

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KATHIE L. SIZEMORE,  
Grievant,**

**v.**

**Docket No. 2017-2337-MAPS**

**DIVISION OF CORRECTIONS and  
DIVISION OF PERSONNEL,  
Respondents.**

## **DECISION**

Kathie L. Sizemore, Grievant, originally filed this grievance against her employer the West Virginia Division of Corrections (DOC), Respondent, on June 7, 2017, protesting her eligibility and rescinded selection for the position of Records Supervisor. The Statement of Grievance reads:

On Thursday, 09 March 2017, I was interviewed at the Mt. Olive Correctional Complex for the position of Corrections Programs [sic] Specialist (job position #CM01700036). This position was to fill the Supervisor vacancy of the Records Department at MOCC. For approximately eighteen (18) years, nine (9) months, I proficiently fulfilled the duties of not only Office Assistant, as per my title, but in part as the designated Records Supervisor. On Wednesday, 15 March 2017, I received a letter (via e-mail) from MOCC offering this position to me and reflecting the amount of what my pay increase would be should I accept. I signed the letter, accepting the offered position and submitted it back to MOCC Human Resources Department on Thursday, 16 March 2017.

On Thursday, 06 April 2017, I corresponded with Ms. Tonya Harrison, Administrative Service [sic] Manager-MOCC, (via-email) inquiring if the Division of Personnel had responded to the position offered to me. Ms. Harrison stated that the transaction was submitted but at the time, they were waiting on DOP to review/approve it. Wednesday, 12 April 2017, I received an e-mail from Ms. Harrison notifying me that the Division of Personnel's review was not in my favor. On Tuesday, 18 April 2017, I received a letter through the U.S. Postal Service from Ms. Tonya Harrison stating that the WVDOP determined I did not meet the qualifications for the CPS position and rejected the transaction MOCC submitted.

On Thursday, 27 April 2017, I submitted a "Letter of Appeal" to the West

Virginia Division of Personnel, to the attention of Wendy Elswick, Assistant Director – Personnel Transaction Review [sic]. In the letter, I detailed the reasoning behind my appeal of their initial decision, which included noting the fact that I acted as the “Records Supervisor Designee” and fulfilled those duties in its [sic] entirety.

On Tuesday, 23 May 2017, I discovered that the Corrections Program Specialist position I had interviewed for, and was offered, was once again posted for application. Immediately after learning such, I contacted Ms. Elswick (via-email), inquiring about the status of the appeal I submitted due to the fact I have had no response at this particular time. [sic] Ms. Elswick answered my e-mail shortly thereafter, requesting I re-send my letter.

Upon arriving at home on the evening of Wednesday, 24 May 2017, I had received [sic] a letter from the WV Division of Personnel, via U.S. Postal Service. This letter stated that the WV DOP’s original determination of denying the transaction was appropriate.

According to the findings of the West Virginia Division of Personnel, I am not “qualified” to perform the duties of a Corrections Programs [sic] Specialist; therefore, for over approximately 18 years, I have been functioning and maintaining responsibilities that were outside the realm of my job classification as an Office Assistant.

See Grievance Form.

The relief sought reads:

I am requesting the pay increase I was denied after being offered (and accepted), which is 19% of my current pay-grade. I am also seeking compensation for the years (18 years, 9 months) I performed duties of the Corrections Program Specialist (Records Supervisor), which was five pay grades higher (22%) than my assigned job classification of an Office Assistant III.

See Grievance Form.

On June 12, 2017, Respondent DOC attempted to waive the matter to level three. An Order of Joinder and Transfer was entered by this Grievance Board on July 7, 2017, joining the West Virginia Division of Personnel (DOP), as a necessary party and transferring the matter to level two for mediation. On July 21, 2017, Respondent DOP raised the affirmative defense of timeliness pursuant to W. Va. Code § 6C-2-4(c)(1). A

level two mediation was conducted on September 22, 2017. Grievant appealed to level three on October 2, 2017. A level three hearing was held before the undersigned Administrative Law Judge on January 23, 2018, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by fellow employee Lee Harper. Respondent DOC was represented by John Boothroyd, Assistant Attorney General and Respondent DOP was represented by its counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about March 2, 2018, the assigned mailing date for the submission of the parties' fact/law proposals. All parties submitted fact/law proposal.

### **Synopsis**

Grievant challenges the West Virginia Division of Personnel's determination that she was not eligible for promotion to the position of Program Specialist/Records Supervisor (CPS) after her selection for the position by the West Virginia Division of Corrections, her employer. Grievant highlights her experience and perceived ability to perform the duties of the position.

The Division of Personnel is the entity of WV State government charged with making classification determinations. DOP develops and manages the State's Classification/Compensation Plan. An applicant must meet the minimum qualifications for a State classified position, before he or she can be approved for a promotion to that position. If DOP finds that an applicant is found to lack the requirements established for the position, it may deny the applicant's promotion. Pursuant to applicable rules and

regulations, Grievant was deemed ineligible for the position in discussion. Grievant did not demonstrate by a preponderance of the evidence that she met the minimum qualifications of the CPS classification specification. Further, it has not established that the duties performed by Grievant fell more closely within the CPS classification than the OA 3 classification to which her position was assigned. Grievant did not establish that Respondent DOP's classification decision(s) were arbitrary and capricious, or clearly wrong. Accordingly, 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. At the time relevant to this grievance, Grievant occupied a position that was classified as an Office Assistant 3 (OA 3) at the Mt. Olive Correctional Complex.<sup>1</sup>
2. Grievant was initially hired by Respondent DOC as an Office Assistant 1 on April 1, 1998, reallocated to an Office Assistant 2 in June 1999<sup>2</sup>, then promoted to Office Assistant 3 in February 2000. The Office Assistant position Grievant maintained was assigned to the Records Department at Mt. Olive Correctional Complex.
3. On February 14, 2017, Grievant applied for a vacant Correctional Program Specialist (Records Supervisor) position, at Mt. Olive Correctional Complex.

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<sup>1</sup> Subsequent to being denied the advancement to Records Supervisor (CPS), Grievant transferred and/or was promoted to a Secretary 1 position in the central office for DOC and no longer works at the Mt. Olive Correctional Complex.

<sup>2</sup> Reallocation is defined as "[r]eassignment by the Director of Personnel of a position from one class to a different class on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." See W. Va. Code R. § 143-1-3.75.

4. The Records Department at Mt. Olive consists of the Records Supervisor (a Corrections Program Specialist position – the position applied for by Grievant), an Office Assistant 3, and two other Office Assistants.

5. From 1998 to 2017, Grievant was under the direct supervision of the Records Supervisor. From 2000 to 2017, Grievant was the Office Assistant 3 and lead worker in the Records Department.<sup>3</sup> As part of her work as an Office Assistant 3, Grievant helped advise and direct the work of other Office Assistants. Grievant did not have the authority to “supervise”, approve leave, perform employee evaluations or initiate discipline. As part of her assigned duties, Grievant received, reviewed and assessed court orders to process in accordance with state and federal law. As part of her responsibilities, Grievant evaluated initial court orders of intake inmates, calculated minimum and maximum discharge dates, and communicated restitution orders to the correct department within DOC. Grievant had communications with DOC staff, law enforcement personnel, judicial officials and the public regarding inmate records. Grievant routinely received, maintained and transferred inmate records pursuant to DOC policy, procedure and practice.

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<sup>3</sup> “Lead worker” is defined by DOP in its Position Description Form (DOP Ex 8) as “a level of work at which an individual is assigned the ongoing responsibility of scheduling and/or reviewing the work of other coworkers and guiding and training them while performing identical or similar kinds of work.” “Direct Supervision” is defined as “Formally delegated responsibility for planning, assigning, reviewing, and approving the work of three or more full time employees, which also includes initiating disciplinary actions, approving sick and annual leave requests conducting performance evaluations, and recommending salary increases.”

6. Grievant's work as an Office Assistant was supervised and reviewed by Records Supervisor Lori Burford from 1998 to November 30, 2016. Ms. Burford testified at the level three hearing regarding the work performed by Grievant.

7. In 2015, Ms. Burford, in a Position Description Form regarding Grievant, described the primary function or purpose of Grievant's position as:

Perform advanced levels of complex clerical assignments and working independently. Interpretation and application of division policies, procedures and practices. Be a lead worker for subordinate staff, reviewing of their work, and assisting and providing guidance in the performance their job duties. Communicate in a professional manner, the guidelines relating to policies, procedures and practices to division staff, officers, law enforcement, judicial employees, and the general public. Perform all other related work as required within the realm of the position.

8. During her eighteen plus years in the Records Department, Grievant was trained by Ms. Burford to perform necessary functions of the Records Department and to handle the Record Department in her absence. Records Supervisor Burford trusted Grievant to handle the Records Department in her absence.

9. Grievant submitted an application for the Records Supervisor (CPS) position initially in September 2016.

10. Grievant requested information from DOP on an informal review, that was conducted as a courtesy for DOC, to verify whether Grievant met the minimum qualifications for a CPS position. On October 11, 2016, Grievant issued a letter of appeal to Respondent DOP.

11. Grievant was informed by letter from then Acting Director of DOP, Joe F. Thomas, dated October 26, 2016, that the duties she performed in her current OA 3 position were considered to be administrative support rather than professional level,

based on the DOP's definition of "professional" and as such would not count toward meeting the minimum qualifications of a position that required professional level experience as a substitute for a college degree. See DOP Ex 1.

12. The DOP Pay Plan Policy (DOP-P12) defines "professional" 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.

See DOP Ex 4.

13. Pursuant to Respondent DOP, the classified position of Office Assistant 3 is not considered to be "professional."

14. On February 17, 2017, Grievant submitted an application for the Records Supervisor (CPS) position at Mt. Olive Correctional Complex, in which Grievant was permitted to interview. Grievant was interviewed by a panel consisting of three members of the Respondent DOC upper management staff, on March 9, 2017.

15. Grievant was selected as the most qualified, top-rated candidate for the position and on March 15, 2017, was issued a letter by the Warden offering the position, with a 19% pay increase. Grievant signed the letter accepting the position.

16. On March 27, 2017, the Personnel Transaction Review (PTR) section of the DOP received a personnel transaction from the DOC attempting to promote Grievant into a position classified as a CPS. The transaction was reviewed, and DOP determined the Grievant did not meet the minimum qualifications for the posted position and rejected the transaction. See DOP Ex 2 and Testimony Rebecca "Becky" White.

17. The minimum qualifications for the CPS classification are as follows:

**Minimum Qualifications**

**Training:** Bachelor's Degree from an accredited college or university 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:** 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.

**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.

See DOP Ex 11.

18. Grievant does not have a bachelor's degree.<sup>4</sup> After a review of Grievant's application, DOP determined that Grievant did not have six years of professional experience as defined by the DOP. See DOP Ex 2, L-3 Testimony White and Assistant Director Campbell.

19. Grievant was notified on April 18, 2017, via Mt. Olive Correctional Complex's Human Resource Department, that Respondent DOP determined that Grievant was "unqualified" to fulfill the position. The offered position was rescinded.

20. Grievant appealed the rejection of the personnel transaction.

21. By letter dated May 22, 2017, Rebecca "Becky" D. White, Administrative Services Manager 1 for the PTR section of the DOP, informed Grievant that the reason for the rejection was due to the minimum qualifications for the title of CPS not being met.

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<sup>4</sup> Without such a degree, Grievant is required to have six years of paid professional experience in corrections, probation/parole, law enforcement, social work, recreation, religion or related behavioral science field, to meet the minimum qualifications of the CPS position.



Specifically, Grievant did not have a four-year college degree and did not have the qualifying “professional” experience to meet the substitution for the degree requirement nor did she have the “professional” experience necessary for the additional experience requirement listed in the minimum qualifications for the CPS classification. See DOP Ex 3 and Testimony White.

22. Wendy Campbell, Assistant Director for the Classification and Compensation section of the DOP, testified at the level three hearing. Ms. Campbell’s section of DOP is responsible for ensuring that all positions in the classified service in State government are classified appropriately and that employees are paid within the range of the pay grade assigned to the classification of the position they occupy. Assistant Director Campbell detailed the difference between a “reallocation” and a “reclassification” as provided in the DOP’s Administrative Rule, W. Va. Code R. §143-1-1 *et seq.* The definitions for each are as follows:

Reallocation is a “[r]eassignment by the Director of a position from one class to a different class on the basis of a significant change in the kind and/or level of duties and responsibilities assigned to the position or to address a misalignment of title and duties.” W. Va. Code R. §143-1-3.72; and,

Reclassification is “[t]he revision by the Board of the specifications of a class or class series which results in a redefinition of the nature of the work performed and a reassignment of positions based on the new definition and may include a change in the title, compensation range, or minimum qualifications for the classes involved.” W. Va. Code R. §143-1-3.74.

See DOP Ex 5 and Campbell Testimony.

23. DOP Administrative Rule sets forth the rules for both *reallocations* and *reclassifications*. Whenever significant changes occur in the duties and responsibilities permanently assigned to a position, the Director [of the DOP] shall reallocate the position

to its proper class . . . W. Va. Code R. §143-1-4.7. The Director shall not reallocate a position based on temporary changes in the duties and responsibilities assigned to the position. W. Va. Code R. §143-1-4.7a. Additionally, W. Va. Code R. § 143-1-4.5 *et seq.*, designates the Position Description Form (“PDF”) as the official record of the *current duties* and responsibilities assigned to a position and is used by the DOP to allocate the position to its proper class.

24. DOP does not classify a position based on a PDF that does not contain current duties. A reallocation cannot occur without a review of the current duties of a position. As for reclassifications, the Rule is clear that the authority to reclassify positions lies solely with the West Virginia State Personnel Board. See DOP Ex 5 and Campbell L-3 Testimony

25. A PDF was completed by Grievant on October 6, 2015, and was received by the DOP for a classification review on March 8, 2016. DOP receives, reviews and makes classification determinations on PDFs daily. Assistant Director Campbell herself has reviewed and made classification determinations on thousands of PDFs.

26. Respondent DOP conducted a complete and thorough position review on the submitted PDF and determined the position was appropriately classified as an OA 3. With regard to the submitted PDF, the Appointing Authority (DOC) did not agree with the statements of Grievant on the PDF and provided additional comments related to such to the DOP for consideration.<sup>5</sup> See DOP Ex 6 and 7.

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<sup>5</sup> The PDF document provides a specific space on which the appointing authority can address any issues of concern regarding the information provided by the employee or the supervisor. See DOP Ex 6 and 8 and Campbell L-3 testimony.

27. As part of a general request from DOC to DOP, after raising concerns regarding their employees in OA 3 positions not qualifying for CPS positions, the DOP conducted a job audit of the position occupied by the Grievant on November 14, 2016.<sup>6</sup> The DOC had specifically raised issues with DOP about the Grievant not qualifying for the CPS position in her office that was soon to be vacated by the retirement of the incumbent, Lori Burford. See Campbell testimony.

28. A second PDF was completed by Grievant after the job audit and was received by the DOP for review on December 8, 2016. DOP again conducted a complete and thorough position review on the PDF and again, on February 15, 2017, determined the position was appropriately classified as an OA 3. See DOP Ex 8 and 9.

29. Grievant's work as an Office Assistant was supervised and reviewed by the Records Supervisor Lori Burford from 1998 to November 30, 2016. Ms. Burford testified at the level three hearing regarding the work performed by Grievant.

30. Grievant did not testify on her own behalf at the level three hearing. The official job duties and responsibilities of Grievant's position were detailed on the two PDFs submitted, filed and reviewed by Respondent DOP.

31. The class specification for OA 3, assigned to pay grade 7, reads in pertinent part as follows:

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<sup>6</sup> A job audit is conducted by DOP at the employee's worksite and allows the employee to clarify and provide additional information about job duties and responsibilities that are included on the PDF.

## OFFICE ASSISTANT 3

### Nature of Work:

Under general supervision, performs advanced level, responsible and complex clerical tasks of a complicated nature involving interpretation and application of policies and practices. Interprets office procedures, rules and regulations. May function as a lead worker for clerical positions. Performs related work as required.

### Distinguishing Characteristics:

Performs tasks requiring interpretation and adaptation of office procedures, policies, and practices. A significant characteristic of this level is a job inherent latitude of action to communicate agency policy to a wide variety of people, ranging from board members, federal auditors, officials, to the general public.

### Examples of Work:

Analyzes and audits invoices, bills, orders, forms, reports and documents for accuracy and initiates correction of errors.

Maintains, processes, sorts and files documents numerically, alphabetically, or according to other predetermined classification criteria; researches files for data and gathers information or statistics such as materials used or payroll information.

Types a variety of documents from verbal instruction, written or voice recorded dictation.

Prepares and processes a variety of personnel information and payroll documentation.

Plans, organizes, assigns and checks work of lower level clerical employees.

Trains new employees in proper work methods and procedures.

Answers telephone, screens calls, takes messages and complaints and gives information to the caller regarding the services and procedures of the organizational unit.

Receives, sorts and distributes incoming and outgoing mail.

Operates office equipment such as electrical calculator, copying machine or other machines.

Posts records of transactions, attendance, etc., and writes reports.

Files records and reports.

May operate a VDT using a set of standard commands, screens, menus and help instructions to enter, access and update or manipulate data in the performance of a variety of clerical duties; may run reports from the database and analyze data for management.

See DOP Ex 10 and 13.

32. The class specification for CPS, assigned to pay grade 12, reads in pertinent part as follows:

### CORRECTIONS PROGRAM SPECIALIST

#### Nature of Work:

Under general supervision, performs work at the full-performance level in the implementation and evaluation of and technical assistance for programs/services characteristic of Division of Corrections or the Regional Jail and Correctional Facility Authority. In Prison Industries, serves as a specialist in promoting prison industries products. Serves in a staff specialist or technical assistant role to ensure compliance with federal, state and local regulations relating to the program or service area. Performs the full range of specialized tasks relating to the program area to include analysis and comprehension of program/services regulations, development and implementation of action plans to achieve desired results, coordination and collaboration with inter- and intra- agency personnel, writing program procedure manuals, compilation of regular and special reports on program status and the signing and review of work to support staff or other specialists. Although regulations, methods and procedures in the program area are available, employee may exercise independent judgement and latitude in the work performed. Travel may be required for some positions. Performs related work as required.

#### Distinguishing Characteristics:

The Corrections Program Specialist is distinguished from the Corrections Program, Senior class by the absence of lead work or supervisory responsibilities over professional staff and, in relation to the Senior level, the limited complexity of the programs/services provided.

#### Examples of Work:

Acquires working familiarity with applicable laws, regulations, policies and procedures and interprets/applies same to the functional area.

Compiles or oversees the compilation of program-specific data for the preparation of regular and special reports on program compliance and status.

Represents the program unit with inter- and intra- agency personnel related to the program/service area.

Collaborates with educational, health, social services, and rehabilitation agencies in the provision of services to inmate population.

Develops policies and procedures for implementation of programs;

conducts periodic evaluation of program operation to determine effectiveness and compliance.

Solicits new accounts in promoting prison industries products; maintains existing accounts.

May lead or supervise security and/or support staff.

See DOP Ex 11 and 13.

33. The OA 3 is the highest classification in the OA class series. These positions perform advanced level complex clerical tasks.

34. Assistant Director Campbell explained that when looking at the job duties and responsibilities detailed on the PDF and comparing them to the class specification, Grievant's duties fell under "complex clerical tasks". The duties of the position were complicated, as opposed to simple filing, answering phones, routing mail and inquires expected predominantly of the lower classification in the series. The OA 3 position can make decisions on court orders, calculating incarceration times, and is permitted to interpret policies and practices of the agency as relates specifically to the job duties. While not functioning as a supervisor, the position also functioned as a lead worker.

Campbell L-3 testimony

35. Respondent DOP is of the stated opinion that the best fit for the position at the time it was occupied by Grievant was OA 3. Campbell L-3 Testimony.

36. Grievant occupied positions classified as OA 1, OA 2 and OA 3 during the 18 years and 9 months she claims to have been working out of classification. At no time prior to the submission of the first PDF in October of 2015, did the Grievant submit a PDF for a classification review or complain to the DOP that she was working out of classification. Respondent DOP determined in both 2015 and in 2016, based on the

review of two different PDFs and a job audit, that the position occupied by Grievant was appropriately classified as an OA 3. Campbell L-3 Testimony.

37. Grievant was made aware of DOP determination in both 2015 and in 2016.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *Burden of Proof*. "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 party bearing the burden has not met its burden. *Id.*

Grievant seeks to be deemed to meet the minimum qualifications for the position, Corrections Program Specialist (CPS), and also requests to be compensated for allegedly working out of classification for nearly nineteen years.<sup>7</sup> See Grievance Form. Grievant believes she was eligible to be promoted to the CPS position, and highlights that the employing agency, Respondent DOC, selected her for the position. Grievant contends that DOP should have counted all her time working in the records department at Mt. Olive Correctional Complex in OA 1, OA 2 and OA 3 positions toward meeting the substitution requirement listed in the class specification. Additionally, Grievant asserts the position

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<sup>7</sup> The record is not clear whether Grievant still desires the position, or just the salary increase lost as a result of not being allowed to assume the position.

she occupied was performing duties beyond its classified and that she is entitled to additional compensation (contending working out of classification for nearly 19 years).

DOP maintains that Grievant did not meet the minimum qualifications required for the CPS position and that the “best fit” for the position she occupied was the classification of OA 3.

WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. DOP is required to classify positions, not employees, into the classification that is the “best fit” within the current State Classification Plan. State agencies, such as the DOC utilize such positions and 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). Thus, it is recognized that in the circumstances of the instant grievance, the employing State agency (DOC) is not the agency charged with setting and interpreting minimum qualifications for classified positions within the state classified system.

As a general matter, Respondent DOC would like to have “professional” defined more broadly or flexibly, so that more of its employees can be promoted from within the agency. Respondent DOC and Grievant both highlight that when the Records Supervisor was absent from Mt. Olive (whether work related or on leave), Grievant as the Office Assistant 3 would manage the Records Department in her place. This included a six-week period in 2013, when Ms. Burford was out on leave. Grievant maintains that she has sufficient training and experience to the point that she should be eligible for promotion to the Correctional Program Specialist position.



The point that Grievant “can” perform the duties is not lost on the undersigned. Regrettably, while the alleged fact to a layperson may seem absolute, the legal weight of the argument is less than persuasive in the facts of this matter. The skill level/ability to perform a duty is distinctly different than qualification to be legitimately placed into a classification. Ability and qualification are not synonymous terms.

DOC’s 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.

Under DOP rules, if Personnel finds that an applicant is found to lack any of the requirements established for the position, it may deny the applicant’s promotion. See W. Va. D.O.P., Administrative Rules, 143 C.S.E. 1, § 6.4.a.1.

Grievant is a long term, valued employee. Respondent DOC approves of Grievant and the job she has performed throughout the years. This is recognized. Further, it is acknowledged that Respondent DOC prefers that Grievant be found eligible and would be amenable to promoting Grievant to Corrections Program Specialist. However, the DOC is not the agency with the legal authority to define and determine qualifications for State classified positions.

Respondent DOP received a personnel transaction from Respondent DOC to promote Grievant into a CPS position. The transaction was reviewed, and DOP determined Grievant did not meet the minimum qualifications for the posted position and

rejected the transaction. This was not new information for Respondent DOC or Grievant. Grievant does not have a bachelor's degree, as required by the minimum qualifications for the CPS position. As such, she would require six years of paid professional experience in corrections, probation/parole, law enforcement, social work, recreation, religion or related behavioral science field to meet the minimum qualifications of the position. For the purpose of meeting the minimum qualifications of a position requiring professional level work, such as the requirement of the CPS class specification, an OA 3 position is not considered "professional" by DOP's definition. Further information also known and debated by Grievant and Respondent DOC.

Respondent DOP's actions are not considered arbitrary and capricious.<sup>8</sup> An applicant must meet the minimum qualifications for a State classified position, before he or she can be approved for a promotion to that position. At the time of Grievant's application and Respondent DOC's attempt to place Grievant into the position of Records Supervisor, Grievant did not meet the identified and recognized qualifications for the

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<sup>8</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).

position. When DOP interprets the job specifications which it developed in accordance with its 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). Under the “clearly wrong” standard of review, an agency’s actions are valid so long as the decision is supported by substantial evidence or a rational basis. See *Adkins v. W.Va. Dep’t. of Educ.*, 210 W.Va. 105, 556 S.E.2d (2001); *Farley v. Dep’t. of Health & Human Res.*, Docket No. 07-HHR-161 (June 10, 2008). As the governing authoritative agency over the State's Classification/Compensation Plan, the West Virginia Division of Personnel's interpretation of its definition of professional experience should be given deference and is not arbitrary or capricious. *Prue v. Division of Corrections and Division of Personnel*, Docket No. 2017-1400-MAPS (Nov. 3, 2017).

In her grievance filing, Grievant also claimed to have been working out of classification for 18 years and 9 months. Grievant was reallocated to an Office Assistant 2 in June 1999, then promoted to Office Assistant 3 in February 2000. In order to prevail upon a claim of misclassification, a Grievant must prove by a preponderance of the evidence that her duties for the relevant period of time more closely match those of another cited classification specification than the classification to which she is currently assigned. See generally, *Hayes v. W. Va. Department of Natural Resources*, Docket No. NR-88-038 (Mar. 28, 1989).

DOP received and reviewed two PDFs for the position occupied by Grievant, in 2015 and then again in 2016. In a classification grievance, the focus is upon the

grievant's duties for the relevant period, and whether they more closely match those of another cited classification specification than the classification to which he/she is currently assigned. *Hayes, supra*.

DOP's classification specifications generally contain five sections as follows: first is the "Nature of Work" section; second, "Distinguishing Characteristics"; third, the "Examples of Work" section; fourth, the "Knowledge, Skills and Abilities" section; and finally, the "Minimum Qualifications" section. These specifications are to be read in "pyramid fashion," i.e., from top to bottom, with the different sections to be considered as going from the more general/more critical to the more specific/less critical. *Captain v. W. Va. Div. of Health*, Docket No. 90-H-471 (Apr. 4, 1991). For these purposes, the "Nature of Work" section of a classification specification is its most critical section. *See generally, Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

The key to the analysis is to ascertain whether the grievant's current classification constitutes the "best fit" for his/her required duties. *Simmons v. W. Va. Dep't of Health and Human Resources*, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. *Broadus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). DOP conducted a detailed review of the position occupied by Grievant and made a well-reasoned determination that the position was properly allocated.

Assistant Director Campbell testified and explained that when looking at the job duties and responsibilities detailed on the PDF and comparing them to the class specification, Grievant's duties fell under "complex clerical tasks". The duties of the

position were complicated, as opposed to simple filing, answering phones, routing mail and inquires expected predominantly of the lower classification in the series. The OA 3 position can make decisions on court orders, calculating incarceration times, and is permitted to interpret policies and practices of the agency as relates specifically to the job duties. While not functioning as a supervisor, the position also functioned as a lead worker. Assistant Director Campbell persuasively explained that the job duties and responsibilities of the position occupied by Grievant clearly did not fall within the CPS classification which requires performing work at the full-performance level in the implementation and evaluation of and technical assistance for programs/services characteristic of Division of Corrections.

Grievant's allegation to have been working out of classification for 18 years is easily discerned as an auxiliary measure to her primary grievance. Nevertheless, if Grievant was truly serious regarding this allegation Grievant failed to persuasively demonstrate her contention. Grievant has not shown by a preponderance of the evidence that her duties fell more closely within the CPS classification than the OA 3 classification. Grievant occupied positions classified as OA 1, OA 2 and OA 3 during the 18 years and 9 months she now alleges to have been working out of classification. At no time prior to the submission of the first PDF in October of 2015 did Grievant submit a PDF for a classification review or complain to DOP that she was working out of classification. DOP determined in both 2015 and in 2016, based on the review of two

different PDFs and a job audit, that the position occupied by Grievant was appropriately classified as an OA 3. Grievant filed her grievance on June 7, 2017.<sup>9</sup>

Grievant's allegation is not supported by a reasonable application of the principle to the facts of this matter. DOP last determined the position occupied by Grievant was appropriately classified as an OA 3 on February 8, 2017, and communicated this determination to the agency with a copy to Grievant on February 15, 2017. This review and determination was not clearly wrong and is supported by the evidence. See DOP Ex 6 - 8 and Campbell L-3 testimony. The best fit for the position at the time it was occupied by Grievant was OA 3.

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 her 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. 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

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<sup>9</sup> Grievant transferred and/or was promoted to a Secretary 1 position in the central office for the DOC and no longer works as an OA 3 in Respondent's Records Department at Mt Olive.

classified exempt service. State agencies which utilize such positions, as a general rule, must adhere to that plan in making assignments to their employees.

3. The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *Aff'd* Kan. Co. C. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

4. Employees have a substantial obstacle to overcome when contesting their classification, as the grievance board's review is supposed to be limited to determining whether or not the agency's actions in classifying the position were arbitrary and capricious. *W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993).

5. An applicant must meet the minimum qualifications for a State classified position, before he or she can be approved for a promotion to that position. If the DOP finds that an applicant is found to lack any of the requirements established for the position, it may deny the applicant's promotion. W. Va. Code R. § 143-1-6.4.a.

6. Grievant did not establish by a preponderance of the evidence that she had sufficient prerequisite qualifications as required by the West Virginia Division of Personnel for the posted Corrections Program Specialist position.

7. When [DOP] interprets the job specifications which it developed in accordance with its 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). Under the “clearly wrong” standard of review, an agency’s actions are valid so long as the decision is supported by substantial evidence or a rational basis. See *Adkins v. W.Va. Dep’t. of Educ.*, 210 W.Va. 105, 556 S.E.2d (2001); *Farley v. Dep’t. of Health & Human Res.*, Docket No. 07-HHR-161 (June 10, 2008).

8. As the governing authoritative agency over the State's Classification/Compensation Plan, the West Virginia Division of Personnel's interpretation of its definition of professional experience should be given deference and is not arbitrary or capricious. *Prue v. Division of Corrections and Division of Personnel*, Docket No. 2017-1400-MAPS (Nov. 3, 2017).

9. An action is arbitrary and capricious if the agency making the decision 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 (4<sup>th</sup> Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

10. 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)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).



11. 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 DOP. *Moore v. W. Va. Dep't of Health & Human Resources*, Docket No. 94-HHR-126 (Aug. 26, 1994); *Celestine v. State Police*, Docket No. 2009-0256-MAPS (May 4, 2009); *Logdson v. Div. of Highways*, Docket No. 2008-1159-DOT (Feb. 23, 2009). 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. See *Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989); *Logdson, supra*.

12. Grievant has not shown by a preponderance of the evidence that her job duties as an OA 3 meet the DOP's definition of "professional" and has not shown that she meets the minimum qualifications of the CPS classification specification. As such, to promote or otherwise place Grievant in the CPS position would be contrary to law.

13. Grievant has not shown by a preponderance of the evidence that her duties fell more closely within the CPS classification than the OA 3 classification to which her position was assigned.

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 12, 2018

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