

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT PAUL TATE, JR.,
Grievant,**

v.

Docket No. 2017-0202-MAPS

**DIVISION OF CORRECTIONS/PARKERSBURG
CORRECTIONAL CENTER,
Respondent.**

DECISION

Robert Paul Tate, Jr., Grievant, filed this grievance against his employer the Division of Corrections ("DOC"), Respondent, on July 21, 2016, challenging the determination by Respondent to deny him the opportunity to interview for the position of Corrections Unit Manager at the Parkersburg Correctional Center. Grievant disagrees with Respondent's determination that he did not have enough relevant paid work experience to qualify for the Unit Manager position. Grievant seeks the pay rate associated with the position.

A hearing was held at level one on August 16, 2016. The grievance was denied at that level on August 24, 2016. Grievant appealed to level two on September 7, 2016. A mediation session was held on November 7, 2016. Grievant appealed to level three on November 21, 2016. A level three hearing was held before the undersigned Administrative Law Judge on February 17, 2017, at the Grievance Board's Charleston office. Grievant appeared *pro se*.¹ Respondent was represented by John Boothroyd,

¹ "*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.

Assistant Attorney General. This matter became mature for consideration on or about March 20, 2012, upon receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law. Both parties submitted Proposed Findings of Fact and Conclusions of Law proposals.²

Synopsis

Grievant presented a timely application for a posted position along with several other applicants. Grievant was informed by Respondent, his employer, that he did not qualify for the position and would not be interviewed. Grievant challenges Respondent's action. Respondent maintains that the information provided at the time of application did not demonstrate that Grievant had the necessary work experience required for the position.

Pursuant to the provisions of W. Va. Code § 29-6-1, *et seq.*, the West Virginia Division of Personnel (DOP) is charged with establishing classification plans for state employees, DOP 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). State agencies which utilize such positions are obligated to select

² The assigned mailing date for the submission of the parties' proposed findings of fact and conclusions of law was March 20, 2017. Respondent's Certificate of Service date specified a mailing date of March 17, 2017, copy received at the Grievance Board's Charleston Office date stamped March 17, 2017. Grievant's submission had a Certificate of Service specified a mailing date of March 22, 2017, copy received at Grievance Board's Charleston Office date stamped March 27, 2017. No request was received requesting an extension for submission of fact/law proposals. Grievant's proposed finding of facts document was mailed after the assigned mailing date for the submission of the parties' proposals. The finding of facts of the two presented proposals are virtually identical, the parties tend to agree on the facts but disagree on the amount of work experience credit Grievant is entitled.

applicants who qualify under the terms established by DOP classification and specifications. The amount of work experience Grievant is rightfully entitled is debatable but given the totality of relevant factors and the circumstances, it is not established by a preponderance of the evidence that Respondent's action was beyond its reasonable exercise of discretion. In accordance with the DOP's interpretation and explanation of the work experience requirements pertaining to the classified position of Corrections Unit Manager, Respondent's action was not arbitrary and capricious nor clearly erroneous, this grievance must be DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.³

Findings of Fact

1. Grievant began employment with the Division of Corrections on June 1, 2015, as a Corrections Counselor 1.

2. On June 21, 2016, the Parkersburg Correctional Center posted a vacant Corrections Unit Manager position. The deadline to apply was June 30, 2016.

3. Grievant timely applied for the position.

4. The Corrections Unit Manager position's duties were listed as:

Under general supervision serves as the supervisor of a multi-disciplinary team of staff assigned to work in a resident [inmate] unit. The work of the unit involves providing security, inmate counseling, treatment services, developing case histories and recommendations regarding inmate behavior and performance, controlling inmate movement, and acting as role models

³ Please note last sentence of preceding footnote, the parties tend to agree on the facts, the undersigned will adopt a significant amount of the mutually acknowledged facts as presented.

for the inmates. Works within general methods and procedures and exercises considerable judgment to adopt and apply guidelines to specific situations. Performs related work as required. R Ex 1

5. The requirements for the Corrections Unit Manager position were listed as:

Training: Graduation from an accredited four-year college or university with a major in criminal justice, corrections, psychology, sociology, counseling, counseling and guidance, criminology, social work or related field.

Substitution: Additional experience as described below may substitute for the required training on a year-for-year basis.

Experience: **Four years of full-time or equivalent part-time paid experience in inmate counseling, security or treatment in a correctional setting or in counseling, counseling and guidance, as a probation or parole officer, mental health counselor or social worker.** Emphasis added

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.

R Ex 1

6. As a general rule, applications are initially reviewed by the Human Resources Department at the West Virginia Division of Corrections ("Corrections") to determine whether an applicant meets the minimum educational and experience requirements for the position based upon their listed education and work history. Candidates' applications are not generally reviewed by the West Virginia Division of Personnel ("Personnel") until after an applicant is selected for the position.

7. Corrections' Policy Directive 132.00 (Non-Correctional Officer Promotion Guidelines), 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.

(R Ex 3, Policy Directive Section V(F)) If the applicant passes the preliminary review by Corrections' Human Resources, he or she may interview for the position. If an applicant is selected for the position, Personnel makes a final determination on the candidate's qualifications.⁴

8. Grievant's application, along with the applications of other applicants, were received by Vicki Miller, Assistant to the Warden at the Parkersburg Correctional Center (PCC). As part of her job duties, Ms. Miller handles human resource matters on behalf of the center.

9. Assistant Miller forwarded the applications to Jason Duckworth for his review as to whether the applicants qualified for the unit manager's position. Mr. Duckworth works for Human Resources at the West Virginia Division of Corrections' Central Office. At the time of the Unit Manager job posting, Mr. Duckworth was assigned to handle human resources matters, including the review of applications for posted positions, for the Parkersburg Correctional Center.

10. Grievant's application included a section for the applicant's employment history and for education.

11. Respondent's Human Resources personnel, Jason Duckworth, reviewed Grievant's application and was of the opinion that Grievant did not have sufficient training

⁴ W. VA. CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies 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); *Guertin v. Tax Dep't and Div. of Personnel*, Docket No. 2009-1687-DOR (July 27, 2010).

or experience for the Corrections Unit Manager position. An email reflecting this determination was sent to Vicki Miller (Assistant to the Warden) on July 1, 2016.

12. Human Resources personnel Jason Duckworth testified at level three regarding how he analyzed Grievant's work history and its application toward experience for the Unit Manager job posting.

13. After receiving the determination of eligibility, Assistant Miller informed Grievant over the telephone that he did not meet eligibility requirements for the Unit Manager position and would not be scheduled for an interview.

14. Interviews for the Unit Manager position were held on July 18, 2016. Grievant was not interviewed.

15. Grievant's application for the Unit Manager position set forth his educational background as a Bachelor's Degree with a criminal justice major from the West Virginia University at Parkersburg, WV and 94 credit hours at the Ohio Peace Officer Training Academy at Washington State Community College, Marietta, OH. R Ex 2

16. Grievant's June 30, 2016, application set forth his work history or experience as:

June 2015 to present [June 30, 2016]:
Correctional Counselor I full time at the Parkersburg Correctional Center

June 2015 to present:
Event Security part time at the Adelphia Music Hall

June 2015 to present:
Ambulance Driver part time at Doddridge County Ambulance Authority

June 2014 to May 2015:
Tutor part time at West Virginia University at Parkersburg

March 2013 to April 2014:
Deputy Sheriff full time at Meigs County Sheriff Office

December 2011 to November 2012:
Corrections Officer full time at Noble Correctional Institution

September 2011 to December 2011:
Corrections Officer full time at St. Marys Correctional Center

R Ex 2

17. Taking the dates on the application at face value, Grievant would have 48.5 months' experience.

13 months as Correctional Counselor I at Parkersburg Correctional Center
6.5 months as Event Security at Adelphia Music Hall
13 months as Deputy Sheriff at Meigs County Sheriff Office
12 months as Corrections Officer at Noble Correctional Institution
4 months at St Marys Correctional Center

48.5 months' experience.

18. Pursuant to West Virginia Division of Personnel's classification specifications and Respondent's job posting, the Unit Manager's position of discussion requires four years or 48 months of "experience in inmate counseling, security or treatment in a correctional setting or in counseling, counseling and guidance, as a probation or parole officer, mental health counselor or social worker."

19. The hearing examiner for Corrections determined that the Grievant had 47 months of experience.

Parkersburg Correctional Center	13 months experience
Adelphia Music Hall Security	06 months exp.
Meigs County Sherriff Office	13 months exp.
Noble Correctional Institution	11 months exp.
St Marys Correctional Center	<u>04 months exp.</u>
TOTAL	47 mths exp. (3yrs & 11 months)

The hearing examiner counted 6 months for event security at Adelphia Music Hall and 11 months for Corrections Officer at Noble Correctional Institution. (Level one grievance decision.)

20. Grievant's training at the Ohio Peace Officer Training Academy was unpaid. The Unit Manager's position requires that work experience be paid.

21. West Virginia Division of Personnel is the state agency with the ultimate authority to determine whether an applicant's work experience qualifies him for a classified position.⁵ W. VA. CODE § 29-6-10

22. Division of Personnel did review Grievant's application after he filed the present grievance. DOP concluded that Grievant's work experience as event security at Adelphia Music Hall, and as Deputy Sheriff at Meigs County Sheriff Office did not count as "experience in inmate counseling, security or treatment in a correctional setting or in counseling, counseling and guidance, as a probation or parole officer, mental health counselor or social worker." See L-3 testimony Rebecca White, DOP Personnel Transaction Unit

⁵ The Division of Personnel certifies that a candidate for promotion possesses the qualifications for the position as set forth in the specifications for the class of position for which he or she is a candidate and the appointing authority may require the candidate to qualify for the new position by a promotional competitive or non-competitive examination administered. See W. Va. Code R. § 143-1-11. If an applicant is determined to lack the requirements established for a position/class, DOP generally disqualifies the applicant or refuses to certify the candidate.

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 presented a timely application for a position along with several other applicants.⁶ There exist educational and work experience requirements. Grievant was informed that he did not qualify for the position and would not be interviewed. Grievant alleges that he had sufficient education and experience to be eligible to be considered for the Unit Manager position posted for the Parkersburg Correctional Center in June 2016. Grievant sets forth in his grievance that he has a Bachelor's Degree in Criminal Justice, one year at the Ohio Police Academy, two and a quarter years corrections experience, and two years law enforcement experience. Grievant maintains he meets if not exceeds the minimum requirements for the position and should have been allowed to interview for

⁶ There was at one time or another approximately six applicants for the position.

the open position. Respondent is of the opinion that the information provided at the time of application did not demonstrate that Grievant had the necessary work experience required for the Unit Manager position. Respondent maintains its actions were appropriate and no injustice has been perpetrated in the course of the instant events. The amount of experience Grievant is rightfully entitled to be credited is of issue.⁷

W. Va. Code § 29-6-10 authorizes the West Virginia Division of Personnel (“DOP” or “Personnel”) to establish a position classification plan for all positions in the classified service through the legislative rule-making process. Also see W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 (2012). There are recognized prerequisites to qualify for most, if not all, job classifications. A Corrections Unit Manager position is no exception. Many times, there is some substitution and exchange between education and work experience requirements, but generally there are identified and specified requirements for any classified position. Pursuant to Personnel’s classification specifications and Respondent’s job posting, the Unit Manager’s position at issue, among other criteria, requires four years or 48 months of paid work experience. R Ex 1 It is essential to note that the work experience required is not just employment but of a certain caliber or nature of duties. To be credible work experience with regard to the Unit Manager position in discussion, experience needed to be “experience in inmate counseling, security or

⁷ The Grievance Board's role is not to act as an expert in matters of classification of positions, job market analysis, and compensation schemes, or to substitute its judgment in place of Personnel. *Moore v. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). Rather, the role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion.

treatment in a correctional setting or in counseling, counseling and guidance, as a probation or parole officer, mental health counselor or social worker.” R Ex 1; L-3 testimony Jason Duckworth and Rebecca White. The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

The precise amount of creditable work experience Grievant is assessed tends to vary somewhat with analysis. Respondent’s analysis of Grievant’s and DOP’s interpretation might be described as a difference of opinion. Respondent tends to challenge Grievant’s work experiences qualifying under DOP’s criteria for experience either as a law enforcement officer, as event security, or as a trainee in the Ohio Peace Officer Training Academy. Grievant’s best case requires this adjudicator to adopt the assumptions that his experience in event security and in law enforcement outside of a correctional setting, could be considered qualifying experience for the Unit Manager position. The undersigned is not persuaded that supposition is factually accurate.

Respondent highlights that Grievant’s experience as “event security” and in law enforcement did not substantially involve “inmate counseling, security or treatment in a correctional setting.” Rebecca White⁸ of Personnel reviewed Grievant’s application and testified that regular law enforcement activities were not the same as inmate counseling,

⁸ Rebecca White, is employed by Division of Personnel as a Manager in the Personnel Transaction Review Unit. This unit among other duties processes applications and reviews the qualifications of candidates.

security or treatment in a correctional setting. DOP would not view Grievant's law enforcement experience as qualifying for the Unit Manager position. Ms. White also testified that Grievant's experience as event security, did not qualify as relevant work experience. Grievant provided limited information regarding his work or duties performed during his Ohio Peace Officer Training Academy training or his unlisted work at the Lowell Police Department, which was work in inmate counseling, security or treatment in a correctional setting.⁹ Regarding his training at the Ohio Peace Officer Training Academy, Grievant testified that he had to pay to attend to the Academy and that he was not paid for any of the hours he spent training. Thus, notwithstanding that the police training did not involve work in a correctional setting, the police training also would not qualify as experience as the Unit Manager's position requires that any experience be paid.

Grievant questions the analysis that Respondent utilized in not permitting him to interview. There is room for reasonable discussion. Grievant needed to establish more than ambiguity. Respondent's analysis and West Virginia Division of Personnel assessment of Grievant's work experience that qualify for the Unit Manager position does differ to some degree. But in the end, while close, both their individual totals for Grievant

⁹ Grievant's work experience at the Lowell Police Department, had not been included on Grievant's application. Grievant did not bring this experience to the attention of Respondent, either by including it in his application or bringing it to the attention of the Parkersburg Correctional Center, or Human Resources, until after the interviews for the Unit Manager position had taken place. Grievant does not identify nor is the undersigned aware of any policy, procedure or practice of the Respondent, which requires it to reopen the interview process to consider new evidence of a candidate's eligibility for an open position, when the candidate had ample opportunity to provide such evidence of eligibility to Human Resources prior to the interviews being held.

tend to fall short of the minimum qualification amount. L-3 testimony Jason Duckworth¹⁰ and Rebecca White; also see Level One decision. Amounts differ, but the ultimate conclusions concur. When 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).

Pursuant to good faith review and analysis, it was Respondent’s determination that Grievant lacked sufficient applicable work experience on or about June 30, 2016, to interview for the posted position of Unit Manager. 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

¹⁰ Duckworth testified that initially he gave Grievant the benefit of the doubt regarding his experience, counting as qualifying experience Grievant’s work as a Corrections Officer, as a Deputy Sheriff, and as Event Security. Duckworth testified that, even giving Grievant the benefit of the doubt, Grievant did not have 48 months of qualifying experience.

(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))." It is not found that Respondent acted unreasonable or arbitrary and capricious.

In the fact pattern of this matter, Grievant has not persuasively demonstrated that Respondent's analysis of the information provided was inaccurate or clearly wrong to the degree of irrational error. Respondent's action of not approving Grievant to interview was reasonable. There was and is valid information of record which support the actions as justified. Further, Grievant has not established, with any degree of certainty, that if not for that determination he would have been selected for the Unit Manager position. There were approximately six other applicants for the position. A number of these individuals had no issues establishing eligibility for the position.

In other words, the amount of work experience Grievant is rightfully entitled is debated but given the totality of relevant factors and the circumstances, it is not established by a preponderance of the evidence that Respondent's action was beyond its reasonable exercise of discretion. Grievant did not establish by a preponderance of the evidence that in June 2016, he had sufficient qualifying work experience for the posted Unit Manager position.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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).

2. W. VA. CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. 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). State agencies 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); *Guertin v. Tax Dep't and Div. of Personnel*, Docket No. 2009-1687-DOR (July 27, 2010).

3. The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*.

4. 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))."

5. Grievant has not persuasively demonstrated that the analysis of his work experience was arbitrary and capricious.

6. Grievant did not establish by a preponderance of the evidence that in June 2016, he had sufficient qualifying work experience for the posted Unit Manager position.

7. Grievant has not established that Respondent violated any applicable policy, procedure, rule or practice in denying him an opportunity to interview for the June 2016 posted position of Unit Manager.

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: April 28, 2017

Landon R. Brown
Administrative Law Judge