

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CYNTHIA J. BONNETT,  
Grievant,**

**v.**

**Docket No. 2020-1556-DOC**

**WORKFORCE WEST VIRGINIA  
AND DIVISION OF PERSONNEL,  
Respondents.**

**DECISION**

Grievant, Cynthia J. Bonnett, is employed by Respondent, Workforce West Virginia (“Workforce”). On June 30, 2020, Grievant filed the instant grievance at level two of the grievance process stating, “DOP denied my temporary upgrade for an Employment Programs Manager II position indicating that I did not qualify due to experience.” For relief, Grievant seeks a temporary upgrade.

By order entered July 29, 2020, the grievance was transferred to level one of the grievance process as Grievant had failed to allege circumstances that would permit filing directly to level two. Following the August 12, 2020 level one conference, a level one decision was rendered on September 1, 2020, denying the grievance. Grievant appealed to level two on September 2, 2020. Following mediation, Grievant appealed to level three of the grievance process on October 2, 2020. Respondent Division of Personnel (“DOP”) was joined as a necessary party by order entered October 30, 2020. A level three hearing was held on January 20, 2021, before the undersigned at the Grievance Board’s Charleston, West Virginia office via video conference. Grievant appeared *pro se*. Respondent Workforce appeared by Acting Commissioner Scott Adkins. Respondent DOP appeared by Assistant Director Wendy Mays and was represented by counsel, Karen O’Sullivan Thornton, Assistant Attorney General. This matter became mature for

decision on February 25, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").<sup>1</sup>

### **Synopsis**

Grievant is employed by Respondent Workforce West Virginia as an Employment Programs Specialist, Sr. Grievant grieves the Division of Personnel's rejection of her temporary upgrade to an Employment Programs Manager 2 position per its determination that Grievant did not meet the minimum qualifications of the position. Grievant failed to prove the Division of Personnel's interpretation of the minimum qualifications was clearly erroneous or that the Division of Personnel's determination Grievant did not meet the minimum qualifications 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 Workforce West Virginia ("Workforce") as an Employment Programs Specialist, Sr. ("EPSS").
2. Respondent Workforce selected Grievant to fill an Employment Programs Manager 2 ("EPM 2") through a temporary upgrade.
3. Agencies are permitted to fill positions through a temporary upgrade in certain circumstances under Respondent DOP's *Temporary Classification Upgrades Policy*. One of the requirements of the policy is that the employee selected for the

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<sup>1</sup> PFFCL were to be submitted by February 18, 2021, but the deadline to submit PFFCL was extended due to technical difficulties with the hearing recording. Respondent Workforce elected not to submit PFFCL.

upgrade must meet the minimum requirements of training and experience for the upgraded position. *Temporary Classification Upgrades Policy* § II.G.

4. By memorandum dated June 4, 2020, Workforce Acting Commissioner Scott Adkins submitted the request for temporary upgrade to Respondent DOP, including an application for employment completed by Grievant on May 28, 2020.

5. The minimum qualifications of an EPM 2 are “[g]raduation from an accredited college or university” and “[s]ix years of full-time or equivalent part-time paid administrative or supervisory experience in the area of assignment.” Experience may be substituted for training on a year-for-year basis.

6. As Grievant had not graduated from a college or university, she would need ten years of qualifying experience to meet the minimum qualifications.

7. Respondent DOP defines “administrative” as “[w]ork activities relating to a principal mission or program of an agency or subcomponent thereof that supports that agency’s mission or program. This involves analyzing, evaluating, modifying, and/or developing programs, policies, and procedures that facilitate the work of agencies’ objectives while applying relevant analysis, theory, and principles.” *Pay Plan Policy*, Appendix A.

8. Respondent DOP defines “administrative support” as “[s]upport services such as personnel, budget, purchasing, data processing which support or facilitate the service programs of the agency, also means work assisting an administrator through office management, clerical supervision, data collection and reporting, workflow/project tracking, etc.” *Id.*

9. Respondent DOP defines “supervisor” as “[f]ormally delegated responsibility for planning, assigning, reviewing and approving the work of two (2) or more full-time employees or three (3) or more .83 full-time equivalent Seasonal employees which includes initiating disciplinary actions, approving leave requests, conducting performance evaluations and recommending salary increases.” *Id.*

10. Respondent DOP defines “manager/managerial” as “[o]versees a formally designated organization unit or program that requires extensive planning, organizing and monitoring of work activities of subordinate staff, controlling resources including staff, budget, equipment, and all the means used to accomplish work within the assigned area of responsibility. Employee is held accountable for establishing and meeting the objectives and goals of the unit or program.” *Id.*

11. Upon review of the proposed temporary upgrade, Respondent DOP determined Grievant’s seven years and three months of experience as an EPSS was qualifying for the EPM 2 position but that none of her other experience was qualifying.

12. As Grievant did not possess ten years of qualifying experience, she did not meet the minimum qualifications for an EPM 2 and Respondent DOP rejected the temporary upgrade.

13. At issue is Grievant’s experience working for the West Virginia State Treasurer’s Office and for a private company, Fourth Venture Group, Inc.

14. Grievant stated on her application that she worked as an Administrative Executive Assistant/Secretary for the West Virginia State Treasurer’s Office from 1979 to 1990. Grievant stated that she “supervised” twenty-six Field Representatives and that she “[m]anaged all aspects of daily office operations.” However, examples of her work

included “scheduling appointments, preparing travel agendas, securing facilities and travel arrangements, [and]. . . reconciling travel expense requirements.” In addition, Grievant “[a]ssisted in preparing requisitions and ordered supplies” and maintained filing.

15. Grievant stated on her application that she worked as an Office Manager/Administrative Executive Assistant for Fourth Venture Group, Inc. from 1993 to 2012. In her description, Grievant used the type of language often found in resumes that does not provide a clear description of actual duties. Grievant stated that she “[m]anage[d] all aspects of daily office operations.” Some of the specific duties that appear clear from Grievant’s description include: general accounting, financial reporting, scheduling appointments, training administrative staff, maintaining a budget, purchasing, negotiating bids, establishing procedures relating to documents and records, prepared travel agendas, made travel arrangements, and processed and reconciled travel expenses.

16. After the rejection of the request for temporary upgrade, Respondent Workforce submitted a request for a discretionary pay increase for “additional duties/responsibilities” under Respondent DOP’s *Pay Plan Policy*, which was approved and became effective on August 15, 2020.

17. “An appointing authority may submit the Request for Approval form (see Appendix B) recommending an in-range salary adjustment for an employee who has been assigned additional duties on a temporary or permanent basis beyond those expected of the position, where the employee has been in the classification for at least 12 months, where a completed Position Description Form has been reviewed by the Division prior to the request for a discretionary pay differential and where a change in classification is not

warranted. The appointing authority shall document the nature and extent of the new duties and/or responsibilities in the request.” *Pay Plan Policy* § III.F.1.

18. A discretionary pay increase for additional duties does not involve a change in the position’s classification and does not require an employee to meet the minimum qualifications of the higher classification associated with the additional duties.

### **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 (2018). “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 she was qualified to hold the Employment Programs Manager 2 position because she had supervisory and administrative duties in her previous positions. She further asserts her subsequent receipt of a discretionary pay increase indicates she should have qualified for the temporary upgrade. Respondent DOP asserts it properly determined Grievant did not meet the minimum qualifications per its policy.

The Division of Personnel has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep’t of Tax and Revenue and Div. of Pers.*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff’d* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

The West Virginia Supreme Court of Appeals, in applying previous cases regarding rules of construction and interpretation of statutes by bodies charged with their administration, found 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)).

Grievant appears to disagree with Respondent DOP's determination of the necessary qualifications required for the position and its definitions of "supervisor," "administrative," and "manager." Respondent DOP is entitled to considerable deference for those determinations. Grievant has not shown that Respondent DOP's interpretations are clearly erroneous. Respondent DOP's requirement of administrative or supervisory experience as minimum qualifications for the position has a rational basis for the position. Respondent DOP's definitions of the above terms also have a rational basis. Although

Grievant believes these terms should be interpreted more broadly, Respondent DOP has not committed clear error in defining the terms more narrowly.

As proof of her allegation that she was qualified to hold the position, Grievant presented her own testimony and the testimony of former State Treasurer, Thomas E. Loehr, for whom Grievant had worked for one year at the State Treasurer's Office and then at Fourth Venture Group, Inc. Grievant asserts she was a supervisor at the State Treasurer's Office and that she performed administrative duties at the State Treasurer's Office and Fourth Venture Group, Inc. Grievant and her witness provided some specific testimony regarding her duties; however, much of the testimony was conclusory or vague. Although it is understandable that proving duties from thirty years ago is difficult, it is nonetheless Grievant's burden to do so.

Grievant and Mr. Loehr frequently used the word "managed" or "supervised" in relation to Grievant's work for him as Treasurer and at his company, Fourth Venture Group, Inc. However, Mr. Loehr and Grievant's description of the actual work she performed does not meet the definition of "manager" or "supervisor" applied by Respondent DOP. Mr. Loehr clearly relied on Grievant's agency knowledge when he was unexpectedly appointed as Treasurer but Grievant's role was as a liaison and gatekeeper between Mr. Loehr and staff, not as a formally designated supervisor or as a manager. She was not responsible for disciplining employees. She was not responsible for formally evaluating employees comparable to the Division of Personnel's EPA process. Although she provided recommendations to Mr. Loehr regarding staff and procedures, she had no independent authority. Grievant's coordination of schedules, timekeeping, and travel was in the role of administrative support rather than supervision. Although there was



testimony that Grievant approved leave for the Field Representatives, this again appeared to be more timekeeping related in that any dispute regarding leave would have been decided by Mr. Loehr. Grievant performed the typical tasks associated with administrative support: answering the telephone, opening the mail, and preparing correspondence. Even if there were a few supervisory tasks fully delegated to Grievant, which is not found, those tasks were not Grievant's predominant duties.

Grievant does not assert that she supervised any employees at Fourth Venture Group, Inc. but appears to argue that her duties were "administrative." Again, at Fourth Venture Group, Inc., Grievant's duties were predominantly administrative support. Grievant essentially served as an office manager. She handled payroll and accounts, purchasing, and employee benefits. She coordinated schedules and meetings, compiled documents, and prepared reports.

It is clear Grievant was a valuable and capable employee who was important to the functioning of the offices in which she was employed. That does not make her duties fit that of Respondent DOP's definitions. Grievant failed to prove her prior experience was supervisory or administrative as Respondent DOP defines those terms.

Grievant also argues that the award of her discretionary pay increase proves that she was qualified for the position. Temporary upgrades and discretionary pay increases for additional duties are two separate considerations with different requirements. Temporary upgrades require an employee meet the minimum qualifications of the position to be upgraded into that position. An employee performing additional duties outside of their current classification without a change in classification is not required to meet the minimum qualifications of the position from which the additional duties originate.

Grievant's award of a discretionary pay increase for additional duties does not entitle her to a temporary upgrade.

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 (2018). "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 has discretion in performing its duties provided it does not exercise its discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Pers.*, Docket No. 99-T&R-118 (Aug 30, 1999), *aff'd* Kan. Co. Cir. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. The West Virginia Supreme Court of Appeals, in applying previous cases regarding rules of construction and interpretation of statutes by bodies charged with their administration, found 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)).

4. Grievant failed to prove the Division of Personnel's interpretation of the minimum qualifications necessary for the temporary upgrade was clearly erroneous or that the Division of Personnel's determination Grievant did not meet the minimum qualifications 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 (2018).

**DATE: April 7, 2021**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**