

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**SAMUEL CUTRIGHT,
Grievant,**

v.

Docket No. 2017-2167-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL and
DIVISION OF PERSONNEL.**

DECISION

Grievant, Samuel Cutright, filed this action on or about May 10, 2017, against his employer, Department of Health and Human Resources. The Statement of Grievance reads: "Not reallocated from HS trainee to HS worker when appropriate (for a year)," and the Relief Sought reads: "To be made whole in every way including back pay with interest."

On May 30, 2017, the Grievance Evaluator at Level One waived the matter to Level Two, because she lacked authority to determine the matter. The Division of Personnel was joined as an indispensable party pursuant to Order of Joinder entered on June 13, 2017. A Level Two mediation session was conducted on October 18, 2017. Grievant perfected his appeal to Level Three, and a Level Three evidentiary hearing was conducted before the undersigned on December 17, 2018. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. The Department of Health and Human Resources appeared by its counsel, James "Jake" Wegman, Assistant Attorney General. The Division of Personnel appeared by its

counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 11, 2019.

Synopsis

Grievant is currently employed by the Department of Health and Human Resources in a position classified as a Health Service Worker. The position was not reallocated from a Health Service Worker Trainee to a Health Service Worker until after Grievant completed a Position Description Form that was then submitted by the Department of Health and Human Resources to the Division of Personnel for review and a classification determination. The Division of Personnel and Department of Health and Human Resources both acted in accordance with applicable policy in regard to the reallocation of the position. Grievant failed to demonstrate that any delay in processing the reallocation violated any law, rule, regulation, policy or practice applicable to his employment situation. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is currently classified as a Health Service Worker, which was effective as of May 27, 2017, at William R. Sharpe Jr., Hospital.
2. Prior to May 27, 2017, Grievant had been working as a Health Service Trainee at William R. Sharpe Jr., Hospital since April 1, 2015.
3. In order for an employee to obtain a reallocation of the position they occupy from the classification of Health Service Worker Trainee to Health Service Worker the

following must occur: (1) the employee must, at a minimum, have served in the Health Service Worker Trainee position for a one year period of time, (2) the employee's supervisor must have confirmed in writing that the employee is now performing at the full-performance level, (3) the employee must complete a Position Description Form, and (4) the Position Description Form must be reviewed by the Division of Personnel to make the appropriate classification determination on the position.

4. If the Division of Personnel determines that the position should be reallocated to the classification of Health Service Worker, the employee must then complete an application that is submitted by the Department of Health and Human Resources along with the personnel transaction for the reallocation in the Oasis system for approval by the Division of Personnel. The effective date of the transaction cannot be until some point after all of the above steps have been met.

5. On May 12, 2016, Grievant sought his reallocation by submitting an online application. Grievant indicated that a secretary in the office advised him to complete an application in order to get "bumped up" to the Health Service Worker classification and that he completed it online because coworkers told him that paper copies get lost.

6. Rather than seeking a reallocation, on May 12, 2016, Grievant applied to get on the register for an Health Service Worker position through the State's NeoGov online application system for state government jobs.

7. Grievant received an email communication from Marsha Jordan from the payroll office at Sharpe Hospital on July 19, 2016. The email requested that Grievant stop by the Human Resources Department to complete a new application and job

description form and also that Grievant needed to obtain a letter from his supervisor. Grievant did not respond to this email nor did he stop by the Human Resources office.

8. Grievant received a second email from Marsha Jordan on August 5, 2016. The email was following up as a reminder to the July 19th email as Grievant had not taken any action with regard to the first email. Grievant did not respond to this email and did not communicate in anyway with Ms. Jordan after receipt of either email.

9. Grievant completed a Position Description Form on March 22, 2017, two weeks after the filing of this grievance. The Position Description Form, along with a letter from Grievant's supervisor indicating successful fulfillment of Health Service Worker Trainee duties was submitted by the Department of Health and Human Resources to the Division of Personnel on March 31, 2017. The Division of Personnel reviewed the Position Description Form and accompanying documentation and determined that the position should be reallocated to the classification of Health Service Worker.

10. The personnel transaction to effectuate the reallocation was processed by the Department of Health and Human Resources in the system with an effective date of May 27, 2017.

11. On December 10, 2015, the Division of Personnel issued a policy memorandum to all Cabinet Secretaries, Bureau Chiefs and Agency Heads, relating to settlement agreements and other various personnel related matters. As it relates to reallocation, the policy read:

Retroactive wages will not be authorized if a classification determination is communicated to the appointing authority by the DOP Classification and Compensation Section within sixty (60) calendar dates of receipt of the signed position description form (PDF) and the agency processes the

corresponding personnel transaction within the following thirty (30) calendar days. Retroactive wages may only be authorized for the period of time the process was delayed beyond this ninety (90) calendar day period.

12. This memorandum was intended to ensure consistency among state agencies, to ensure that employers were aware of the reasonably established timelines for processing the Position Description Forms as had been the practice of the Division of Personnel and was necessary with the implementation of Oasis, and to ensure employees were all treated the same for the purpose of reallocation.

13. The policy memorandum also informed state agencies that the practice of “automatic reallocation” would no longer be permitted since the practice was in violation of the Administrative Rule. The memorandum read in part:

When an employee transitions from entry level or trainee duties to full-performance resulting in a reallocation to a higher classification in a series, if there is a PDF on file for that position, the supervisor must submit with the reallocation personnel transaction a letter explaining the requested reallocation of the position. If there is no PDF on file for the position, a PDF must be submitted with the personnel transaction.

14. The Division of Personnel and the Department of Health and Human Resources met the required time frames established by the policy for the processing of the Position Description Form and the personnel transaction for the reallocation.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the

evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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 and classified exempt service. As a general rule, State agencies which utilize such positions must adhere to that plan in making assignments to their employees. It is the Division of Personnel who is charged with setting and interpreting the minimum qualifications for classified positions within the state classified system. *Pure v. Div. of Corrections and Div. of Personnel*, Docket No. 2017-1400-MAPS (Nov. 3, 2017).

Grievant asserts that he is entitled to back wages for an unspecified period of time due to the position he occupies not being reallocated in what he feels to be an untimely manner. Respondents contend that Grievant failed to follow instructions he needed to comply with in order to ensure the position he occupied was considered for possible reallocation in a timely manner. Respondent Division of Personnel contends that the classification review and determination were made in a timely fashion, therefore, not permitting an award of back pay.

The record established that retroactive wages will not be authorized for reallocations if a classification determination is communicated to the appointing authority by the Division of Personnel Class & Comp section within sixty calendar days of receipt of the signed Position Description Form and the agency processes the corresponding personnel transaction within the following thirty days. Retroactive wages may only be authorized for the period of time the process was delayed beyond the ninety day calendar period. *See also Moore v. Dep't of Health and Human Resources and Div. of Personnel*, Docket No. 2017-2453-DHHR (Aug. 3, 2018).

The record established that a Position Description Form for the position held by Grievant was submitted by the Department of Health and Human Resources to the Division of Personnel on March 31, 2017, and a review of the Position Description Form was expedited with a classification determination being made by the Division of Personnel on April 3, 2017. The reallocation of the position was effective on May 27, 2017. Based upon the established time frames, the Position Description Form was timely processed and, accordingly, Grievant is not entitled to back wages.

Grievant failed to point out to the undersigned any law, rule, regulation, policy or practice which required the Department of Health and Human Resources to provide him with back pay for a reallocation. The Division of Personnel established time lines for all State agencies as it relates to the processing of Position Description Forms and eligibility for back pay through the policy memorandum it issued in December of 2015. Back wages are only available when a reallocation is made and the time lines for processing of such are not met by the Division of Personnel or the employing agency.

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. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. The State Personnel Board and the Director of the Division of Personnel have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug. 30, 1999).

3. "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 was 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)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

4. Grievant has not demonstrated by a preponderance of the evidence that the Division of Personnel or the Department of Health and Human Resources violated any law, rule, regulation, policy or practice, or that their actions were arbitrary and capricious.

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 (2018).

Date: March 12, 2019

Ronald L. Reece
Administrative Law Judge

