

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**CONNIE LYNN WESTFALL,
Grievant,**

v.

Docket No. 2017-1093-DOT

**DIVISION OF MOTOR VEHICLES AND
DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Connie Lynn Westfall, is employed by Respondent, Division of Motor Vehicles. On October 13, 2016, Grievant filed this grievance against Respondent Division of Motor Vehicles. Grievant did not complete the statement of grievance or request for relief on the grievance form, instead attaching a four-page document in which Grievant protests the Division of Personnel's determination that she did not meet the minimum qualifications for the Transportation Services Manager 2 position for which she applied. For relief, Grievant seeks for the Grievance Board to find "Grievant did perform administrative duties as defined by the DOP during her tenure as Lead CSR at the Spencer Regional DMV Office" and to order Respondent Division of Motor Vehicles to "include credit for such time when calculating and determining eligibility for the Transportation Services Manager II position she applied for on or about August 30, 2016" and to "include credit for such time when calculating and determining eligibility for any other position the Grievant may apply for in the future."

On November 17, 2016, Respondent Division of Motor Vehicles's chief administrator waived the grievance to level two of the grievance process. By order entered February 9, 2017, the Division of Personnel was joined as a party. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on

June 5, 2017. Level three hearings were held on November 9, 2017, and March 20, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and by her representative, Tina Payne. Respondent Division of Motor Vehicles was represented by counsel, Gretchen A. Murphy, Assistant Attorney General, during the November 9, 2017 hearing and by David E. Gilbert, Assistant Attorney General, during the March 20, 2018 hearing. Respondent Division of Personnel was represented by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on May 11, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law. The deadline to submit written Proposed Findings of Fact and Conclusions of Law was extended by thirty days at the request of Grievant with the agreement of the parties.

Synopsis

Grievant is employed by Respondent Division of Motor Vehicles as a Supervisor

2. Grievant protests Respondent Division of Motor Vehicles' determination that she did not meet the minimum qualifications for a Transportation Services Manager 2 position. Respondent Division of Motor Vehicles based its decision of Respondent Division of Personnel's interpretation of the relevant classification specification and definitions. Although Respondent Division of Personnel had previously interpreted the relevant classification specification and definitions to allow lead worker experience to qualify for the position, its management team had determined that interpretation was in error and directed a change in the interpretation. Grievant failed to prove Respondent Division of Personnel's interpretation of the classification specification and related definitions was clearly erroneous, that Respondent Division of Personnel was prohibited from correcting

its mistake, or that she was entitled to relief based on other employees receiving the benefit of Respondent Division of Personnel's prior erroneous interpretation. 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 Division of Motor Vehicles as a Supervisor 2.

2. On August 30, 2016, Grievant applied for a Transportation Services Manager 2 position.

3. On October 6, 2016, Grievant was informed by Respondent Division of Motor Vehicles' Human Resources Director, Monica Price, that she lacked the necessary experience to qualify for the position based on Respondent Division of Personnel's interpretation of lead worker experience.

4. In the past, Respondent Division of Personnel employees had considered lead worker experience as qualifying experience for Transportation Services Manager positions. The definitions of "administrative" or "supervisor" have not changed, however, as part of a general review of their practices and interpretations regarding minimum qualifications, Respondent Division of Personnel administration determined that the previous interpretation of lead worker experience as qualifying experience for "administrative" or "supervisor" experience was in error. In making this determination, job audits were conducted and the entire management team reviewed the issue and agreed

the prior interpretation was an error based on the language of the definitions and the affected classification specifications.

5. Sometime in February 2016, during interactions with Respondent Division of Personnel employees regarding another position, Ms. Price had been informed that the Division of Personnel's position on this issue had changed and that lead worker experience would no longer be considered qualifying experience for Transportation Services Manager series.

6. Respondent Division of Motor Vehicles disagreed with Respondent Division of Personnel's change in interpretation but complied with the interpretation.

7. Although Respondent Division of Personnel was not asked to review Grievant's qualifications prior to the hiring decision, Respondent Division of Personnel agrees with Respondent Division of Motor Vehicles' determination that Grievant was not qualified.

8. The minimum qualifications for the Transportation Services Manager 2 are as follows:

Training: Graduation from an accredited four-year college or university.

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

Experience: Six years of full-time or equivalent part-time paid administrative or supervisory experience in the area of assignment.

Special Requirement: A valid West Virginia drivers license may be required.

9. Grievant does not possess a college degree, so she was required to possess four years of experience to substitute for the lack of a degree and six years of experience for the required experience for a total of ten years of administrative or supervisory

experience. She had six years of qualifying experience as a Supervisor. She had six additional years of experience as a Customer Service Representative, Lead. If Grievant's lead worker experience had been counted as qualifying experience, she would have met the minimum qualifications for the position.

10. "Administrative" is defined in the Division of Personnel's Classification Terms (Glossary)¹ as: "Work Activities relating to planning, organizing, directing, controlling, supervising, and budgeting of agency or unit operations, programs, and missions."

11. "Supervisor" is defined in the Division of Personnel's Classification Terms (Glossary) 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, conduct performance evaluations, and recommend salary increases."

12. "Lead Work/Lead Worker" is defined in the Division of Personnel's Classification Terms (Glossary) as: "This is a level of work at which an incumbent is assigned the on-going responsibility of scheduling and/or reviewing the work of other co-workers and guiding and training them while performing identical or similar kinds of work."

13. The Customer Service Representative, Lead performs work as follows:

¹ Respondent Division of Personnel entered into evidence the Division of Personnel's Pay Plan Policy that contains an appendix with "Division of Personnel Terms." The Pay Plan Policy entered into evidence has a revision date of July 1, 2017. As the decision not to allow Grievant to interview was made in the summer of 2016, it is the Division of Personnel's interpretation of the glossary definitions and not the Pay Plan Policy definitions that is at issue. With the exception of "supervisor" the definitions are identical and the difference in the definition of "supervisor" has no impact on this grievance.

Under general supervision and in a lead capacity, performs and leads public contact work involving the receipt, auditing, processing, recording and issuance of drivers' license, vehicle registration, vehicle titles and related documents. Performs daily audits and prepares daily labor reports as directed. Responsible for office in the absence of the manager or supervisor. Performs voids and corrects errors in computer cash register system. Assists in assigning, reviewing and approving the work of other employees; may approve leave requests, trains employees in new work methods and orientation; handles unusual and complex driver or motor vehicle licensing and title problems. Assists public by telephone and in person in processing driver or motor vehicle license and title processing. Explains and provides assistance in requirements, fees, documents, forms, taxes and surcharges involved in registering and licensing vehicles. Reviews and processes documents, issues drivers' licenses, vehicle plates. Performs related duties as required.

14. As a Customer Service Representative, Lead, Grievant performed the following relevant duties: made daily bank deposits, scheduled Customer Service Representatives, made sure Customer Service Representatives turned in paperwork, opened and closed the office by unlocking and locking doors and counting tills, trained employees, approved leave in the absence of the supervisor; and sat in on interviews.

15. As a Customer Service Representative, Lead, Grievant had no responsibility for budgeting, evaluating employees, disciplining employees, hiring employees, or recommending salaries.

16. Grievant covered for her supervisor on and off for approximately eighteen months and would make deposits and open and close the office during that time. Grievant received a temporary upgrade for four and one half months of that time.

Discussion

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

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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant asserts that Respondent Division of Personnel’s change in its interpretation of the relevant definitions is unreasonable, that, regardless of the Customer Service Representative, Lead specification, Grievant did perform administrative and supervisory duties due to the frequent absence of her supervisor, and that Respondent Division of Personnel’s review of applications is inconsistent. Although Respondent Division of Motor Vehicles complied with Respondent Division of Personnel’s interpretation when it decided Grievant was not qualified for the position, Respondent Division of Motor Vehicles does not agree with Respondent Division of Personnel’s interpretation and asserts that lead worker experience should qualify as administrative experience. Respondent Division of Personnel asserts it has discretion in interpreting its classification specifications and that it was permitted to correct its previous error in interpreting lead worker experience.

Respondent Division of Personnel’s general application review process is not applicable to this grievance as it was Respondent Division of Motor Vehicles that made the determination Grievant did not meet the minimum qualifications, so that argument will not be addressed further. Further, even if Grievant was given credit for the full eighteen months she claimed she performed the duties of a supervisor while covering for her supervisor who was frequently absent, Grievant still falls well short of the four years of

experience she needed unless her experience as lead is found to be qualifying. Therefore, it is not necessary to determine whether or not Grievant should have received credit for the full eighteen months. The relevant determination to be made in this grievance is whether Respondent Division of Motor Vehicles erred in determining that Grievant did not meet the minimum qualifications, which relies on the determination of whether Respondent Division of Personnel erred in changing its interpretation of its classification specification definitions.

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)).

The Division of Personnel has interpreted the Transportation Services Manager 2 and Customer Service Representative, Lead classification specifications using the written definitions of "administrative" and "supervisor" contained in the Classification Terms (Glossary) of the classification specifications. The Grievance Board has consistently recognized the Division of Personnel's use of these definitions. See *Estep v. Div. of Juvenile Serv.*, Docket No. 05-DJS-272 (Dec. 30, 2005); *Goff and Cantrell v.*

Dep't of Health and Human Serv., Docket No. 05-HHR-392 (May 31, 2006); *Brightwell v. Dep't of Health and Human Serv.*, Docket No. 06-HHR-058 (June 8, 2006); *Hart v. Dep't of Health and Human Serv.*, Docket No. 2008-0641-DHHR (Feb. 19, 2009); *Bradley v. Dep't of Transp.*, Docket No. 2008-1772-DOT (Feb. 27, 2009); *Marcum v. Insurance Comm'n*, Docket No. 2009-0463-DOR (May 24, 2010); *Rose v. Div. of Rehab. Serv.*, Docket No. 2011-0047-DEA (Oct. 7, 2011).

Respondent Division of Personnel admits that it had previously interpreted lead worker experience as administrative or supervisory for purposes of minimum qualifications but asserts that interpretation was in error and has now been corrected. In reaching this determination, Respondent Division of Personnel's management team reviewed the issue, including job audits of the position, and determined the duties clearly did not meet the definitions as written. A review of the Customer Service Representative, Lead classification specification and the relevant definitions clearly supports this determination. While there is some overlap between the definition of "supervisor" and "lead worker," in that both positions plan or schedule and review work, a supervisor is clearly distinguished from a lead worker by a supervisor "initiating disciplinary actions, approving sick and annual leave requests, conduct performance evaluations, and recommend salary increases." Grievant had no responsibility for initiating disciplinary actions, conducting performance evaluations or recommending salary increases and only approved leave requests in the absence of her supervisor. Grievant's regular duties, as described, all fall within the Customer Service Representative, Lead classification specification. Therefore, the Division of Personnel's interpretation of the Customer Service Representative, Lead classification specification is supported by substantial

evidence and a rational basis.

Both Grievant and Respondent Division of Motor Vehicles argue that Respondent Division of Personnel should not be permitted to change its previous interpretation of the Customer Service Representative, Lead classification specification. Grievant and Respondent Division of Motor Vehicles both assert it was improper for Respondent Division of Personnel to change its interpretation without changing the classification specification or definitions. Grievant also asserts Respondent Division of Personnel should not be permitted to change a long-standing practice because the employees in charge change. Respondent Division of Motor Vehicles also asserts Respondent Division of Personnel violated its own policy because it failed to apply the policy uniformly across time.

There was no error in the classification specification or the definitions for Respondent Division of Personnel to correct. The error was in the prior interpretation of those things by Respondent Division of Personnel employees. Respondent Division of Personnel's management team corrected that error by conforming the agency's interpretation to the written specification and definitions. Public employers are not obligated to continue past errors. See *Akers v. W. Va. Dep't of Tax & Revenue*, 194 W. Va. 456, 460 S.E.2d 702 (1995); *Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Dinger v. Mercer County Bd. of Educ.*, Docket No. 2013-1047-MerED (Sept. 19, 2013). In fact, public employers are encouraged to correct mistakes. See *Bailey v. Mingo County Bd. of Educ.*, Docket No. 2015-1551-CONS (Jan. 8, 2016), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 16-AA-20 (June 30, 2016) (citing *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*,

Docket No. 96-15-512 (Dec. 31, 1997); *Toney v. Lincoln County Bd. of Educ.*, Docket No., 2008-0533-LinED (Oct. 31, 2008)). A grievant is not entitled to relief based on the erroneous receipt of a benefit by another employee. *White v. Dept. of Transp.*, Docket No. 00-DOH-313D (Jan. 17, 2001); *Sheehan v. Fayette County Bd. of Educ.*, Docket No. 04-10-147 (Aug. 27, 2004), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 04-AA-121 (Mar. 30, 2005).

As previously discussed in footnote one, the Pay Plan Policy entered into evidence was not the version of the Pay Plan Policy that was in effect at the time of the decision. However, even if the language cited by Respondent Division of Motor Vehicles is the same in the relevant version of the policy, that the purpose of the policy is “[t]o establish a uniform policy for the use and application of the salary schedule for the classified service consistent with merit principles,” this language does not prevent Respondent Division of Personnel from recognizing that previous employees had interpreted established definitions and classification specifications wrongly.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. 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*).

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." 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)).

4. Public employers are not obligated to continue past errors. See *Akers v. W. Va. Dep't of Tax & Revenue*, 194 W. Va. 456, 460 S.E.2d 702 (1995); *Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Dinger v. Mercer County Bd. of Educ.*, Docket No. 2013-1047-MerED (Sept. 19, 2013).

5. Public employers are encouraged to correct mistakes. See *Bailey v. Mingo County Bd. of Educ.*, Docket No. 2015-1551-CONS (Jan. 8, 2016), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 16-AA-20 (June 30, 2016) (citing *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997); *Toney v. Lincoln County Bd. of Educ.*, Docket No., 2008-0533-LinED (Oct. 31, 2008)).

6. A grievant is not entitled to relief based on the erroneous receipt of a benefit by another employee. *White v. Dept. of Transp.*, Docket No. 00-DOH-313D (Jan. 17, 2001); *Sheehan v. Fayette County Bd. of Educ.*, Docket No. 04-10-147 (Aug. 27, 2004), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 04-AA-121 (Mar. 30, 2005).

7. Grievant failed to prove Respondent Division of Personnel's interpretation of the classification specification and related definitions was clearly erroneous, that Respondent Division of Personnel was prohibited from correcting its mistake, or that she was entitled to relief based on other employees receiving the benefit of Respondent Division of Personnel's prior erroneous interpretation.

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: June 26, 2018

Billie Thacker Catlett
Chief Administrative Law Judge