

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TRAVIS WINANS,
Grievant,**

v.

Docket No. 2019-1630-MAPS

**DIVISION OF CORRECTIONS AND REHABILITATION/
BUREAU OF PRISONS AND JAILS/
HUTTONSVILLE CORRECTIONAL CENTER AND JAIL
and DIVISION OF PERSONNEL,
Respondents.**

DECISION

Grievant, Travis Winans, is employed by Respondent, the Division of Corrections and Rehabilitation (DCR), Bureau of Prisons and Jails at the Huttonsville Correctional Center and Jail. On May 17, 2019, Grievant filed a grievance against Respondent stating:

I interviewed for Investigator II at HCC, and was selected for the position. Was advised that application was lacking 20 months of qualifying experience. I was advised to resubmit my application with additional work history and work details. I was advised to submit my application through the DOP website which did require to take an open test. DOP did advise that I DID NOT HAVE ENOUGH qualifying experience and to send in a rerate for if I did not agree with the decision. I did submit a rerate form and it did come back as I was qualified. Six days later I did receive an email from DOP stating I did not have any qualifying work experience. I feel the review process applied to all aspects to rate my qualifications were arbitrary and capricious.

The relief sought states, "want to be viewed as qualified for Investigator II, back pay from of [sic] posting closing, any attorney or legal fees, reallocation to the pay grade of the position or put into the position I was chosen for with the appropriate paygrade."

Pursuant to a level one waiver dated June 3, 2019, this matter was waived from level one to level two of the grievance process. An order joining the Division of Personnel (DOP) as a necessary party was entered on July 26, 2019. Mediation occurred November

14, 2019. Grievant appealed to level three on December 30, 2019. A level three hearing was held before the undersigned via an online platform on November 16, 2020. Grievant appeared and was represented by Krystal Winans. Respondent DCR appeared by Steven Berthiaume, Deputy Director of Corrections Investigation Division, and was represented by Briana J. Marino, Assistant Attorney General. Respondent DOP appeared by Joe Thomas, Deputy Director, and was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on December 18, 2020. Respondent DOP and Grievant submitted Proposed Findings of Fact and Conclusions of Law (PFFCL). Respondent DCR declined.

SYNOPSIS

Grievant is employed by the Division of Corrections and Rehabilitation (DCR) and was so employed when he was selected for an Investigator 2 position. The Division of Personnel (DOP) and DCR subsequently determined that Grievant was unqualified because he did not meet the minimum qualifications of the position. DOP's policy then in effect did not allow for consideration of prior non-primary duties in determining the qualifications of an applicant. A year later, DOP's new Director implemented a policy change allowing the consideration of Grievant's prior non-primary investigative duties and approving Grievant for the Investigator 2 position. Grievant requests backpay to the original selection date, arguing that the initial refusal to consider his prior non-primary duties was arbitrary and capricious. Grievant did not prove that DOP's policy prohibiting the consideration of prior non-primary duties was unreasonable. He did not prove he was entitled to backpay prior to his promotion or prior to the policy change by DOP. 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 the Division of Corrections and Rehabilitation (DCR) as an Investigator 2.

2. On November 2, 2018, while employed by DCR as a Corrections Case Manager, Grievant was selected for an Investigator 2 position.

3. DCR chose not to submit Grievant's personnel transaction paperwork to the Division of Personnel (DOP) after Grievant was deemed unqualified by the Human Resources (HR) Manager for the Division of Administrative Services,¹ April Darnell.

4. As a courtesy, Elisabeth Arthur (Administrative Services Manager 2 for the Personnel Transaction Review section² of the DOP) provided an unofficial review of Grievant's qualifications and confirmed that Grievant did not meet the minimum qualifications.

5. Grievant revised his original application, adding an investigative component to the descriptions.

6. Ms. Arthur reviewed the updates and concluded that Grievant still did not meet the minimum qualifications of the Investigator 2 position.

7. The minimum qualifications for the Investigator 2 classification require a bachelor's degree from a regionally accredited college or university and 2 years of either

¹The Division of Administrative Services is responsible for providing HR support to DCR.

²The Personnel Transaction Review section of the DOP is responsible for processing personnel transactions for all DOP covered entities to ensure compliance with DOP law, rule, and policy. (See Arthur's testimony)

full-time or equivalent part-time paid experience in law enforcement or investigative work. A substitution clause allows this experience to substitute on a year for year basis for the lack of a bachelor's degree. (DOP Exhibit 1 and Ms. Arthur's testimony)

8. Grievant did not have a bachelor's degree. Thus, Grievant needed a total of 6 years of full-time or equivalent part-time paid experience in law enforcement or investigative work to qualify for the Investigator 2 position. (DOP Exhibits 1-3 and Ms. Arthur's testimony)

9. DOP counted Grievant's experience as a Corrections Case Manager and as a Correctional Officer 3 (CO 3) towards the minimum qualifications of the Investigator 2 position.

10. However, DOP did not consider Grievant's experience as a Correctional Officer 1 (CO 1), Correctional Officer 2 (CO 2), and Correctional Counselor 1 as investigative experience for the minimum qualifications of the Investigator 2 position because investigation was a non-primary duty of these positions. Thus, Grievant was credited only 4 years and 1 month of qualifying investigative experience, leaving him 1 year and 11 months short of the 6 years qualifying experience necessary for the position. (DOP Exhibits 1-3 and Ms. Arthur's testimony)

11. When DOP reviewed Grievant's initial applications, it had always been DOP policy to not count the non-primary duties of a position towards experience requirements. As such, DOP had never deemed experience as a CO 1, CO 2, or Correctional Counselor 1 as satisfying the investigative experience requirements for Investigator 2. (DOP Exhibits 1-3 and testimony of Ms. Arthur and Mr. Thomas)

12. While not all duties of a position are detailed in the class specifications created by DOP, the primary duties DOP expects from a position are included under the Nature of Work section of the class specification. (DOP Exhibits 1-3 and testimony of Arthur and Thomas)

13. In November of 2019, new DOP Director Sheryl Webb, Deputy Director Joe Thomas, and other DOP management staff met to discuss the issue of State employees changing their applications to meet the minimum qualifications for a posted position. The facts and circumstances regarding Grievant's application were among those discussed. (Testimony of Arthur and Thomas)

14. At that time, Director Webb changed DOP policy to allow for consideration of non-primary duties from a prior position where the applicant had performed those duties on a regular basis in the position. Ms. Webb further allowed employees to change their applications to allow them to take advantage of this policy change. (Testimony of Arthur and Thomas)

15. Director Webb changed the protocol for employee applicants by permitting agencies to provide written verification of the employee's current or prior job duties even when those duties were not the primary duties of the employee's current or prior position. This new protocol allowed DOP to consider an applicant's prior non-primary duties on a case-by-case basis. It permitted employers to submit verification of duties to the Director for approval of an exception from the standard interpretation of whether an individual met the minimum qualifications for a posted position. (Testimony of Arthur and Thomas)

16. It is not unusual for a new DOP Director to change interpretations, policies, processes, and procedures. (Mr. Thomas' testimony)

17. On November 12, 2019, Deputy Director of DCR's Corrections Investigation Division Steve Berthiaume submitted for DOP Director Webb's consideration a letter stating that Grievant met the minimum investigative experience to qualify for the Investigator 2 position in consideration of his time performing investigative duties while a CO 1, CO 2, and Correctional Counselor 1. Director Webb, Deputy Director Thomas, and Assistant Director Teresa Morgan reviewed the letter and agreed to count Grievant's time as a CO 1, CO 2, and Correctional Counselor 1 towards the minimum qualifications of the Investigator 2 position. DOP chose to make this exception even though it would not normally have attributed this experience towards qualifying for Investigator 2 positions. (Grievant's Exhibit 2 and testimony of Ms. Arthur and Mr. Thomas)

18. Grievant was promoted to an Investigator 2 position on December 7, 2019. (DOP Exhibit 9)

19. Grievant did not meet the minimum qualifications of the Investigator 2 position until DOP changed its policy to allow for submission of exceptions and granted Grievant an exception. (Testimony of Ms. Arthur and Mr. Thomas)

20. Employees do not receive the associated increase in the pay until their promotion is effectuated and they begin performing the higher-level duties of the new position to which they have been promoted. (Mr. Thomas' 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 was initially selected for a position classified as an Investigator 2 pursuant to a job posting by DCR in November 2018. DCR did not submit a personnel transaction to promote Grievant into the position after the Division of Administrative Services HR Manager, April Darnell, deemed Grievant unqualified for the position since he did not have a bachelor's degree or the requisite substitute experience. Nevertheless, Ms. Darnell reached out to DOP to request an unofficial review of the Grievant's qualifications to confirm that he did not meet the minimum qualifications. DOP reviewed Grievant's original application and his revised application. Both times DOP confirmed that Grievant did not meet the minimum qualifications of the Investigator 2 position. DOP based this conclusion on its longstanding interpretation of classified positions, class specifications, and minimum qualifications.

In November 2019, DOP implemented a change to policy and procedure whereby it would consider on a case-by-case basis the prior non-primary job duties of an employee in determining their qualification for another position. DOP would also permit an agency to provide the Director of DOP with written verification that an employee had performed these non-primary job duties on a regular basis. DOP would consider this supplemental information from the employing agency and determine whether to grant an exception from the historical interpretation of whether an individual met the minimum qualifications for a posted position. As a result of this policy change, DCR submitted to Director Webb a request that she consider Grievant's prior non-primary investigative duties. After review

and consideration of supplemental information provided by DCR, DOP permitted Grievant's performance of non-primary investigative duties as a CO 1, CO 2, and Correctional Counselor 1 to count toward the minimum qualifications of the Investigator 2 position, even though such would not typically be counted. On December 7, 2019, Grievant was promoted to an Investigator 2 position.

Grievant contends he met the minimum qualifications to be eligible for a promotion to Investigator 2 when he was initially selected for the position in November 2018 and that he is entitled to retroactive back pay to this date. He asserts that DOP acted in an arbitrary and capricious manner in deeming him unqualified for the Investigator 2 position. Grievant argues that the fact that DOP determined him qualified a year later using the same experience it had earlier rejected is proof of its arbitrary interpretation of the policy. DOP counters that Grievant's promotion would never have occurred if not for recent changes to the policy by the new DOP Director Webb. DOP contends that its policy originally did not allow for the consideration of non-primary investigative duties from Grievant's prior positions as CO1, CO2, and Correctional Counselor 1 and that the policy was changed to allow for exceptions on a case-by-case basis.

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. § 143-6.4.a.1 (2016). The minimum qualifications for the Investigator 2 classification require a bachelor's degree from a regionally accredited college or university and 2 years of full-time or equivalent part-time paid experience in law enforcement or investigative work. Grievant does not have a bachelor's degree. As

such, the substitution clause of the minimum qualifications allowed Grievant to substitute his lack of a degree with experience on a year for year basis. Thus, Grievant needed 6 years of full-time or equivalent part-time paid experience in law enforcement or investigative work to qualify for the Investigator 2 position.

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

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)). “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 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).

Initially, DOP did not count Grievant’s investigative experience gained as a CO 1, CO 2, and Correctional Counselor 1 because it was not listed as a primary duty of these prior positions. The primary duties of a position are included in the Nature of Work section

of each class specification. Investigation was not included in the Nature of Work section of class specification for the CO1, CO2, and Correctional Counselor 1 positions. At the time DOP reviewed Grievant's applications, it had long been DOP's practice to not count investigative work gained under the CO 1, CO 2, and Correctional Counselor 1 positions as a primary duty for these positions. It had further been DOP's longstanding policy to not count non-primary duties towards the requisite experience for other positions.

DOP is responsible for the establishment and interpretation of the State's Classification Plan, which includes the class specifications and minimum qualifications. See W. VA. CODE §§ 29-6-5 and 29-6-10; W. VA. CODE ST. R. § 143-1-4. As explained by Deputy Director Thomas, DOP class specifications are to be read in pyramid fashion, from top to bottom, with the different sections to be considered as 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 classification specification is its most critical section. See generally, *Dollison v. W. Va. Dep't of Employment Sec.*, Docket No. 89-ES-101 (Nov. 3, 1989). DOP's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. See *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

Grievant did not meet the minimum qualifications of the Investigator 2 position until the change in policy and procedure by DOP was implemented in November 2019. Only then could DOP issue an exception and deem Grievant to meet the minimum qualifications of Investigator 2. DOP's Administrative Rule defines "promotion" as [a] change in the status of an employee from a position in one class to a vacant position in

another class of higher rank as measured by salary range and increased level of duties and/or responsibilities. W. VA. CODE ST. R. § 143-1-3.70. As such, employees cannot receive an increase in their pay until their promotion is effectuated and they begin performing the higher-level duties of the new position to which they have been promoted.

Grievant misses the point in arguing that nothing about his work experience changed from the time of the initial review of his qualifications to the time he was promoted and that he is therefore entitled to back wages to the time of his initial selection. While Grievant's work experience may not have changed, DOP did in the interim, between the initial selection and the eventual promotion, change its internal policy and procedure. It was this change, and this change alone, that allowed for Grievant to receive the promotion. DOP's actions mirrored its policy before and after the change in policy. Therefore, these actions are not arbitrary and capricious.

DOP correctly applied the relevant interpretation in place at the time of the initial review in determining that Grievant did not meet the minimum qualifications. DOP later applied to Grievant's benefit a change in policy and procedure that allowed for Grievant's promotion to Investigator 2. As noted in a somewhat similar grievance where a change in DOP interpretation effected a grievant, "[t]his is not the first or last time DOP will adjust its application of a rule, regulation or policy. As a standard operating procedure, a State agency applies applicable employment rules, regulations and policies as they are at the time of the decisions, not what they think they may become some day in the future." *Prue v. Div. of Corrections*, Docket No. 2017-1400-MAPS (Nov. 3, 2017). Deputy Director Thomas testified that new Directors typically make changes to agency policy and procedure. The changes made by new Director Webb were within her purview and

reasonable. Understandably, Grievant does not challenge these changes because they work to his benefit. However, he uses this benefit to imply that the creation of an exception proves that the exception should have been the norm all along. He offers no authority for the proposition that DOP must apply a change in policy retroactively, especially when there is no evidence that DOP was duty bound to implement the change in the first place.

It appears that Grievant was the anomaly in being granted an exception from DOP's normal protocol. Ironically, Grievant implies that DOP's provision of an exception in his favor proves that DOP acted in an arbitrary and capricious matter when it initially denied his investigative experience under CO1, CO2, and Correctional Counselor 1 positions. If anything, the opposite is true. DOP showed that not everyone in Grievant's position is necessarily granted an exception from the normal protocol. Further, this exception was created shortly before DOP allowed this prior investigative experience to count in Grievant's favor for his approval as an Investigator 2. The implementation by DOP of an exception to its rule cannot be used by Grievant to retroactively apply that exception prior to its creation.

Ultimately, Grievant could point to no law, rule, or policy to support his claim for back wages. There is no mechanism to enact back wages prior to the implementation of a promotion. DOP's Administrative Rule establishes that a promotion only occurs when there is an assumption of the new higher-level duties and responsibilities. W. VA. CODE ST. R. § 143-1-3.70. Grievant was not promoted to Investigator 2 until he received the position on December 7, 2019, upon which he received a pay raise commensurate with his promotion. While the Grievance Board has the authority to grant pay raises

retroactively, Grievant must first prove that he is entitled to back pay by virtue of a statute, regulation, policy, rule, or procedure. See *Green v. Dept. of Health and Human Resources and Div. of Personnel*, Docket No. 2011-1577-DHHR (Oct. 1, 2012). Grievant failed to point to any authority in support of his claim for back pay.

In summary, DOP initially deemed Grievant unqualified for an Investigator 2 position, as its policy did not allow for consideration of his prior non-primary investigative duties. A year later, DOP's new Director allowed for exceptions to this policy. After granting Grievant an exception, DOP credited him with investigative experience from his prior non-primary investigative duties and approved his promotion to Investigator 2. Grievant now requests back pay for the intervening year. Grievant did not prove that DOP's initial interpretation of its policy was arbitrary and capricious or that he was entitled to back pay prior to his promotion.

Accordingly, this grievance is DENIED.

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. 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 lacks any of the requirements established for the position, it may deny the applicant's promotion. W. VA. CODE ST. R. § 143-6.4.a.1 (2016).

3. 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*.

4. 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)).

5. Grievant did not prove by a preponderance of evidence that he is entitled to back wages or that DOP acted in an arbitrary and capricious manner in initially deeming him unqualified for the Investigator 2 position.

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: January 28, 2021

Joshua S. Fraenkel
Administrative Law Judge