

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

TIMOTHY WAYNE ABNER,

Grievant,

v.

Docket No. 2022-0183-DHS

**DEPARTMENT OF HOMELAND SECURITY/
BUREAU OF PRISONS AND JAIL/NORTH CENTRAL
REGIONAL JAIL AND CORRECTIONAL FACILITY and
DIVISION OF PERSONNEL,**

Respondents.

DECISION

Grievant, Timothy Abner, filed this action on or about September 2, 2021, seeking to have certain work experience accepted by the Division of Personnel in order to allow him to meet the minimum qualifications for a promotion to a position classified as a Corrections Hearing Officer. The Department of Homeland Security conducted a level one hearing on September 22, 2021. A decision denying the grievance was issued on October 14, 2021. Grievant appealed to level two. An Order of Joinder was issued on November 30, 2021, joining the Division of Personnel as a necessary party. An Order of Unsuccessful Mediation was issued on January 10, 2022. A level three evidentiary hearing was conducted before the undersigned on May 24, 2022, by Zoom. Grievant appeared *pro se*. The Department of Homeland Security appeared by Superintendent Joseph Wood and by Jodi Tyler, Assistant Attorney General. The Division of Personnel appeared by Elizabeth Arthur, Personnel Transaction Review section, and by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for

consideration upon receipt of the Division of Personnel's Findings of Fact and Conclusions of Law on June 27, 2022.

Synopsis

Grievant is employed by the Department of Homeland Security in a position classified as a Correctional Officer 3. Grievant seeks to have his work experience as a Correctional Officer 2 count toward meeting the established minimum qualifications of the Corrections Hearing Officer 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 position as set forth in the class specification for the Corrections Hearing Officer. After consultation with, and agreement of, the Department of Homeland Security, the Division of Personnel was advised to reject the personnel transaction for the promotion. The record supported a finding that the interpretation of the minimum requirements and the determination that Grievant lacked the necessary qualifications was reasonable and Grievant was unable to demonstrate that the work of positions assigned to the classification of Correctional Officer 2 met the definition of professional. Grievant was also unable to demonstrate that the Division of Personnel's interpretation of the definition of professional, as applied to the State's Classification Plan, was arbitrary and capricious.

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

Findings of Fact

1. Grievant is employed by the Department of Homeland Security in a position classified as a Correctional Officer 3.

2. Grievant applied for a vacant position classified as a Corrections Hearing Officer. A personnel transaction to promote the Grievant into the position was submitted by the Department of Homeland Security to the Division of Personnel's Personnel Transaction Review section for processing on August 8, 2021. The Personnel Transaction Review section reviewed the personnel transaction and rejected the personnel transaction on August 19, 2021.

3. Training for the position requires a bachelor's degree in criminal justice, corrections, social work, or related behavioral science field. However, qualifying experience may be substituted for the required training on a year-for-year basis. The position also requires experience of two years of full-time or equivalent part-time paid professional experience in corrections, probation/parole, law enforcement, social work, recreation, or legal environment.

4. Since Grievant does not possess a bachelor's degree he needs six years of full-time or equivalent part-time professional experience in corrections, probation/parole, law enforcement, social work, or legal environment in order to meet the minimum qualifications for the position.

5. At the time Grievant applied for the Corrections Hearing Officer position, a review of his application determined that Grievant had two years and five months of qualifying experience.

6. Grievant's work experience as a Correctional Officer 3 was counted toward meeting the minimum qualifications of the position, but his experience as a Correctional Officer 2 was not considered by the Division of Personnel to be professional experience.

At the time of his selection, Grievant was three years and seven months short of the six years qualifying experience necessary for the position.

7. The Division of Personnel defines “professional” as work which requires the application of theories, principles and methods of 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.

8. Correctional Officer 2 time has not been counted toward meeting the professional experience requirements because the duties do not rise to the type and level of experience the Division of Personnel intended to be necessary to meet the professional requirements of the class specifications.

9. The Division of Personnel has historically not counted time worked in the Correctional Officer 3 positions toward meeting the professional requirement included in the minimum qualifications of class specifications. Due to recruitment and retention concerns raised by the Department of Homeland Security, the Division of Personnel determined that the definition of “professional” would be interpreted broadly enough to encompass positions assigned to the Correctional Officer 3 classification and began considering such when reviewing personnel transactions to determine if minimum qualifications were met as of March 30, 2017.

10. The record does not contain any evidence that would require the Division of Personnel to change its interpretation of its definition of professional as it relates to positions assigned to the Corrections Officer 2 class specification.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

Grievant asserts that he met the minimum qualifications to be eligible for a promotion to a Corrections Hearing Officer position and that the Division of Personnel erred by not counting his Correctional Officer 2 time as professional work experience. The Division of Personnel stands by its interpretation that time as a Correctional Officer 2 is, by definition, not considered professional for purposes of meeting the established minimum qualifications for any positions in the Division of Personnel's Classification Plan.

Grievant applied and was selected for a position as a Corrections Hearing Officer. A personnel transaction to promote the Grievant to the position was submitted to the Division of Personnel. After review and consultation with the Department of Homeland Security, they agreed Grievant did not meet the minimum qualifications of the position, the Division of Personnel rejected the transaction. This conclusion was based on the Division of Personnel's interpretation and application of the definition of professional. The record established that an employee must meet the minimum qualifications for a State classified position before they can be approved by the Division of Personnel for the position.

The minimum qualifications established for the Corrections Hearing Officer require a bachelor's degree from an accredited four-year college or university with a degree in criminal justice, corrections, social work, or related behavioral science field and two years of full-time or equivalent part-time paid professional experience in a corrections, probation/parole, law enforcement, social work, recreation, or legal environment. In lieu of a bachelor's degree, the Division of Personnel looks to the substitution clause of the minimum qualifications that allows for experience on a year for year basis to substitute for the degree. The Grievant needed to have six years of full-time or equivalent part-time paid professional experience in corrections, probation/parole, law enforcement, social work, recreation, or legal environment in order to qualify for the position at the time the personnel transaction was submitted for the promotion.

It is undisputed that the Department of Homeland Security was suffering from recruitment and retention issues among its Correctional Officer positions. The Division of Personnel agreed to change its interpretation with regard to what Correctional Officer work experience would be counted toward meeting the "professional" requirement found in the minimum qualifications. The change permitted time worked in a position assigned to the Correctional Officer 3 to be considered professional, but maintained that the Correctional Officer 2 and below would not be considered as such. Grievant's experience as a Correctional Officer 3 was counted toward meeting the minimum qualifications of the Corrections Hearing Officer; however, his experience as a Correctional Officer 2 was not counted toward the professional experience qualification.

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 did not demonstrate that the Division of Personnel acted arbitrarily or capriciously in coming to the opinion that the Grievant's Correctional Officer 2 experience did not qualify him for the Corrections Hearing Officer position. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

The Division of Personnel's determination that the duties of positions assigned to the Correctional Officer 2 classifications did not require the carrying out of acquired academic theories, principles and methods, as defined in the term "professional," was not implausible nor was it contrary to the evidence. The predominant duties of positions assigned to the 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 Division of Personnel's decision, in consultation with the Department of Homeland Security, to allow time as a Corrections Officer 3 to count toward meeting the definition of professional cannot be viewed by the undersigned as arbitrary and capricious.

Additionally, 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 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 undersigned recently addressed this question in regard to Correctional Officer time meeting the Division of Personnel's definition of "professional." *Quimet v. Div. of*

Corr., and Rehab, et al., Docket No. 2020-0409-MAPS (May 25, 2021). Grievant Quimet was attempting to have his time as a Correctional Officer 1 and Correctional Officer 2 count toward meeting the definition of professional to be deemed qualified for the position of Corrections Associate Superintendent 2. The undersigned ruled that the Division of Personnel's determination that Grievant's time as a Correctional Officer 3 counting toward meeting the professional requirement, but not time worked as a Correctional Officer 1 and Correctional Officer 2, was not arbitrary and capricious.

In conclusion, the record did not prove that the Division of Personnel's interpretation of its definition of "professional" as applied to established minimum qualifications was clearly wrong, or 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. 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 2 experience was not qualifying professional experience was arbitrary and capricious or contrary to statute, policy or rule.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: July 26, 2022

Ronald L. Reece
Administrative Law Judge

¹On April 8, 2021, Senate Bill 275 was enacted, creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend W. VA. CODE § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.