THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JULIE LYNN TOMES,
Grievant,

v. **DOCKET NO. 2017-1103-MAPS**

DIVISION OF CORRECTIONS/SALEM CORRECTIONAL CENTER,
Respondent, and

CAITLIN E. BROWN,
Intervenor.

DECISION

Grievant, Julie Lynn Tomes, filed this grievance against her employer, the Division of Corrections, on October 17, 2016, challenging the selection of another employee for a Corrections Program Specialist position. As relief, Grievant seeks to be placed in the Corrections Program Specialist position with a pay increase, back pay to October 1, 2016, and answers to certain questions she had asked of an employee in Respondent's Human Resources Department.

A hearing was held at level one on November 7, 2016, and a decision denying the grievance at that level was issued on December 1, 2016. Grievant appealed to level two on December 13, 2016, and a mediation session was held at level two on January 19, 2017. Grievant appealed to level three on or about January 27, 2017, and a level three hearing was held before the undersigned Administrative Law Judge on April 18, 2017. Grievant appeared *pro se*, Respondent was represented by John H. Boothroyd, Assistant Attorney General, and Intervenor appeared *pro se*. This matter became mature for

decision on May 18, 2017, the deadline for submission of Proposed Findings of Fact and Conclusions of Law. Intervenor declined to submit written proposals.

Synopsis

This grievance was filed when Grievant was selected for a posted Corrections Program Specialist position, offered the position, and then informed that the Division of Personnel had determined she was not minimally qualified for the position. Another applicant was then placed in the position. The Division of Personnel concluded on review of Grievant's experience that she had not acquired the minimum six years of professional experience required to be minimally qualified for the position at issue. Grievant did not demonstrate that the Division of Personnel's determination that she was not minimally qualified for the position at issue was clearly wrong or arbitrary and capricious.

The following Findings of Fact are made based on the evidence developed at level three.

Findings of Fact

1. Grievant is employed by the Division of Corrections ("Corrections"), at the Salem Correctional Center ("SCC"), as a Secretary 2. She has been employed by Corrections since July 2013, when the former juvenile facility (Industrial Home for Youth) became an adult correctional facility, and it was transferred from the jurisdiction of the Division of Juvenile Services to Corrections. Grievant had worked at the facility as an employee of the Division of Juvenile Services since May 2005.

2. In the summer of 2016, Corrections posted a Corrections Program Specialist vacancy at SCC. The minimum experience requirements for the position, as found in the

Division of Personnel's ("DOP") classification specification for the position, are, "Training. Bachelor's Degree from an accredited college or university in criminal justice, corrections, social work or behavioral science field. . . . Experience. Two years of full-time or equivalent part-time paid professional experience in a corrections, probation/parole, law enforcement, social work, recreation, religion or related behavioral science field." The classification specification states that "[f]ull-time or equivalent part-time paid experience as described [under experience] may substitute for the required training on a year-for-year basis."

3. Grievant applied for the position on July 25, 2016, was interviewed by an interview panel, and was selected to fill the vacancy. On August 19, 2016, Grievant received a written offer of employment from SCC Warden David Jones for the Corrections Program Specialist position, and she accepted the offer in writing on August 20, 2016. The offer did not indicate that the selection was subject to approval by DOP. Warden Jones did not personally approve the issuance of the letter, nor did he sign the letter. His signature on the letter is from a signature stamp used by the SCC Human Resources Department.

4. After Grievant was determined by Corrections to be the best qualified candidate for the position, DOP then reviewed Grievant's experience to determine whether she was minimally qualified for the position. This review resulted in a determination that Grievant was not minimally qualified for the posted position, because she did not hold a Bachelor's Degree, and her work experience was not professional experience. Grievant was not placed in the Corrections Program Specialist position.

5. The classification specification minimum experience requirements for the position at issue for an applicant with no Bachelor's Degree, as interpreted by DOP is six years of professional experience, four years' experience to substitute for the Degree, and two years' experience under the experience requirement.

6. Corrections has adopted a Policy Directive, Number 132.00, which provides the guidelines for promotion of non-Correctional Officers. That Policy Directive states that, "[a]ll applicants must meet the minimum qualifications established by the Division of Personnel for any vacancy." It states that Corrections' Human Resources will do a "preliminary review to determine eligibility. The Division of Personnel will make the final determination on qualifying . . .." Grievant is familiar with Corrections' policies.

7. Grievant does not have a Bachelor's Degree. She began working for the Division of Juvenile Services in May 2005, as an Office Assistant 2. She became classified as a Secretary 1 in 2006. Grievant's position was transferred to Corrections in July 2013, and she became classified as a Secretary 2 in October 2013, working as the secretary to the Warden.

8. Grievant served as a Field Training Officer, an in-house title, for about six months during her employment with the Division of Juvenile Services.[1] Rebecca White, Administrative Services Manager 1 with DOP, acknowledged that the duties of the Field Training Officer are comparable to the duties of a Correctional Trainer, which is a professional position.

[1] Grievant testified this was about one year, but her application for the posted position lists her time in this job as the six month period from July to December 2006.

9. In her current position as a Secretary 2, Grievant supervises a Receptionist and two inmates on the inmate work crew who perform cleaning duties. She spends about 15% of her time daily supervising the inmates.

10. DOP has in place definitions of terms used in connection with the classification system for state employees. Professional is defined by DOP as "[w]ork 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." Administrative support is defined by DOP as "[s]upport services such as personnel, budget, purchasing, data processing which support or facilitate the service programs of the agency; also means work assisting an administrator through office management, clerical supervision, data collection and reporting, workflow/project tracking, etc."

11. DOP's classification definitions in defining supervision state that the employee supervises three or more full-time employees. Ms. White pointed out that supervising inmates would not fall within this definition, and would not be considered professional duties.

12. Nataniel Garnes, an Administrative Services Assistant 3 in Corrections' Human Resources Department for four years, performed the internal review of Grievant's qualifications during the selection process. He recognized that whether Grievant's experience met the requirement for professional experience was an issue, but it had been his experience that DOP had made an exception to the definition of supervision when an employee supervised inmates, and he suggested that Grievant revise her duty statement

to focus on her supervision of inmates, which she did, adding that she had daily contact with inmates. It was Mr. Garnes' opinion that Grievant was minimally qualified for the posted position. However, it has been his observation that DOP has recently been more stringent in applying the definitions in determining whether an applicant meets the minimum qualifications for a position, and that exceptions to the rules that had been allowed in the recent past in order to qualify lower level employees for positions are not being allowed now. It was Mr. Garnes' experience, however, that the determination of whether an individual was minimally qualified was a subjective process, and that he receives different opinions from different DOP employees.

13. Mr. Garnes had in the past been able to ask DOP to review applications prior to the selection to pre-qualify applicants, but DOP no longer does such preliminary reviews. DOP will not review an individual's qualifications until the selection has been made.

14. Caitlin Brown had also applied for the posted Corrections Program Specialist position at issue, and was interviewed for the position. Ms. Brown was awarded the position, and began working in the position in October 2016.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). A preponderance of the evidence is defined as evidence which is 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. *Leichliter v. W. Va. Dep't of Health and 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 pointed out that the written offer of employment in the posted position and her written acceptance of the offer meets the definition of a legal document, apparently asserting that the offer was binding. The offer letter was not issued at the direction of the Warden, nor did he personally sign the letter. Further, it is clear that the Warden had no authority to extend such an offer without all the requisite approvals, which had not been obtained. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.,* 179 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" *Freeman v. Poling,* 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983). "It is well settled that a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay." *Chapman v. Dep't of Transp.,* Docket No. 97-DOH-261 (Nov. 24, 1997), *citing Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel,* Docket No. 92-HHR-186 (Jan. 22, 1993).

> In effect, potential state employees are charged with knowing that the persons who interview and offer them employment are typically not

> authorized to make final employment decisions. The prospective employee must not rely on statements made by such individuals as to salary or rates of pay. The new hire must not rely even on official-looking documents, unless the document reviewed is the Form WV-11 by which hiring is actually approved. While this rule is unquestionably burdensome in the extreme to prospective employees, any other rule would render the State powerless before the whims of individual supervisors, and would require strained interpretations of clear precedent set by this Board and the Courts of this State.

Chapman, supra. The offer letter was not binding on Corrections.

Normally, in a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

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*. In this case, however, Grievant was selected to fill the position as the best applicant for the position, but could not be placed in the position because DOP determined that she did not meet the initial threshold of being minimally qualified.

WEST VIRGINIA 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 Division of Personnel 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).

"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." *Williams v. Dep't of Health and Human Res. and W. Va. Div. of Personnel*, Docket No. 2010-1592-DHHR (Dec. 10, 2012). 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)).

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).

Corrections' personnel selected Grievant as the best candidate for the position at issue. Warden Jones testified that Grievant runs his office, handling all departmental problems, and she is the contact person in his office. He had no doubt that Grievant had the ability to perform the duties of the Corrections Program Specialist. DOP, however, found Grievant failed to meet the minimum qualifications for the position based on a determination that none of her experience met the definition of professional experience. Although the testimony presented was that DOP had in the past made a determination that supervision of inmates is professional experience, DOP did not count Grievant's supervision of inmates as professional experience based on the definition of supervision, which is defined as supervision of three or more full-time employees. While it is certainly

true that Grievant's supervision of inmates does not meet the definition of supervision, this definition does nothing to answer the question of whether this is professional experience. However, even were the undersigned to conclude that DOP's interpretation that supervision of inmates did not qualify as professional experience, Grievant did not supervise inmates prior to working for Corrections, which was in 2013. Even counting the three years from 2013 to 2016, and the six months as a Field Training Officer as professional experience, Grievant does not have the required six years of professional experience, rather, she only has three and a half years of professional experience. There is no evidence to support a finding that her work as a Secretary 1 or an Office Assistant for the Division of Juvenile Services can be considered professional experience as opposed to administrative support. While Grievant apparently is an excellent employee who is quite capable, she, unfortunately does not meet the minimum qualifications for the posted position.

Grievant argued that she was found to be qualified for three other positions for which she had applied, and therefore, she should have been found qualified for the position at issue here. The positions were an Administrative Services Manager 1, a Corrections Hearing Officer, and a Corrections Unit Manager. Like the position at issue, Corrections' personnel thought Grievant was minimally qualified for the first two positions, but Grievant was not selected for the positions, and DOP did not review her qualifications. As to the Corrections Unit Manager position, the record reflects that Corrections' personnel did not believe Grievant was minimally qualified. Grievant's argument does not address the issue here, which is that DOP determined, based on the classification specification requirements, that Grievant did not meet the minimum qualifications for the position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988).

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv*., Docket No. 93-RS-489 (July 29, 1994).

3. WEST VIRGINIA 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 Division of Personnel 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).

4. "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." *Williams v. Dep't of Health and Human Res. and W. Va. Div. of Personnel*, Docket No. 2010-1592-DHHR (Dec. 10, 2012). 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)).

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. Grievant did not demonstrate that DOP's determination that she was not minimally qualified for the position at issue was arbitrary and capricious or clearly wrong.

7. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.,* 179 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" *Freeman v. Poling,* 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983). "It is well settled that a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay." *Chapman v. Dep't of Transp.,* Docket No. 97-DOH-261 (Nov. 24, 1997), *citing Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel,* Docket No. 92-HHR-186 (Jan. 22, 1993).

8. The Warden had no authority to offer Grievant employment in the position at issue without all the necessary approvals, which had not been given. The offer of employment is not binding on Corrections.

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).

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BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: June 28, 2017