

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW E. HARPER,
Grievant,

v.

Docket No. 2022-0057-DOA

**DEPARTMENT OF ADMINISTRATION/
PURCHASING DIVISION/SURPLUS PROPERTY
And DIVISION OF PERSONNEL,
Respondent.**

DECISION

Grievant, Matthew Harper, is employed Respondent, Division of Purchasing, in the Agency for Surplus Property (Surplus"). Mr. Harper filed a level one grievance form dated July 16, 2021, alleging the following:

In an application review, DOP¹ gave me 3 years and 7 months of supervisory experience. I didn't know the difference between a lead worker and a supervisor, so I incorrectly called myself a lead worker on my application .I was told by the former Surplus Director that I shouldn't list my WACO² experience due to the job title sounding inappropriate. Listening to the former director has cost me years of credit for supervisor experience. Clarification of my experience was sent to DOP in my handwriting as requested by DOP reviewer and so were copies of my EPA saying I supervised, but not receiving supervisor credit.

As relief, Grievant seeks:

Credit for administrative experience as a Storekeeper 1, and credit for administrative and supervisor experience as a Storekeeper 3, as well as credit for supervisory experience while employed with WACO.

¹ Division of Personnel

² These letters are an acronym for the company name. The parties did not clarify the words represented by the letters.

By mutual agreement, the parties waived level one. An Order was issued on September 23, 2021, joining the Division of Personnel (“DOP”) as a party. A level two mediation was conducted on November 2, 2021 and Grievant perfected a timely appeal to level three.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on March 4, 2022. Grievant Harper personally appeared and was represented by coworker Dana Hoffman. Respondent, Division of Purchasing appeared through Director W. Michael Sheets, and was represented by James Meadows, Purchasing Division General Counsel. Respondent, DOP, appeared through Wendy Mays, Assistant Director for Classification and Compensation and was represented by Karen O’Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on April 7, 2022, upon receipt of the last of the Proposed Findings of Fact and Conclusion of Law submitted by the parties.

Synopsis

Respondent Division of Purchasing sought to have Grievant’s position at Surplus Property reallocated to the Administrative Services Manager 1 (“ASM 1”) classification and allow Grievant to remain in that position. DOP determined that Grievant did not meet the minimum qualifications to hold a position in the ASM 1 classification because he did not hold a college degree or the requisite supervisory experience to substitute for such degree. Grievant argues that his duties in the Storekeeper 1 and 3 classifications as well as his work for WACO Scaffolding included supervisory duties. Grievant avers that experience qualifies him for the ASM 1 classification. DOP found that his duties in those positions did not meet the definition for supervisory work found in the DOP policies.

Grievant did not prove by a preponderance of the evidence that DOP's determination was clearly wrong or arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Matthew is employed by the Purchasing Division and assigned to the Surplus section. His position is in the Supervisor 3 classification.

2. Grievant was originally hired by Surplus in 2009 as a temporary employee. He was later hired as a fulltime laborer in Surplus. Grievant was promoted to a Storekeeper 1 position in June 2012 and to a Storekeeper 3 position in January 2016.³

3. In November 2017, Grievant was promoted to a position classified as Supervisor 1 and promoted again to a Supervisor 3 position in November 2019.⁴

4. On May 26, 2021, DOP received an application from Surplus to reallocate Grievant's position from the Supervisor 3 classification at pay grade 13, to the Administrative Services Manager 1 ("AMS 1") classification at pay grade 16.

5. When a position is reallocated to a different class, the incumbent must meet the minimum qualifications for the newly classified position to remain in the job. If the employee does not have the training or experience to meet the minimum qualifications, he or she may be transferred, promoted, or demoted by appropriate action in accordance with the provision of the DOP Administrative Rule. If the employee does not meet the minimum qualifications of the reallocated position classification, and he or she is not

³ Respondent DOP Exhibit 1, (wvOASIS Review Sheet)

⁴ *Id.*

transferred, promoted or demoted, the provisions of the Administrative Rule regarding separations applies. W. Va. Code St. R. § 143-1-4.7.b.

6. Additionally, 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 employee is found to lack one or more of the requirements established for the position, it may deny a reallocation. W. Va. Code St. R. § 143-1-6.4.a.1.

7. The minimum qualifications for the ASM 1 class specification reads in pertinent part as follows:

Training: Graduation from a regionally accredited college or university with a degree in the area of assignment.

Substitution: Experience as described below may substitute for the training requirement on a year -for-year basis.

Experience: Four years of full-time or equivalent part-time paid administrative or supervisory experience in the area of assignment.

(Respondent DOP Ex. 2, Classification Specifications ("Class Specs.") for ASM 1).

8. The Personnel Transaction Review ("PTR") section of DOP is responsible for processing personnel transactions for all DOP covered entities to ensure compliance with DOP law, rule, and policy. The PTR reviewed Grievant's qualifications to determine if he held the minimum qualifications to hold a position in the ASM 1 classification.

9. Grievant does not hold a college degree. Therefore, to be qualified for the ASM 1 classification he needed to meet the experience requirement of four years of administrative or supervisory work, plus four more years of such work as a substitute for a college degree. Grievant does not have administrative experience, therefore he needed eight years of supervisory experience.

10. After a review of all the Grievant's applications on file with the DOP, as compared to the minimum qualifications of the ASM 1 class specification, Elizabeth Arthur, Manager of the PTR section, rejected the transaction and notified Purchasing that the Grievant did not meet the minimum qualifications.

11. The DOP *Pay Plan Policy* ("PPP") defines "supervisor" as follows:

Supervisor- Formally delegated responsibility for planning, assigning, reviewing and approving the work of two (2) or more full-time employees or three (3) or more .83 full-time equivalent Seasonal employees which *includes initiating disciplinary actions, approving leave requests, conducting performance evaluations and recommending salary increases*. (Emphasis Added)

12. Grievant was promoted to a Storekeeper 1 for Surplus on March 1, 2021, based on a vacancy posting for that position dated February 3, 2012. One of the duties listed in the Storekeeper 1 posting description was ". . . Supervises lower-level storekeepers, store clerks, clerks, drivers or other related positions. . ."). (Grievant Exhibit 1)

13. In the Storekeeper 1 and 3 positions, Grievant's Employee Performance Appraisal ("EPA") forms, in the section entitled Performance Standards and Expectations,⁵ the expectations for Grievant are consistently listed as, "oversee the warehouse operations" as well as other duties which sometimes include, "assign work to personnel, schedule deliveries and pick-ups, assist manager in pricing, and act as warehouse supervisor." (Grievant's Exhibits 6 through 10)

⁵ In this section the reviewer places the objectives to be accomplished by the employee during the rating period.

14. Grievant assigned work to as many as three drivers and a mechanic assigned to the warehouse daily. He managed leave for those employees but did not have the final authority to sign off on the approval of their leave.

15. As a Storekeeper 1 and 3, Grievant completed incident reports for injuries or other extraordinary events which occurred in the warehouse and provided verbal counseling to employees who are not performing appropriately. (Grievant Exhibit 12)

16. Grievant assisted with the EPAs for the drivers and mechanics but did not have authority to sign those documents. The EPAs were officially issued by Grievant's supervisor. Grievant did not have authority to initiate discipline, or recommend salary increases for other workers.

17. The PTR review determined that the duties Grievant performed in the Storekeeper 1 and 3 positions did not meet the DOP *Pay Plan Policy* ("PPP") definition of "supervisor" and those periods of time could not be used by Grievant as experience toward meeting the minimum qualifications for the ASM 1 classification.

18. Grievant was promoted to a Supervisor 1 position in November 2017 and a Supervisor 3 position in November 2019. He remained in the Supervisor 3 position at the time of the hearing. The PTR review determined that Grievant's duties in those positions did meet the PPP definition of supervisor and could be used as qualifying experience for the ASM 1 classification.

19. The PTR determined that due to his work in the Supervisor classification, Grievant held three years and seven months of qualifying experience credited toward the minimum qualifications for the ASM 1 classification. That amount fell four years and five months short of meeting the eight years necessary to meet the minimum qualifications.

20. Grievant worked for a company called WACO Scaffolding from June 1999 to June 2007 (seven years). In his application for the ASM 1 position, Grievant described his work for that company as, “[l]ead scaffold assembler, assigned work to subordinates, responsible for timing and safety on jobs.” In the section regarding the supervision of employees, Grievant checked the box indicating “yes.”⁶

21. In an application for a Surplus position submitted to the DOP in 2009, Grievant described his work at WACO Scaffolding as, “[s]et up scaffolding.” In answer to whether Grievant supervised any employees, Grievant marked the space indicating “No.”⁷ Grievant also submitted an application in 2012 through NEOGOV.⁸ In response to a question concerning supervisory experience, Grievant responded, “There are no supervisory jobs listed on my application.”⁹

22. Based upon the information submitted by Grievant DOP, the DOP PTR review determined that Grievant’s duties at WACO scaffolding did qualify for supervisory experience to meet the ASM 1 minimum qualifications.

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 and*

⁶ Respondent DOP Exhibit 3.

⁷ Respondent DOP Exhibit 4.

⁸ A platform for submitting applications for government employment electronically.

⁹ Respondent DOP Exhibit 5.

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 is challenging DOP's determination that he does not have sufficient management experience to meet the minimum qualification for the ASM 1 classification. Grievant argues that his main responsibility as a Storekeeper 1 and 3 was to "oversee the warehouse operations" as consistently reflected in his Employee Performance Appraisals. Grievant points to the definition of "overseer" in *The Law Dictionary* to demonstrate that this is supervisory work. That definition of "overseer" is, "a superintendent or supervisor: a public officer whose duties involve general superintendence of routine affairs."¹⁰ However, definitions related to State personnel decisions are more specialized. In this matter, the definition for the term "supervisor" is found in the DOP *Pay Plan Policy* which was adopted by the DOP and approved by the State Personnel Board. That definition states:

Supervisor- Formally delegated responsibility for planning, assigning, reviewing and approving the work of two (2) or more full-time employees or three (3) or more .83 full-time equivalent Seasonal employees which *includes initiating disciplinary actions, approving leave requests, conducting performance evaluations and recommending salary increases.* (Emphasis Added)

In his Storekeeper 1 and 3 positions, Grievant's supervisor gave him wide discretion in overseeing the warehouse and assigning work to the employees who worked there. Grievant assigned their daily work, managed their schedules and they reported to him when they needed leave. Grievant also assisted with preparing the EPAs for those workers. However, he was not authorized in those positions to sign off on their leave,

¹⁰ Cited by Grievant as (<https://thelawdictionary.org/overseer/>). Grievant Exhibit 19.

issue and sign their EPAs, or recommend salary increases. Grievant counseled employees regarding performance deficiencies, but could not initiate disciplinary. In short, Grievant's duties in the storekeeper classifications did not meet the definition of a supervisor set out in DOP PPP policy.

It is axiomatic that 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). The 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. The 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 also 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)).

While there are a variety of definitions relating to “supervision” in the workplace, DOP has been charged by law with providing that definition as it relates to the State classified workforce. The definition of “supervisor” found in the DOP PPP was adopted by DOP and is the one that universally applies to all state classifications. Since Grievant’s duties in the storekeeper classifications did not meet the definition of a supervisor set out in DOP policy, it was neither clearly wrong nor arbitrary and capricious¹¹ for DOP to not give him supervisory credit for the time he worked in those classifications.

The other job Grievant seeks to receive supervisory experience for is his seven years working for WACO Scaffolding. In his application for the ASM 1 position Grievant described his work for that company as, “[l]ead scaffold assembler, assigned work to subordinates, responsible for timing and safety on jobs.” In answer to whether Grievant supervised any employees, Grievant marked the space indicating “yes.”¹² When Grievant listed his experience with WACO in previous applications submitted to DOP, Grievant described his work as “[s]et up scaffolding.” Grievant also answered that he did not supervise employees in the WACO job in the two previous applications.¹³

The Grievance Board has applied the following factors to assess a witness’s testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3)

¹¹ Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "

¹² See FOF 19 *supra*.

¹³ See FOF 20 *supra*.

reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

In this case, Grievant testified that he supervised employees while working for WACO Scaffolding. He also claimed that time as supervisory experience on his ASM 1 application. However, that claim is not consistent with his prior statements made on applications for jobs at Surplus. In fact, those statements specifically denied that he performed supervisory work at WACO. It is unnecessary to determine that Grievant's testimony was truthful. Since Grievant made completely contradictory statements regarding "supervision" on these three documents, he did not prove by a preponderance of the evidence that he performed supervisory duties at WACO. DOP's determination that he could not receive such experience credit for the ASM 1 position was neither clearly wrong nor arbitrary and capricious.

Grievant did not prove that DOP's determination that he lacked the necessary supervisory experience to meet the minimum qualification for a position in the ASM 1 classification were clearly wrong or arbitrary and capricious. Accordingly, the grievance is DENIED.

Conclusions of Law

1. 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. "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 and 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.*

2. The term "supervisor" is found in the DOP *Pay Plan Policy* which was adopted by the DOP and approved by the State Personnel Board. That definition states:

Supervisor- Formally delegated responsibility for planning, assigning, reviewing and approving the work of two (2) or more full-time employees or three (3) or more .83 full-time equivalent Seasonal employees which *includes initiating disciplinary actions, approving leave requests, conducting performance evaluations and recommending salary increases.* (Emphasis Added)

3. The 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.

4. The 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).

5. "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)).

6. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "

7. Grievant did not prove that DOP's determination that he lacked the necessary supervisory experience to meet the minimum qualifications for a position in the ASM 1 classification were clearly wrong or arbitrary and capricious.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: May 5, 2022

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**