

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**STRIDER BLU OUMET,
Grievant,**

v.

Docket No. 2020-0409-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/EASTERN
REGIONAL JAIL AND CORRECTIONAL FACILITY,**

and

**DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Strider Blu Ouimet, filed this action on or about September 11, 2019, seeking to have certain work experience acknowledged in order for him to meet the minimum qualifications for a promotion into a position classified as a Corrections Associate Superintendent 2. The Division of Corrections and Rehabilitation conducted a level one hearing on November 18, 2019. A decision denying the grievance was issued by Commissioner Betsy C. Jividen on November 25, 2019. Grievant perfected his appeal to level two and the Division of Corrections and Rehabilitation filed a request to join the Division of Personnel on January 27, 2020. An Order of Joinder was entered by the West Virginia Public Employees Grievance Board on February 21, 2020, joining the Division of Personnel as an indispensable party. A level two mediation session was conducted on September 29, 2020. Grievant perfected his appeal to level three and an evidentiary

hearing was conducted before the undersigned on March 15, 2021, by Zoom video conference. Grievant appeared *pro se*. The Division of Corrections and Rehabilitation appeared by James Bray, Assistant Superintendent of Operations and by counsel, Briana Marino, Assistant Attorney General. The Division of Personnel appeared by Wendy Mays, Assistant Director of Classification and Compensation and by counsel, Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 28, 2021.

Synopsis

Grievant is employed by the Division of Corrections and Rehabilitation as a Correctional Officer 4. Grievant seeks to have his work experience as a Correctional Officer 1 and Correctional Officer 2 to count toward meeting the minimum qualifications of the Corrections Associate Superintendent 2 class specification in order for him to be eligible for a promotion. The Division of Personnel determined that Grievant failed to meet the minimum qualifications of the Corrections Associate Superintendent 2 position. The interpretation of the minimum requirements for the Corrections Associate Superintendent 2, and the determination that Grievant lacked the qualifications for the position, was reasonable. Grievant was not able to demonstrate that the work of positions assigned to the Correctional Officer 1 and Correctional Officer 2 met the definition of "professional" as defined in the relevant policy. Grievant failed to demonstrate that the Division of Personnel's interpretation of the definition of "professional" was arbitrary and capricious. The grievance is denied.

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

Findings of Fact

1. Grievant is employed by the Division of Corrections and Rehabilitation in a position that is classified as a Correctional Officer 4.

2. Grievant applied for a vacant position classified as a Corrections Associate Superintendent 2. A personnel transaction to promote Grievant into the position was submitted by the Division of Corrections and Rehabilitation to the Division of Personnel's Transaction Review for processing on November 14, 2019. This section reviewed and rejected the personnel transaction on December 2, 2019.

3. The minimum qualifications for the Corrections Associate Superintendent 2 provides:

Training: Bachelor's degree from a regionally accredited four-year college or university.

Substitution: Full time or equivalent part time paid experience as described below may substitute for the required training on a year-for-year basis. Additional four (4) years needed to offset degree.

Experience: Six (6) years of full-time or equivalent part-time paid professional experience in adult or juvenile correctional custody or criminal justice program administration to include four (4) years in the supervision of employees.

Substitution: Master's degree from a regionally accredited college or university may substitute for the required experience on a year-for-year basis.

Division of Personnel's Exhibits No. 2 and No. 4.

4. Division of Personnel's Classification and Compensation section is responsible for the drafting and interpreting of all class specifications.

5. An employee must meet the minimum qualifications for a State classified position, before they can be approved for the position. If an applicant is found to lack any of the qualifications for a position, it may deny the applicant's promotion.

6. Grievant does not possess a bachelor's degree, therefore, he needed ten (10) years of full-time or equivalent part-time paid professional experience in adult or juvenile correctional custody or criminal justice program administration to include four (4) years in the supervision of employees in order to meet the minimum qualifications for the position.

7. At the time Grievant applied for the Corrections Associate Superintendent 2 position, a review of the application determined that Grievant had eight (8) years and six (6) months of qualifying experience.

8. Grievant's work experience as a Correctional Officer 3 and Correctional Officer 4 was counted toward meeting the minimum qualifications of the Corrections Associate Superintendent 2 position; however, his experience as a Correctional Officer 1 and Correctional Officer 2, and his time at Terrell State Hospital in Texas, was not considered by the Division of Personnel to be professional experience in adult or juvenile correctional custody or criminal justice program administration for meeting the minimum qualifications of the position. Grievant was one (1) year and six (6) months short of the ten (10) years of qualifying experience necessary for the position.

9. The Division of Personnel Pay Plan Policy defines "professional" as:

Work which requires the application of theories, principles and methods typically acquired through completion of a Bachelor's degree or higher or comparable experience; requires the consistent exercise of discretion and judgment in the research, analysis, interpretation and application of acquired theories, principles and methods to work product.

10. The Division of Personnel's interpretation of the "professional" requirement included in the minimum requirements of class specifications has never permitted time as a Correctional Officer 1 or Correctional Officer 2 to be counted toward meeting the professional experience. This rationale is based upon the fact that the duties do not and have never risen to the type and level of experience the Division of Personnel intended to be necessary to meet the professional requirements of the class specifications.

11. Due to recruitment and retention concerns, the Cabinet Secretary of the Department of Homeland Security, Jeff Sandy, and the Division of Personnel determined that the definition of "professional" could be interpreted broadly enough to encompass positions assigned to the Correctional Officer 3 classification and began considering such when reviewing transactions to determine if minimum qualifications were met as of March 30, 2017. This interpretation and application remains in spite of a change occurring to the class specifications for the Correctional Officer 3 position. At the request of the Division of Corrections and Rehabilitation positions assigned to the Correctional Officer 3 classification no longer serve in a supervisory position; rather, they now act as lead workers for the subordinate Correctional Officer 1 and Correctional Officer 2 positions.

12. This interpretation benefits Grievant as his work experience in a position classified as a Correctional Officer 3 counts toward meeting the minimum qualifications of any position assigned to a classification that requires professional experience.

13. The position that Grievant sought was filled by the Division of Corrections and Rehabilitation in December of 2019.

14. The record lacks any law, rule or policy that would require the Division of Personnel to change its interpretation and application of its definition of "professional" as

it relates to positions assigned to the Correctional Officer 1 and Correctional Officer 2 class specifications.

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).

Grievant asserts that he met the minimum qualifications to be eligible for a promotion to a Corrections Associate Superintendent 2 position and that the Division of Personnel was mistaken by not considering his Correctional Officer 1 and Correctional Officer 2 time as professional work experience. Grievant originally claimed that his work experience at Terrell State Hospital in Texas should be counted toward meeting the minimum qualifications for the promotion. Grievant presented no evidence to support this claim and thus this argument is deemed abandoned by the Grievant. The Division of Personnel counters that its interpretation that time as a Correctional Officer 1 and

Correctional Officer 2 is, by definition, not considered professional for purposes of meeting the established minimum qualifications of a position.

The Division of Personnel interpretations of the class specifications are entitled to 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, 348, 431 S.E.2d 681, 687 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985). The Division of Personnel is responsible for the establishment and interpretation of the State's Classification Plan, which includes the class specifications and minimum qualifications. The undersigned is bound by legal precedent to the effect that the Division of Personnel's interpretation of the class specifications at issue should be given great weight unless clearly wrong. *Blankenship, supra*.

Grievant applied for and was selected for a position as a Corrections Associate Superintendent 2. A personnel transaction to promote Grievant into the position was submitted to the Division of Personnel. It was rejected after having been determined by the Division of Personnel that Grievant did not meet the minimum qualifications of the position. This conclusion was based on the Division of Personnel's interpretation and application of the definitions contained in class specifications and minimum qualifications. An employee must meet the minimum qualifications for a State classified position before he or she can be approved for the position. If the Division of Personnel finds that an applicant lacks any of the requirements established for the position, it may deny the applicant's promotion. W. VA. CODE R. § 143-6.4.a.1.

The minimum qualifications established for the Corrections Associate Superintendent 2 classification requires a bachelor's degree from a regionally accredited four-year college or university and six years of full-time or equivalent part-time paid professional experience in adult or juvenile correctional custody or criminal justice program administration to include four years in the supervision of employees. Since Grievant does not have a bachelor's degree, the Division of Personnel turned to the substitution clause of the minimum qualifications that allows for experience on a year for year basis to substitute for the degree. Grievant needed to have ten years of full-time or equivalent part-time paid professional experience in adult or juvenile correctional custody or criminal justice program administration to include four years of supervision of employees in order to qualify for the position at the time the personnel transaction was submitted for his promotion.

The Division of Corrections and Rehabilitation was suffering from recruitment and retention issues among its Correctional Officer positions. As a result, the Division of Personnel agreed to change its interpretation with regard to what Correctional Officers work experience would be viewed to count toward meeting the "professional" requirement found in the minimum qualifications of class specifications. The change permitted time worked in a position assigned to the Correctional Officer 3 classification to be considered professional, but maintained that the Correctional Officer 1 and Correctional Officer 2 time would not be considered professional. This change allowed the Division of Personnel to count Grievant's experience as both a Correctional Officer 3 and Correctional Officer 4 toward meeting the minimum qualifications of the position. Grievant's experience as a Correctional Officer 1 and Correctional Officer 2 was not considered to be professional

experience for the position. The rationale by the Division of Personnel is that in the ordinary course of business the primary duties of the positions do not require the carrying out of acquired academic theories, principles and methods as defined under the term "professional."

The record of this case does not demonstrate that the Division of Personnel acted arbitrarily or capriciously in their analysis of Grievant's work experience or in coming to the conclusion that Grievant's Correctional Officer 1 and Correctional Officer 2 experience did not qualify him for the Corrections Associate Superintendent 2 position.¹ The Division of Personnel's determination that the duties assigned to the Correctional Officer 1 and Correctional Officer 2 classification did not require the carrying out of acquired academic theories, principles and methods as defined under the term "professional," cannot be viewed as implausible nor was it contrary to the evidence. The predominant duties of positions assigned to the Correctional Officer 1 and Correctional Officer 2 classification appear to be entry and full performance level; however, both only require a high school diploma to meet the training portion of the minimum qualifications of the position.

The record provided that at the time the Division of Personnel determined it could permit experience gained while working in a position assigned to the Correctional Officer 3 classification to count toward meeting the professional requirements, the Correctional Officer 3 served as the first line supervisor of subordinate positions. It was this distinction

¹ "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).

that persuaded the Division of Personnel that the definition of “professional” could be interpreted to include those supervisory positions as involving the consistent use of “research, analysis, interpretation of acquired theories, principles and methods.” This interpretation was the product of a deliberative process in consultation with the Cabinet Secretary of the Department of Homeland Security and cannot be viewed as clearly wrong under the Division of Personnel’s definitions and classification scheme. The record did not establish by a preponderance of the evidence that Grievant is entitled to have his work experience as a Correctional Officer 1 and Correctional Officer 2 to count toward meeting the minimum qualifications for the Corrections Associate Superintendent 2 position.

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. "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).

3. The Division of Personnel interpretations of the class specifications are entitled to 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, 348, 431 S.E.2d 681, 687 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985).

4. The Division of Personnel is responsible for the establishment and interpretation of the State’s Classification Plan, which includes the class specifications and minimum qualifications. The undersigned is bound by legal precedent to the effect that the Division of Personnel’s interpretation of the class specifications at issue should be given great weight unless clearly wrong. *Blankenship, supra*.

5. "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).

6. Grievant did not demonstrate by a preponderance of the evidence that the determination by the Division of Personnel that his Correctional Officer 1 and Correctional Officer 2 experience was not qualifying professional experience in adult or juvenile

correctional custody or criminal justice program administration as required by the class specification was arbitrary and capricious or contrary to statute, policy or rule.

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: May 25, 2021

Ronald L. Reece
Administrative Law Judge