

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**BRADLEY KEITH GODDARD,
Grievant,**

v.

Docket No. 2019-0884-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF JUVENILE SERVICES/WETZEL TYLER YOUTH
REPORTING CENTER and DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Bradley Goddard, is employed by Respondent, Division of Corrections and Rehabilitation (DCR), Bureau of Juvenile Services at Wetzel Tyler County Youth Reporting Center as a Corrections Case Manager. Respondent Division of Personnel (DOP) ensures that DCR's positions are properly classified. On February 11, 2019, Grievant filed this grievance against DCR, seeking to have the position he occupies reallocated¹ to the classification of Corrections Program Specialist, Senior.

The grievance states, "I have performed all of the duties of a Corrections Program Specialist Senior since 6/16/16 without the classification title or pay. The Administrative Rule of the West Virginia Division of Personnel, W.VA. CODE ST. R. § 143-1-5.1 states that a worker is entitled to equal pay for equal work." As relief, Grievant seeks, "I should

¹Grievant used the term "reclassification" but actually seeks a reallocation of the position he occupies. W. VA. CODE ST. R. § 143-1-3.74 defines "reclassification" as "[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 St. R. § 143-1-3.72 defines "reallocation" as "[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."

be reclassified as a Correction Program Specialist Senior and compensated with back pay for the work.”

On March 6, 2019, Grievant filed for default, alleging that DCR did not meet the required timeline for scheduling a level one hearing. A default hearing was scheduled for June 17, 2019. On June 11, 2019, DCR filed a Motion for Continuance and Admission of Default. The default hearing was continued. On September 5, 2019, a default hearing was conducted before Administrative Law Judge William McGinley. On December 3, 2019, ALJ McGinley issued an Order Denying Default, finding that DCR acted within the statutory timeframes. On December 4, 2019, DOP was joined as a necessary party by an Order of Joinder.

On December 31, 2019, Grievant filed a Petition for Appeal of the Order Denying Default in Kanawha County Circuit Court. On January 7, 2020, the Grievance Board entered an Order of Abeyance pending outcome of the Circuit Court appeal. On June 18, 2020, the Circuit Court denied Grievant’s appeal. A level two mediation took place on September 29, 2020. Grievant appealed to level three on October 8, 2020. A level three hearing occurred before the undersigned via an online platform on March 1, 2021, and March 12, 2021. Grievant appeared and was self-represented. DCR appeared by Jason Wright, DCR’s Director of Community Based Services, and was represented by Mark S. Weiler, Assistant Attorney General. DOP appeared by Wendy Mays, Assistant Director of DOP’s Classification and Compensation Section, and was represented by Karen O’Sullivan Thornton, Assistant Attorney General. DCR, DOP, and Grievant each

submitted Proposed Findings of Fact and Conclusions of Law (PFFCL). This matter became mature for decision on April 26, 2021.²

Synopsis

Grievant is employed by the Division of Corrections and Rehabilitation as a Corrections Case Manager (CCM). Grievant requested that the Division of Personnel (DOP) reallocate his position to a Corrections Program Specialist, Senior. DOP determined that the primary duties of the position were best suited to a CCM. Grievant did not prove that this determination was arbitrary and capricious. Accordingly, this 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 has been employed as a Corrections Case Manager (CCM) by the Division of Corrections and Rehabilitation (DCR) at the Wetzel Tyler County Youth Reporting Center (WTYRC) since 2016.

2. WTYRC provides programming, supervision, and monitoring for juveniles referred by Wetzel and Tyler county courts.

3. Jason Wright is the Director of Community Based Services stationed in Charleston, West Virginia, and has supervised Grievant and WTYRC since 2016. (Director Wright's testimony)

4. DCR deemed WTYRC too small for its own lead or supervisory position. (Director Wright's testimony)

²The original mature date of April 23, 2021 was extended based on Grievant's request.

5. Nevertheless, Grievant asserts he was a lead worker or supervised workers at WTYRC between 2016 and 2019, and requests that the position he occupies³ be reallocated to a Corrections Program Specialist, Senior (CPS, Sr.), or Program Director⁴ of WTYRC.

6. The class specifications⁵ of a CCM and a CPS, Sr. are differentiated as follows:

CORRECTIONS CASE MANAGER

NATURE OF WORK:

Under general supervision of the Corrections Unit Manager functions as a member of a team providing services to the assigned caseload of inmates living in the unit. The work of the unit involves providing security, inmate counseling, treatment services, developing case histories and recommendations regarding inmate behavior and performance, controlling inmate movement, and acting as role models for the inmates. Compiles information, analyzes causal factors for the inmate's involvement in crime and criminal activities, and recommends a correctional self-improvement program to assist the inmate in controlling and overcoming problems. Performs related work as required.

EXAMPLES OF WORK:

Collects, verifies and analyzes factual material in preparation of classification summaries for inmates housed in the unit. Determines the accuracy of available information concerning the inmates.

Develops and formulates appropriate individual program goals.

Prepares written reports based on a review of the written record and adjustment to the facility and the program.

Meets with the inmate periodically to discuss the inmate's progress and attitude or any particular problem within the facility or in selecting an appropriate program.

³"The position Grievant occupies" is used interchangeably with "Grievant's position."

⁴"CPS, Sr." is "Program Director" for the Youth Reporting Center.

⁵Class specifications are broadly written to encompass a wide range of positions in State government.

Informs inmates of programs available along with any special services which may be used in addressing problems.
Guides a group of inmates in identifying individual or group problems that may affect behavior and attitudes.
Guides discussion in order to effectively and efficiently utilize available time.

CORRECTIONS PROGRAM SPECIALIST, SENIOR

NATURE OF WORK:

Under general supervision, performs advanced and lead work in the implementation and evaluation of, and technical assistance for, programs/services characteristic of the Division of Corrections or the Regional Jail and Correctional Facility Authority. Performs work ensuring 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/service 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 assigning 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. Performs related work as required.

DISTINGUISHING CHARACTERISTICS:

The Corrections Program Specialist, Senior is distinguished from the Corrections Program Specialist by the broader scope of administrative oversight and responsibility for the planning and operational aspects of a program or technical area. In addition, this level may function in a regularly assigned lead or supervisory capacity over professional, paraprofessional, and clerical classes. The Corrections Program Specialist, Senior is distinguished from the Corrections Program Supervisor by the absence of comprehensive responsibility for a particular program or technical area.

EXAMPLES OF WORK:

Interprets federal and state laws, regulations, and guidelines for staff.
Consults with other program or technical area staff, supervisors, or managers concerning projects and priorities.

Develops rules, policies, and legislation regarding specific work projects.
Evaluates program or technical area effectiveness.
Informs director of technical area or program deficiencies and recommends improvements.
Reads, reviews, and responds to correspondence or distributes to appropriate staff.
Develops research, information, or training programs.
Writes, edits, or contributes to policy and procedure manuals.
Has contact with federal, state, local program representatives and officials, Division of Corrections or Regional Jail and Correctional Facility Authority management and staff, and legislature.
Plans and develops budget requests and short-and-long-range work plans.
May lead or supervise professional and support staff.

(Grievant's Exhibits 1 & 2 and testimony of Wendy Mays, Assistant Director of the Classification and Compensation Section of DOP)

7. During the period at issue, WTYRC had three employees, including Grievant and two counselors, averaged three clients a day, and at times had no participants.

8. After the grievance was filed, DCR moved the counselor positions to a different YRC, leaving Grievant as its only employee.

9. When there are no participants, Grievant administers and implements programming at WTYRC under the supervision and direction of Director Wright and the Bureau of Juvenile Services. (Director Wright's testimony)

10. When WTYRC had two counselors, Grievant did not supervise them, conduct their performance evaluations, approve their leave requests, direct their work, or discipline them. (Director Wright's testimony)

11. Grievant contends that after he filed this grievance, Jackie Martin, Program Director of Wood County Youth Reporting Center, was assigned to oversee WTYRC and assumed any administrative duties that Grievant was performing.

12. A Position Description Form (PDF) is the official document detailing the officially assigned duties and responsibilities of a position. A PDF is used by DOP to properly allocate positions within the classified service. Employees may submit a PDF when they believe they are working out of classification or that their predominant job duties have substantially changed. (DOP Exhibit 5 and Mays' testimony)

13. On September 3, 2019, Grievant submitted a PDF to DOP requesting reallocation of his position from a CCM to a CPS, Sr. (Grievant's Exhibit 3)

14. Grievant included the following duties and percentages on his PDF:

- Duty 1 - 20% > Lead or supervise professional and support staff to ensure that the Youth Reporting Center is in compliance with federal and state laws.
- Duty 2 - 10% > Develops research, information, or training programs.
- Duty 3 - 10% > Training of staff members.
- Duty 4 - 20% > Reads, reviews, and responds to correspondence or distributes to appropriate staff.
- Duty 5 - 20% > Evaluates program or technical area effectiveness.
- Duty 6 - 10% > Informs Director of technical area or program deficiencies and recommends improvements.
- Duty 7 - 10% > Has contact with state, local program representatives and officials.

15. Director Wright made the following notes on Grievant's PDF to dispute Grievant's descriptions and percentages:

- Duty 1 - All leave, discipline, staff schedules and EPA's are done by me. (Jason Wright) All Kronos and timekeeping is done by me. Brad delegates minimal tasks i.e., ordering supplies, transports.
- Duty 2 - Other staff statewide in various positions do this. These staff that are certified as Train the Trainers. Could be any level of staff.
- Duty 3 - Other case managers and counselors do this across the state in YRC's.
- Duty 5 - This % is too high, what specific areas is he evaluating of the program when the enrollment in the program is low.

16. Director Wright also noted thereon as follows:

No mention in this PDF regarding (primary) his duties to conduct group, transport youth, supervise youth, complete intakes, complete service plans, document daily interaction with youth, attend court hearings, complete reports to the courts, drug testing youth.

17. Instructions on the PDF mandate that "[d]uty statements should focus on primary, current and usual duties and responsibilities of the position." However, Grievant only included on his PDF duties and responsibilities he occasionally and intermittently performed. Grievant failed to include the predominant case management duties of his position. (Grievant's Exhibit 3, DOP Exhibit 6, Grievant's Exhibit 3, and Mays' testimony)

18. In completing the "Purpose of Position" section on his PDF, Grievant used language from the class specification for CCM yet failed to detail the essential duties of

the position or to assign percentages accounting for these duties. (Grievant's Exhibit 3 and testimony of Grievant & Mays)

19. At the time Grievant completed his PDF, his position did not have the authority to hire, discipline, evaluate work, add new programs, handle budget issues, or spend any money without approval. (Director Wright's testimony)

20. DOP's Classification and Compensation Section is responsible for drafting, applying, and interpreting the class specifications, as well as establishing pay ranges and ensuring that all classified positions in state government are classified and paid within the State's Classification and Compensation Plans. (Mays' testimony)

21. DOP makes classification determinations based on the current, permanently assigned, predominant duties of the position. (Mays' testimony)

22. The permanently assigned, predominant duties of Grievant's position during the period in question entailed case management. This included, but was not limited to, receiving referrals, establishing intake dates, booking youth (including going over rules and expectations), conducting group sessions, transporting youth, completing intakes and service plans, documenting daily interaction with youth, preparing monthly progress reports, attending court hearings, completing reports to the courts, and drug testing/conducting pat down searches of youth. This was consistent with the duties detailed in the CCM job posting for Grievant's position. (Grievant's Exhibit 3, DOP Exhibit 4, and testimony of Wright & Mays)

23. As the Assistant Director of the Classification and Compensation Section of DOP, Wendy Mays has conducted thousands of PDF reviews and classification determinations. (Ms. Mays' testimony)

24. Ms. Mays determined that the job duties performed by the Grievant in 2016 and 2017 would not be taken into consideration in the review of a 2019 PDF unless the duties were ongoing. Nor would the addition or subtraction of duties to or from the position in 2021 impact the review of a PDF covering 2019. (Ms. Mays' testimony)

25. Ms. Mays determined that Grievant had provided only lower level, occasional, and intermittent duties and failed to mention the predominant duties of his position. Thus, Ms. Mays felt obligated to perform additional research about the position to verify the accuracy of the information provided by Grievant on his PDF. This led to a review of the original job posting as well as information contained in the State's personnel data systems. (Grievant's Exhibit 3 and Mays' testimony)

26. Ms. Mays identified duties Grievant relied on to show that his position should be classified as a CPS, Sr. DOP viewed these duties as either lower level or occasional and intermittent duties. These duties included attending quarterly Director meetings, obtaining exit signs for the office, working on a Memorandum of Understanding, arranging cabinet installation for the office, working on obtaining internet hook up for the office, and serving as a counselor. (Mays' testimony)

27. Ms. Mays reviewed Grievant's PDF and determined that Grievant's position should remain a CCM. On September 5, 2019, Ms. Mays relayed this decision to Grievant and DCR. (DOP Exhibit 6 and Mays' testimony)

28. On February 25, 2021, after being unable to locate its original written classification determination, DOP provided Grievant and DCR a letter explaining that Grievant's position is properly allocated as a CCM based on the duties assigned to Grievant's position. The letter states in part:

The *Administrative Rule of the West Virginia Division of Personnel*, Subsection 4.7, requires that there be a significant change in the duties and responsibilities assigned before a position reallocation is warranted. A review of the PDF revealed no significant change in the duties assigned to the position occupied by Mr. Goddard. The predominant duties assigned to the position are: 1) conduct juvenile group counseling, transport youth, supervise youth; 2) complete intakes and service plans and document daily interactions with youth; and 3) attend court hearings, complete reports to the courts, and drug test youth. The Corrections Case Manager (8918) class specification describes work as:

“Under general supervision of the Corrections Unit Manager functions as a member of a team providing services to the assigned caseload of inmates living in the unit. The work of the unit involves providing security, inmate counseling, treatment services, developing case histories and recommendations regarding inmate behavior and performance, controlling inmate movement, and acting as role models for the inmates. Compiles information, analyzes causal factors for the inmate’s involvement in crime and criminal activities, and recommends a correctional self-improvement program to assist the inmate in controlling and overcoming problems.”

This is descriptive of Mr. Goddard’s duties.

(DOP Exhibit 6 and Mays’ testimony)

29. The DOP Pay Plan Policy (Effective December 2, 2017) provides the following relevant definitions:

Lead Work/Lead Worker - This is a level of work at which an incumbent is assigned the ongoing 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.

Supervisor - Formally delegated responsibility for planning, assigning, reviewing, and approving the work of three or more full-time employees or four or more .83 full-time equivalent

seasonal employees which includes initiating disciplinary actions, approving leave requests, conducting performance evaluations, and recommending salary increases.

Class Series - A grouping of two or more classes having the same kind of work with ascending level of difficulty and complexity.

Administrative - Work 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.

(DOP Exhibit 5 and Mays' testimony)

30. The tasks Grievant claimed to have performed did not meet the definition of "lead work" or "supervisor." Regardless, lead and supervisory work is not a predominant duty of the CPS, Sr. classification but simply a permissive rather than mandatory expectation of that classification. (Grievant's Exhibit 2, DOP Exhibit 5, and Mays' testimony)

31. DOP determined that the duties of Grievant's position for the period in question did not fit within the CPS, Sr. class specification because Grievant's position did not have the authority to perform the broader scope of administrative oversight and responsibility for the planning and operational aspects of WTYRC. DOP determined Grievant's position had not performed as a lead worker or supervisor, as Grievant neither had the requisite ongoing responsibility over coworkers to qualify as a lead or a minimum of three coworkers necessary for oversight as a supervisor. DOP determined that Grievant's position did not have responsibility or authority for implementing and/or evaluating the programs and services as would be expected of a CPS, Sr. position.

Rather, DOP views the position occupied by Grievant as a benchmark position assigned to the CCM classification. (DOP Exhibit 6 and Mays' testimony)

32. Grievant requests that his position be moved to an entirely different class series from its current class. This move would be highly unusual and would require not only a higher level of work but also a different type of work. In this case, it would require that Grievant perform administrative duties. (Mays' testimony)

33. Based on the testimony and evidence provided by Grievant and DCR, as well as all other available information, Ms. Mays determined that the position occupied by Grievant did not perform as a supervisor or lead worker, have the authority to perform the broader scope of administrative oversight necessary for the CPS, Sr. classification, or have responsibility for the planning and operational aspects of WTYRC. Ms. Mays concluded that the proper allocation for the position occupied by Grievant is the CCM classification. (Mays' testimony)

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 (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 contends that the position he occupies should be retroactively reallocated to a Corrections Program Specialist, Senior (CPS, Sr.) because he performed some

examples of work listed under the CPS, Sr. class specification between 2016 and 2019. The Division of Corrections and Rehabilitation (DCR) and the Division of Personnel (DOP) counter that Grievant never performed the duties of a CPS, Sr., but that, even if he had, these were not the predominant duties of his position. Further, Grievant did not include his predominant duties on the Position Description Form (PDF) he submitted to DOP. DOP determined that the permanent, predominant duties of Grievant's position were those of a Corrections Case Manager (CCM) and that Grievant was properly classified as a CCM.

DOP is responsible for ensuring that all positions in the classified and classified-exempt service are appropriately classified based primarily upon a review of the duties and responsibilities of each position. W. VA. CODE R. § 143-1-4 *et seq.* The key to its analysis is ascertaining whether the employee's classification constitutes the "best fit" for their 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. *Broaddus v. W. Va. Div. of Human Serv.*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). *Carroll v. Dep't of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004), *citing Broaddus, supra; Barrett et al v. Dep't of Health & Human Res. & Div. of Personnel*, Docket No. 04-HHR389 (Dec. 6, 2007).

Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified *per se*. *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996). Furthermore, incidental duties which require an inconsequential amount of employees' time will not warrant a higher classification if the remainder of their duties are accurately described by their current

classification. *Graham v. Nicholas County Bd. of Educ.*, Docket No. 93-34-224 (Jan. 6, 1994). Grievance Board case law is clear and long standing as it relates to the issue of predominant duties. *Broaddus, supra*. DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009).

Grievant asserts that there was no supervisor at his work location, the Wetzel Tyler County Youth Reporting Center (WTYRC). He claims he performed the supervisory role at WTYRC from 2016 through the time he filed his grievance in 2019, including managing the office and supervising his two coworkers, after which a supervisor from another office was assigned these duties. Grievant only included in the PDF his purported supervisory duties but not his case management duties, despite the instruction on the PDF that “[d]uty statements should focus on primary, current and usual duties and responsibilities of the position.” Grievant thereby implied that his case management duties were not his primary duties.

Jason Wright, the Director of Community Based Services for DCR, testified that he has supervised WTYRC for the duration of Grievant’s employment at WTYCR and that Grievant never supervised his coworkers. Wright stated that the duties Grievant provided on his PDF were lower level, occasional, and intermittent duties. Wright claimed that these were not the permanent predominant duties Grievant performed under case management which comprised conducting group, transporting youth, supervising youth, completing intakes, completing service plans, documenting daily interaction with youth, attending court hearings, completing reports to the courts, and drug testing youth. Wright

testified that when Grievant completed his PDF, his position did not have the authority to hire, discipline, evaluate work, add new programs, handle budget issues, or spend any money without approval. Thus, credibility determinations are required.⁶

Not every credibility factor is necessarily relevant to every credibility determination. In this situation, the relevant factors are consistency and plausibility. Grievant contends he performed lead or supervisory work for the office. However, the only specifics he provided were two incidents of performing EPA1 evaluations for coworkers in 2017 and 2018; attending quarterly Director meetings; obtaining exit signs, internet hookup, and cabinets for the office; and reviewing a Memorandum of Understanding. In completing the "Purpose of Position" section of the PDF, Grievant used language from the class specification for CCM but failed to list the essential case management duties of the position.

Of significance is Grievant's contention that the supervisory duties on his PDF were transferred to a neighboring YRC Program Director just after he filed his grievance in 2019. This implies that Grievant thereafter did not perform the duties on his PDF but

⁶In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEM PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

went back to performing the case management duties he was originally hired to perform as a CCM. However, Grievant did not provide an explanation as to who performed the case management duties during the three-years he was supposedly immersed in lead work or supervisory duties.

Conversely, Director Wright gave a more plausible explanation in testifying that the case management duties were Grievant's predominant duties all along. It is apparent that Grievant failed to include in his PDF the predominant case management duties of his position and only included therein the duties and responsibilities that he, at most, occasionally and intermittently performed. Thus, Director Wright was more credible than Grievant.

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 the agency's action in classifying the position was arbitrary and capricious. *W. Va. Dept. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993). 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.⁷

⁷"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 Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). "[T]he '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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)." Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary

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. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

Wendy Mays, Assistant Director of DOP's Classification and Compensation Section, reviewed Grievant's PDF and determined that the CCM classification was the best fit for Grievant's duties. Ms. Mays explained that she considered only the current, permanently assigned, predominant duties of Grievant's position, and excluded the occasional or intermittent duties. Ms. Mays determined that Grievant's predominant duties have not changed from those in the job description when Grievant accepted the position in 2016. Further, the duties are substantially similar to those set forth in DOP's class specifications for CCM.

Ms. Mays detailed the basis of her determination in a letter to Grievant, stating:

The predominant duties assigned to the position are: 1) conduct juvenile group counseling, transport youth, supervise youth; 2) complete intakes and service plans and document daily interactions with youth; and 3) attend court hearings, complete reports to the courts, and drug test youth. The Corrections Case Manager (8918) class specification describes work as:

"Under general supervision of the Corrections Unit Manager functions as a member of a team providing services to the assigned caseload of inmates living in the unit. The work of the unit involves providing security, inmate counseling, treatment services, developing case histories and recommendations regarding inmate

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 Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

behavior and performance, controlling inmate movement, and acting as role models for the inmates. Compiles information, analyzes causal factors for the inmate's involvement in crime and criminal activities, and recommends a correctional self-improvement program to assist the inmate in controlling and overcoming problems."

As a prerequisite to the reallocation of a position, there must be a significant change in job duties and responsibilities. See W. VA. CODE ST. R. § 143-1-3.72. DOP's class specifications generally contain the following five sections: "Nature of Work," "Distinguishing Characteristics," "Examples of Work," "Knowledge, Skills and Abilities," and "Minimum Qualifications." These specifications are to be read in pyramid-fashion, from top to bottom, 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 class specification is the most critical section. See generally, *Dollison v. W. Va. Dep't of Employment Security*, Docket No. 89-ES-101 (Nov. 3, 1989).

Grievant was unable to show that the primary duties and responsibilities of his position were a better fit for the classification specifications of a CPS, Sr. than a CCM. DOP's interpretation of class specifications should be given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *Blankenship, supra*; *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). 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 or her judgment

for that of DOP. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

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 for that 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); *Logsdon 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); *Logsdon, supra*. DOP provided reasonable justification for its assessment that Grievant's position should remain classified as a CCM. Grievant failed to prove this determination was arbitrary and capricious.

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 (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. In ascertaining which classification constitutes the best fit, DOP looks at the predominant duties of the position in question. These predominant duties are deemed to be “class-controlling.” *Carroll v. Dep’t of Health & Human Res.*, Docket No. 04-HHR-245 (Nov. 24, 2004), citing *Broaddus v. W. Va. Div. of Human Services*, Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990); *Barrett et al v. Dep’t of Health & Human Res. & Div. of Personnel*, Docket No. 04-HHR389 (Dec. 6, 2007).

3. DOP is required to classify a position based on predominant duties, not duties that are performed on an occasional and intermittent basis. *Adkins v. Workforce W. Va. and Div. of Pers.*, Docket No. 2009-1457-DOC (Oct. 13, 2009). Employees who simply perform some duties normally associated with a higher classification may not be considered misclassified per se. *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (April 15, 1996). Furthermore, incidental duties which require an inconsequential amount of an employee’s time will not warrant a higher classification if the remainder of their duties are accurately described by their current classification. *Graham v. Nicholas County Bd. of Educ.*, Docket No. 93-34-224 (Jan. 6, 1994).

4. 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 Res./Div. of Personnel*, Docket No. 90-H-433 (Mar. 28, 1991); *Propst v. Dep’t of Health and Human Resources and Div. of Personnel*, Docket No. 93-HHR-351 (Dec. 3, 1993).

5. 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 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).

6. 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, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

7. Grievant did not prove by a preponderance of the evidence that DOP acted in an arbitrary and capricious manner when it determined that the best fit for the position occupied by Grievant was and continues to be Corrections Case Manager.

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: May 24, 2021

Joshua S. Fraenkel
Administrative Law Judge