. The training and experience requirements for the position are specified on the posting and job classification specs. See finding of fact 4, *supra* for specifics. Among the requirements for the position is graduation from an accredited four-year college or university with a degree in one of an identified type/field,<sup>6</sup> which Grievant does not possess (Grievant has a degree in a field which does not qualify). Without the correct degree, Grievant needed to have four years of qualifying experience, which he does have. A Corrections Program Manager II requires five years professional qualifying experience in addition to the four years Grievant must have to substitute the degree, for a total of nine years of professional experience.

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<sup>6</sup> A degree in criminal justice, corrections, social work or related behavioral science field.

At the time relevant to the issue in discussion, the Correctional Officer I through Correctional Officer V classifications were not considered through the West Virginia Division of Personnel to be within a professional category and as such was not counted toward professional experience. W. VA. CODE § 29-6-10 authorizes the W. Va. Division of Personnel to establish and maintain a position classification plan for all positions in the classified and classified exempt service. As a general rule State agencies which utilize such positions must adhere to that plan in making assignments to their employees. Thus, it is recognized that in the circumstances of the instant grievance, the employing state agency DOC, Respondent is not the agency charged with setting and interpreting minimum qualifications for classified positions within the state classified system.

Corrections' Policy Directive 132.00 requires that an applicant for a vacant position meet the minimum qualifications. Policy Directive 132.00 creates no right for an applicant to be interviewed and considered for a vacant position, where that applicant does not meet minimum requirements established. The West Virginia Division of Personnel develops and manages the State's Classification/Compensation Plan and assigns Occupation Group. DOC does not have the authority to rewrite or disregard Personnel's position classification plan.

Grievant assignment of error/argument is basically two-fold, the definition of professional experience as applied in the circumstance of his application was erroneous causing him to suffer economic damage, evident by the agency's later alteration in the interpretation and/or the interpretation of professional experience is inconsistently being applied by Respondent DOC in that individual cases known to Grievant were granted

professional experience credit for the same or similar classification activity he was denied credit.

Regrettably, while both of Grievant's arguments, to a layperson may seem absolute, the legal weight of the individual arguments are less than persuasive in the facts of this matter. Respondent DOC's actions cannot be considered arbitrary and capricious.<sup>7</sup> Respondent Corrections informed Grievant that he would not be able to interview for the Director of Classification/Corrections Program Manager II position on November 16, 2016 approximately four months prior to an official change in the interpretation of professional work experience. The employing agency used the relevant interpretation applicable at the time of the discussion. DOC could not just decide to ignore the applicable standard. The successful candidate Intervenor, Lesley Hill, was selected and took over the position effective January 7, 2017, approximately two months prior to the official March 30, 2017, change in the interpretation of professional work experience to include Correctional Officer III experience. This is not the first or last time DOP will adjust its application of a

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<sup>7</sup> Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982); *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

rule, regulation or policy. As a standard operating procedure, a State agency applies applicable employment rules, regulations and policies as they are at the time of the decisions, not what they think they may become some day in the future.

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)). It is readily possible after the March 30, 2017 change in the interpretation of professional work experience that a pending determination regarding the amount of credible experience for an applicant or two was effected. This does not constitute illegal action by Respondent DOC or necessarily constitute inconsistency, it characterizes a rule change.

Arguendo, even if it was determined that Grievant's Correctional Officer III experience should have been considered as professional work experience, this would not establish that Grievant should be placed in the position of Corrections Program Manager II or to be compensated similarly. At best, it would have then provided Grievant with opportunity. Grievant would have only been entitled to be interviewed and considered for the position. Corrections held Interviews with four to six candidates for the Corrections Program Manager II position. There is no evidence that, had Grievant been interviewed, he would have been selected over the Intervenor. Grievant has not identified any policy, rule or practice, which would have required him to be selected over the Intervenor Hill.

Respondent's November 16, 2016 decision to not interview and consider Grievant for the Corrections Program Manager II position, was not in violation of any Corrections' policy, or of any Personnel policy, rule, interpretation or practice. Corrections' Policy Directive 132.00 requires that an applicant for a vacant position meet the minimum qualifications as established by West Virginia Division of Personnel. Respondent DOC's interpretation of the prerequisites for the Corrections Program Manager II in discussion and Grievant's qualifications was reasonable at the time of the interviewing for the position. It is not established that Grievant as a matter of law is entitled to the Corrections Program Manager II position in discussion or the salary of the job classification.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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, the employer has not met its burden. *Id.*

2. Grievant has not established that the West Virginia Division of Corrections violated any identifiable statute, policy, rule, or then applicable practice in not allowing him to interview for the Director of Classification/Corrections Program Manager II position.

3. W. VA. CODE § 29-6-10 authorizes the W. Va. Division of Personnel to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies which utilize such positions, as a general rule, must adhere to that plan in making assignments to their employees.

4. Grievant did not establish by a preponderance of the evidence that he had sufficient qualifying experience as required by the West Virginia Division of Personnel for the posted Corrections Program Manager II position at the time of his application in November 2016.

5. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

7. It is established that the West Virginia Division of Personnel's interpretation of professional experience changed within a six-month period. Grievant did not establish by a preponderance of the evidence that DOP's interpretation of professional experience is or was arbitrary and capricious.

8. Grievant has not established that the West Virginia Division of Corrections was arbitrary, capricious or acted contrary to applicable policy in not allowing him to interview for the Director of Classification/Corrections Program Manager II position.

9. Grievant did not establish by a preponderance of the evidence that his employing state agency DOC's application of DOP's interpretation of professional experience is a violation of an identifiable practice, policy, rule, or statute.

10. Grievant has not established that he is entitled to fiscal relief for an alleged lost employment opportunity.

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 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:** November 3, 2017

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**Landon R. Brown**  
**Administrative Law Judge**