

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**AMBER NICOLE MCDANIEL,
Grievant,**

v.

Docket No. 2020-0799-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU FOR PRISONS AND JAIL/ LAKIN CORRECTIONAL
CENTER AND DIVISION OF PERSONNEL,
Respondents.**

DECISION

Amber Nicole McDaniel, Grievant, filed this grievance against her employer, the Division of Corrections and Rehabilitation ("DCR"), Bureau of Prisons and Jails, Lakin Correctional Center ("Lakin") on January 8, 2020, protesting her non-promotion into the classification of Corrections Case Manager. The original grievance statement provides in part:

I was denied promotion by the Division of Personnel on December 31, 2019 from Corrections Counselor I to Corrections Case Manager at Lakin Correctional Center and Jail due to their assessment that I was lacking 1 year, 7 months of experience in programming or treatment. I was discriminated against due to the longstanding past practice of using total years of experience in Corrections for promoting employees to Corrections Case Manager with similar/less experience in programming or treatment. As of the posting for the position of Corrections Case Manager, I had 10 years, 9 months as a Corrections Officer and 2 years, 4 months as a Corrections Counselor I.

. . .

Relief sought:

Promotion to the position of Corrections Case Manager at LCC&J and placement into the position with appropriate 12% pay increase from the date of denial with no retaliation, or to receive the 12% pay increase denied to me plus an additional 10% pay increase from the date of denial with no retaliation. Further, to hold the position open until the resolution of this grievance.

A hearing was held at level one on February 3, 2020, and the grievance was denied at that level on or about February 20, 2020. Grievant appealed to level two on March 2, 2020. The Division of Personnel ("DOP") was joined as a necessary party by *Order of Joinder* entered on April 24, 2020. A mediation session was held at level two on October 30, 2020. Grievant appealed to level three on November 5, 2020. A level three hearing was held before the undersigned Administrative Law Judge via Zoom videoconferencing on May 5, 2021. Grievant appeared and was represented by coworker, Joseph Brandal. Respondent DCR appeared by Lori Lynch, Director of Staffing Services, and was represented by Mark S. Weiler, Assistant Attorney General. Respondent DOP appeared by Joe Thomas, Deputy Director and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. At or near the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. This matter became mature for decision after the assigned June 11, 2021, mailing date for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant applied to a vacant posting seeking a promotion to a position classified as a Corrections Case Manager. Grievant was selected by her employer (Respondent Lakin) to fill the position; however, when the agency submitted the personnel transaction to Division of Personnel, it was determined that the Grievant did not possess the minimum qualifications of the position as set forth in the class specification for the Corrections Case Manager. Specifically, Grievant does not hold a college degree and arguably does not

possess the requisite substitution for the degree requirement. Grievant believes that her employment history as a Correctional Officer ("CO") should be counted toward meeting the substitution for the degree requirement and argues that in the past, an employee's time worked in a position classified as a CO was a permissible substitution.

Work experience as a CO is considered to be experience in the area of security. Neither Respondent DCR nor Respondent DOP currently adhere to the position or believe the experience as a CO is, or should be, considered experience in an area of corrections programming or treatment. It is true that, in the past, a small section within the DOP permitted time as a CO to count toward meeting the Training Substitution for the Corrections Case Manager classification, this was done unbeknownst to DOP management. Once discovered by DOP management, the error was corrected, and the mistake was not further perpetuated. Grievant desires to have the mistaken interpretation continued for her benefit. DOP is not legally required to perpetuate a mistake. It was not established that Grievant, as a matter of law, is entitled to the relief she seeks. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the filing of this grievance, Grievant was employed by the Division of Corrections and Rehabilitation ("DCR"), Respondent, in a position classified as a Correctional Counselor 1 at Lakin Correctional Center. DOP Ex. 3 and L3 Testimony

2. Grievant applied for a position classified as a Corrections Case Manager pursuant to a job posting on November 2, 2018. Grievant was selected by Lakin to fill the posted position. DOP Ex. 2 and Testimony Cheryl Gerlach and Elisabeth Arthur

3. WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel (DOP) to establish and maintain a position classification plan for positions in the classified and classified exempt service. As a rule, State agencies that utilize such positions must adhere to that plan in making assignments to their employees.

4. Respondent DCR submitted a personnel transaction to DOP to promote Grievant into the position. See DOP Ex. 4, Testimony Gerlach and Arthur.

5. After a review of Grievant's application, as compared to the minimum qualifications of the position, Elisabeth Arthur, Administrative Services Manager 2 for the Personnel Transaction Review (PTR) section¹ of the DOP, rejected the transaction and notified the DCR that the Grievant did not meet the minimum qualifications. See DOP Ex. 4-5 and Testimony Arthur.

6. The minimum qualifications for the Corrections Case Manager class specification read as follows:

¹ The PTR section is responsible for processing personnel transactions for all DOP covered entities to ensure compliance with DOP law, rules, and policy. See Testimony Arthur.

Training: Graduation from an accredited four-year college or university with a major in criminal justice, corrections, psychology, sociology, counseling, counseling and guidance, criminology, social work or related field.

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

Experience: Two years of full-time or equivalent part-time paid experience in inmate counseling, security, or treatment in a correctional setting or in counseling, counseling and guidance, as a probation and parole officer, mental health counselor or social worker.

Substitution: Master's Degree from an accredited college or university in criminal justice, corrections, social work or related behavioral science field may substitute for the required experience on a year-for-year basis.

See DOP Ex. 1.

7. An employee must meet the minimum qualifications for a State classified position before he or she can be approved for the position. If DOP finds that an applicant lacks any of the requirements established for the position, it may deny the applicant's promotion. W. VA. CODE ST. R § 143-1-6.4.a.1

8. For a period, prior to Grievant's selection to the Corrections Case Manager position, a small subsection of the PTR section of the DOP mistakenly permitted time worked in a position assigned to a CO classification to count toward meeting the Training Substitution for the Corrections Case Manager minimum qualifications. This interpretation was unknown to the DOP management team. The rest of the DOP did not consider time worked as a CO as meeting the Training Substitution as a CO does not perform work in corrections programming or treatment; rather, the predominant duty of a position assigned to a CO classification is one of providing security. In the ordinary

course of business, neither programming nor treatment are predominant/primary duties of positions assigned to the CO series of classifications. See Testimony Joe Thomas, Arthur and Lori Lynch.

9. Grievant does not meet the Training requirement of the minimum qualifications for the Corrections Case Manager classification as she does not possess a college degree. Given such, it is appropriate to look to the Training Substitution clause that allows for experience in an area of corrections programming or treatment on a year-for-year basis to substitute for the degree. See DOP Ex. 1 and Testimony Arthur.

10. Time worked in a CO position is not considered by Respondent DOP to be experience in an area of corrections programming or treatment. See DOP Ex. 1-5 and Testimony Arthur.

11. At the time of the review of the personnel transaction, Grievant had two (2) years and five (5) months of experience credited toward the Training Substitution but fell short of the one (1) year and seven (7) months necessary to meet the minimum qualifications. See DOP Ex. 1-5 and Testimony Arthur.

12. In 2016, then DOP Director Sara Walker established an internal agency work group to identify DOP policies, procedures, interpretations, etc. that were not being consistently applied throughout all the sections that comprise the agency and to ensure consistent application going forward. This workgroup continued under Acting Director Joe Thomas (now Deputy Director) and continues to this day under current Director Sheryl Webb. Sometime toward the end of 2017, the workgroup identified an issue with the way that the subsection of the PTR section was mistakenly interpreting and applying

CO experience toward meeting the Training Substitution for the minimum qualifications of the Corrections Case Manager classification. DOP management corrected the error, and the mistaken interpretation was to cease from that point forward. See Testimony Thomas, and Arthur.

13. Joe Thomas, who has 28 years of State government Human Resources experience; 22 of those years have been with the DOP, noted that the DOP continues to strive for correct and consistent processes, procedures, and interpretations throughout the agency. See L3 Testimony Thomas.

14. Lori Lynch, Director of Staffing Services for DCR concurred with the DOP's interpretation and agreed that the DCR does not consider time worked in a position assigned to a CO classification to be performing in a corrections programming or treatment capacity and that the CO positions' work is considered primarily to be security. Ms. Lynch indicated that the DCR has no desire to change the minimum requirements of the Corrections Case Manager classification. She identified several of the classifications assigned to positions within the DCR that do serve in a corrections programming and/or treatment capacity as the predominant duty of their job that would be considered as meeting the Training Substitution for the minimum qualifications of the Corrections Case Manager classification including, but not limited to: Correctional Counselor 1 and 2, Corrections Case Manager, Substance Abuse Therapist 1, 2 and 3. See Testimony Lynch.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE ST. R. §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant applied and was selected for a position classified as a Corrections Case Manager pursuant to a job posting by Lakin Correctional Center (Lakin). Respondent DCR submitted a personnel transaction to promote Grievant into the position. After a review of Grievant's application, as compared to the minimum qualifications of the position, Respondent DOP rejected the transaction and notified the Division of Corrections and Rehabilitation (DCR), that Grievant did not meet the minimum qualifications for the position. Grievant seeks to have her work experience as a Correctional Officer (CO) count toward meeting the minimum qualifications of the Corrections Case Manager classification so that she could be promoted into a position classified as such.

The Division of Personnel is the entity of WV State government primarily charged with making classification determinations. WEST VIRGINIA CODE § 29-6-10 authorizes the W. Va. Division of Personnel (DOP) to establish and maintain a position classification plan for positions in the classified and classified exempt service. As a general rule, State

agencies that utilize such positions must adhere to that plan in making assignments to their employees.

Grievant believes she met the minimum qualifications to be eligible for a promotion to a Corrections Case Manager position. Further, Grievant relies on the fact that on occasions in the past DOP permitted time worked in positions assigned to a CO classification to count toward meeting the Training Substitution of the minimum qualifications for the Corrections Case Manager classification. DOP admits that a small subsection within the agency did for a time "mistakenly" allow CO time to count toward the Training Substitution. However, once DOP management identified the mistaken interpretation it was immediately corrected and was to cease occurring in the future.

An employee must meet the minimum qualifications for a State classified position before he or she can be approved for the position. If the DOP finds that an applicant is found to lack any of the requirements established for the position, it may deny the applicant's promotion. W. VA. CODE ST. R § 143-1-6.4.a.1 The minimum qualifications for the Corrections Case Manager classification require a four year degree from an accredited college or university with a major in criminal justice, corrections, psychology, sociology, counseling, counseling and guidance, criminology, social work or related field and two (2) years of full-time or equivalent part-time paid experience in inmate counseling, security or treatment in a correctional setting or in counseling, counseling and guidance, as a probation and parole office, mental health counselor or social worker.

Grievant does not meet the Training requirement of the minimum qualifications for the Corrections Case Manager as the Grievant does not possess a college degree.

Parties thus look to the Training Substitution clause that allows for experience in an area of corrections programming or treatment on a year for year basis to substitute for the degree.

Grievant's experience as a CO does not count toward meeting the Training Substitution as time worked in a CO position is not considered by DOP to be experience in an area of corrections programming or treatment. Grievant's time working in the position classified as a Correctional Counselor 1 meets the Training Substitution and was counted by DOP in determining whether she met the minimums. However, Grievant needed four (4) years to meet the requirement and at the time the personnel transaction was submitted, Grievant had two (2) years and five (5) months of experience credited toward the Training Substitution but fell short one (1) year and seven (7) months of necessary additional training.

DOP is responsible for the establishment and interpretation of the State's Classification Plan, which includes the class specifications and minimum qualifications. See WEST VIRGINIA CODE §§ 29-6-5 and 29-6-10; W. VA. CODE ST. R § 143-1-4. DOP's interpretations of the 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, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681, 687 (1993); *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). "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)). Importantly, the Grievance Board is bound by the legal precedent that the DOP’s interpretation and explanation of the class specifications at issue should be given great weight unless clearly wrong. *Blankenship, supra*.

For a period prior to Grievant’s selection to the Corrections Case Manager position, a small subsection of the DOP did mistakenly permit time worked in a position with a CO classification to count toward meeting the Training Substitution for the minimum qualifications. This interpretation was occurring unbeknownst to DOP management. A CO does not perform work in corrections programming or treatment as a regular and routine part of the job; rather, the **predominant duty** of a position assigned to a CO classification is one of providing security.

In 2016, DOP established an internal “quality control” workgroup to identify inconsistencies throughout the agency. Respondent DOP continues to strive for correct and consistent processes, procedures, and interpretations throughout the agency and this workgroup continues today.² Sometime toward the end of 2017, the workgroup identified the mistaken interpretation being made relating to applying CO experience toward meeting the Training Substitution for the minimum qualifications of the Corrections Case Manager classification. When notified, DOP management corrected the error, and the mistaken interpretation was to cease from that point forward.

² As of the drafting time of this decision July 2021.

To be clear, there is no error/mistake in the class specification for the Corrections Case Manager as written. The mistake was in the prior interpretation by the small subsection within the DOP contrary to the understanding and interpretation of the entire rest of the agency as well as that of the DCR. DOP's management team corrected the mistake by conforming the small subsection's interpretation to that of the rest of the agency. 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); *Westfall v. Div. of Motor Vehicles and Div. of Personnel*, Docket No. 2017-1093-DOT (June 26, 2018). 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)). Furthermore, 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).

Ms. Lynch, on behalf of the Respondent DCR, concurred with DOP's interpretation and agreed that time worked in a position assigned to a CO classification should not be counted as performing corrections programming or treatment; instead, the work of a CO

position is considered primarily to provide security. Correcting the mistake being made within the DOP is not considered arbitrary and capricious. DOP has an obligation to ensure consistency in interpretation both within the agency and throughout all civil service covered entities.

Grievant failed to establish that DOP's interpretation of the minimum qualifications of the Corrections Case Manager class specification was clearly erroneous. Grievant pointed to no law, rule, or policy to substantiate her claim that DOP should continue to perpetuate a mistake it identified and corrected. Grievant did not establish that Respondent DOP's interpretation and application regarding minimum qualifications of the Corrections Case Manager classification was arbitrary and capricious or that the DOP should continue to perpetuate the mistake simply for her benefit.

Grievant failed to prove that Respondent DOP is prohibited from correcting a mistake, or that she was entitled to relief based on others purportedly receiving the benefit of DOP's prior erroneous interpretation.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving her grievance by a preponderance of the evidence. See W. VA. CODE ST. R. §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. W. Va.*

Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. WEST VIRGINIA CODE § 29-6-10 authorizes the W. Va. Division of Personnel (DOP) to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies that utilize such positions, as a general rule, must adhere to the plan in making assignments to their employees.

3. Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. Syl. pt. 3, *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *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).

4. The Division of Personnel is the entity of West Virginia State government primarily charged with making classification determinations. An employee must meet the minimum qualifications for a State classified position before he or she can be approved for the position. If the DOP finds that an applicant is found to lack any of the requirements established for the position, it may deny the applicant's promotion. W. VA. CODE ST. R. § 143-1-6.4.a.1

5. 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 in place 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*.

6. An action is arbitrary and capricious if the agency making the decision 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 is 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). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

7. Grievant has not shown by a preponderance of the evidence that DOP acted in an arbitrary or capricious manner as it relates to Grievant's accredited qualifications for the position in discussion.

8. 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).

9. 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)).

10. Grievant failed to establish by a preponderance of the evidence that she is entitled to the relief requested based on others purportedly receiving the benefit of DOP's prior erroneous interpretation. Grievant failed to establish DOP is prevented or prohibited from correcting a mistake, or prior erroneous interpretation.

11. Grievant has not shown by a preponderance of the evidence that DOP acted in an arbitrary or capricious manner as it relates to Grievant's accredited qualifications for the Corrections Case Manager classification.

12. Grievant failed to prove that DOP's interpretation of the minimum qualifications of the Corrections Case Manager class specification is clearly erroneous.

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: July 20, 2021



Landon R. Brown
Administrative Law Judge