

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

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

v.

Docket No. 2017-1184-MAPS

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

DECISION

Grievant, Robert Paul Tate, Jr., is employed by Respondent, Division of Corrections at Parkersburg Correctional Center. On November 15, 2016, Grievant filed this grievance against Respondent stating:

I applied for position of Case Manager at PBCC. Three other employees of the facility applied and were all told they did not meet the minimum requirement for the job and were not allowed to interview. One of the employees, Kelly Lee, counselor 1 at PBCC relayed that she was not allowed to interview because she did not have the required degree nor required programming experience. On the date of the interview, October 26, 201[6], I was told that Kelly Lee had been allowed to interview at the last minute. The next day, October 27th, I received a call from Unit Manager Patrick Shreves stating that I was not selected for the job and that two people with more experience had been selected. One of those selected was Kelly Lee.

I have a college degree and the required experience for the job of Case Manager. Kelly Lee has neither the required degree nor the four years of experience in programming to substitute. It is my belief that Ms. Lee was allowed to interview, and subsequently awarded the job, without meeting the minimum requirements as set forth by the West Virginia Division of Corrections job posting for Case Manager with an effective date of 3/23/2000.

For relief, Grievant seeks "Position and paygrade of Case Manager at Parkersburg Correctional Center, retroactive to October 27th 2016. If no Case Manager position is

available at PBCC, I request pay grade of Case Manager and keep my current role as Correctional Counselor.”

Following the November 30, 2016, level one hearing, a level one decision was rendered on December 13, 2016, denying the grievance. Grievant appealed to level two on January 5, 2017. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on July 19, 2017. A level three hearing was scheduled to be held before Administrative Law Judge Carrie H. LeFevre on October 11, 2017. On October 2, 2017, days prior to the scheduled level three hearing, Grievant filed a *Motion for Default Judgment* alleging Respondent had failed to timely respond to discovery requests. On October 10, 2017, the day before the scheduled level three hearing, emails were received from the parties suggesting that a continuance of the level three hearing might be requested as a result of the discovery issues, but neither party actually moved to continue the hearing at that time. Judge LeFevre proceeded to hearing as scheduled on October 11, 2017, and addressed the discovery issues and the motion. After hearing the parties’ arguments on these issues, Judge LeFevre orally continued the level three hearing. By order entered October 16, 2017, Judge LeFevre entered an order continuing the level three hearing and finding that, while no formal order for discovery had been issued, the Respondent’s response to Grievant’s requests was made too late for Grievant to properly prepare for the level three hearing. Judge LeFevre further found that default judgment could not be awarded as a sanction for a party’s failure to provide discovery and denied Grievant’s motion. Judge LeFevre ordered the matter be rescheduled for level three hearing. On November 14, 2017, the undersigned, as chief administrative law judge, reassigned the grievance for administrative reasons. A level three hearing

was held on November 20, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*¹. Respondent was represented by counsel, John H. Boothroyd, Assistant Attorney General. This matter became mature for decision on December 20, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent at Parkersburg Correctional Center as a Correctional Counselor. Grievant was not selected for a Case Manager position and asserts that the successful candidate falsified her application and that she did not meet the minimum qualifications of the position. The successful candidate did meet the minimum qualifications, and, although she made false statements on a revised application, there was no evidence that the selection committee viewed the revised application or relied on the false statements in making the selection decision. Grievant failed to prove that the selection decision was arbitrary and capricious. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent at Parkersburg Correctional Center as a Correctional Counselor.

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

2. On October 4, 2016, Respondent posted two vacant Case Manager positions.

3. On or about October 4, 2016, Grievant applied for a Case Manager position.

4. Grievant was not selected for a Case Manager position.

5. The two positions were awarded to Kelly Lee and another applicant. Grievant grieves Kelly Lee's selection over himself, but does not grieve the selection of the other person.

6. The job posting for the Corrections Case Manager listed the following as requirements in relevant part:

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: Experience in an area of corrections programming or treatment may be substituted for the required training on a year-for-year basis.

Experience: Two 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 and parole officer, mental health counselor or social worker.

7. The selection procedure for the position was governed by State of West Virginia Division of Corrections Policy Directive 132.00, Non-Correctional Officer Promotion Guidelines, which states in relevant part:

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 the final determination on qualifying, in accordance with applicable requirements.

8. Ms. Lee submitted her initial application on October 11, 2016.

9. Earlier in the year, Ms. Lee had applied for a previous open Case Manager position. At that time, the human resources department of the Division of Corrections had determined she did not meet the minimum qualifications, Ms. Lee requested reconsideration, and the Division of Personnel reviewed and determined that Ms. Lee did, in fact, meet the minimum qualifications. Ms. Lee was permitted to interview for that previous open position but was not selected at that time.

10. The wording Ms. Lee used in the description of her job duties as Correctional Officer II in the earlier application was identical to the wording in her initial October 11, 2016 application.

11. When the facility's secretary sent Ms. Lee's October 11, 2016 application to the Division of Corrections' human resources department for review, she attached the previous memo of the Division of Personnel in which they had determined Ms. Lee was qualified for the position.

12. Despite this prior determination of Ms. Lee's qualification by the Division of Personnel, an employee of the human resources department of the Division of Corrections determined Ms. Lee did not meet the minimum qualifications for the position.

13. Ms. Lee then requested reconsideration and submitted a revised application, also dated October 11, 2016. Ms. Lee added the following to the description of her Correctional Officer II job duties: "Received RSAT² Training and performed RSAT Officer duties. Including running all RSAT Programs. Worked as Shift Commander when Corporal was absent."

² Residential Substance Abuse Treatment.

14. On October 21, 2016, a different employee of the human resources department of the Division of Corrections, Jason Duckworth, who is the employee who had received the decision of the Division of Personnel on the previous application, reviewed the application and determined that Ms. Lee did meet the minimum qualifications stating, “training can be substituted with experience, which includes inmate counselling or security in a correctional setting.”

15. The Division of Personnel, not the hiring agency, is ultimately responsible for determining whether an applicant meets the minimum qualifications for a position.

16. Neither “programming” nor “treatment” have an official definition in the Division of Personnel’s class specifications, but the long-standing practice of the Division of Personnel has been to count experience as a correctional officer as treatment experience.

17. Ms. Lee had two years and three months of qualifying experience as a Corrections Counselor I and four years and eleven months of qualifying experience as a Correctional Officer II. As Ms. Lee did not have the required education, she was required to have a combined six years of experience to meet the minimum qualifications. As she had seven years and two months of qualifying experience, Ms. Lee met the minimum qualifications for the position.

18. Grievant did not submit any evidence of his own qualifications or his own application packet for the position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-

1-3 (2008); *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). "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).

Grievant asserts Ms. Lee purposefully falsified her application, in collusion with the Parkersburg Correctional Center, and that Ms. Lee does not meet the minimum qualifications for the position. Respondent asserts that Ms. Lee does meet the minimum qualifications for the position, that the Division of Personnel's interpretation must be given deference, and that Respondent did not act in an arbitrary and capricious manner.

In a selection case, 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 Rehab. 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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

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)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant asserts that Ms. Lee was found to meet the minimum qualifications based on her statement that she had experience “running all RSAT programming.” This assertion is not supported by the evidence, which shows that, although Ms. Lee had submitted a revised application to the Division of Corrections with that language, the Division of Personnel only reviewed her original application, which did not contain that language in making their determination. The Division of Personnel determined Ms. Lee met the minimum qualifications based on her experience as a Correctional Officer II, not because of her claimed experience with the RSAT program.

Grievant additionally disagrees with the Division of Personnel’s view that correctional officer experience, which he asserts is “security” experience, should count as “treatment” experience for purposes of determining the minimum qualifications for the position at issue. The West Virginia Supreme Court of Appeals, in applying previous cases regarding rules of construction and interpretation of statutes by bodies charged by their administrations, found that the Division of Personnel’s “interpretation and explanation of the classifications should [be] ‘given great weight unless clearly erroneous.’” *W. Va. Dep't of Health and Human Res. v. Blankenship*, 189 W. Va. 342,

431 S.E.2d 681, 687 (1993) (per curiam). “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.” Syl. pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W.Va. 105, 556 S.E.2d 72 (2001) (citing Syl. pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)).

Rebecca White, the manager of the unit within the Division of Personnel’s Personnel Transaction Review section that processes all transactions for state government employees, testified regarding the Division of Personnel’s determination of Ms. Lee’s qualifications. Ms. White explained that “treatment” is a broad term with no specific definition in the class specifications, but that it has been Division of Personnel’s longstanding practice to count correctional officer experience towards treatment experience for this position. Ms. White testified that the rationale for this is the day-to-day interaction correctional officers have with inmates, and that speaking and interacting with the inmates can be treatment. This view is supported by the essential job functions of the Correctional Officer 2 specification that state, in relevant part, “Interacts with offenders in order to facilitate development or improvement of living and social skills.” The Division of Personnel’s interpretation is supported by a rational basis and is entitled to deference.

Grievant asserts that his grievance should also be granted because Ms. Lee falsified her revised application. Ms. Lee stated, “Received RSAT training and performed RSAT Officer duties. Including running all RSAT Programs.” This statement was not true. Ms. Lee was employed as a Correctional Officer II from November 2011 to June 2014. Ms. Lee did not receive RSAT training until December 2014. During the level three

hearing, Ms. Lee admitted that she “ran RSAT” as a Corrections Counselor and not as a Correctional Officer II and that listing it in her job duties as a correctional officer was “my mistake.”

Whether Ms. Lee’s statements on her application were intentionally false or a mistake, Grievant presented no evidence that these statements rendered the selection decision arbitrary and capricious. As explained above, Ms. Lee’s statements about her RSAT experience as a correctional officer did not impact Ms. Lee’s ability to meet the minimum qualifications of the position. There was no evidence presented to show that the interview committee even reviewed the revised application, much less relied on this information in making their selection decision. If the statements had been something upon which the hiring decision was based, or had kept Ms. Lee from meeting the minimum qualifications, that certainly would have been grounds to find that the hiring decision was arbitrary and capricious. Absent evidence that these statements did impact the hiring decision, it cannot be said that the selection decision was flawed.³

Grievant presented no other evidence or argument why the selection decision was arbitrary and capricious. Although Grievant stated that he was more qualified than Ms.

³ This in no way negates the seriousness of an employee making a false statement on an application. The Division of Personnel’s legislative rule provides the following: “The Director may temporarily or permanently prohibit the reinstatement, appointment, temporary employment, promotion, reallocation, demotion, lateral class change, temporary upgrade, transfer, or examination of an applicant, or after examination, may disqualify the applicant or remove his or her name from a register or certification, or refuse to certify any eligible on a register if: . . . he or she has made a false statement or omission of material fact or has misrepresented his or her qualifications in his or her application. . . .” W. VA. CODE ST. R. § 143-1-6.4.a. and 6.4.a.4 (2016). An employee who is found to make a false statement may also be subject to disciplinary action for such conduct. It is not necessary to determine in this decision whether Ms. Lee provided incorrect information intentionally or by mistake.

Lee and should have been selected for the position, he did not provide any evidence of his qualifications, his application packet, or call any of the interview committee members to testify. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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). “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).

2. In a selection case, 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 Rehab. 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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. 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)). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. The West Virginia Supreme Court of Appeals, in applying previous cases regarding rules of construction and interpretation of statutes by bodies charged by their administrations, found that the Division of Personnel’s “interpretation and explanation of the classifications should [be] ‘given great weight unless clearly erroneous.’” *W. Va. Dep't of Health and Human Res. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993) (per curiam). “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.” Syl. pt. 1, *Adkins v. W. Va.*

Dep't of Educ., 210 W.Va. 105, 556 S.E.2d 72 (2001) (citing Syl. pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)).

5. Grievant failed to prove that the selection decision was arbitrary and capricious.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: January 30, 2018

Billie Thacker Catlett
Chief Administrative Law Judge