BEVERLY GANDEE,

Grievant,

v. **Docket No. O4-CORR-O92**

DIVISION OF CORRECTIONS and

DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

Grievant, Beverly Gandee, filed this misclassification grievance against her employer the Division of Corrections ("CORR") on September 2, 2003. Her Statement of Grievance states, "Working out of class since June 2001." The relief sought is, "[b]ack pay for working out of class, to be made whole and to be reclassified in a higher classification."

This grievance was denied at Levels I and II. (See footnote 1) A Level III hearing was held on February 19, 2004, and a Level III Decision denying the grievance was issued on or about February 20, 2004. Grievant appealed to Level IV on February 25, 2004. A Level IV hearing was held on June 8, 2004. (See footnote 2) This case became mature for decision on August 9, 2004, after receipt of the parties' proposed findings of fact and conclusions of law.

After a through review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Grievant is currently classified as a Corrections Program Specialist, Senior, and began her employment on June 1, 2001. Her working title is Senior Inmate Grievance Coordinator. Her Pay Grade is 13.

2. Shortly after she started her duties, Grievant formed the belief that she was misclassified, but did not file this grievance until September 2, 2003. On the advice of her supervisor, Charles Houdyschell, Grievant submitted a Position Description Form to the Division of Personnel on September 11, 2003, and the grievance was held in abeyance.

3. On September 19, 2003, the Division of Personnel, after reviewing Grievant's Position

Description Form, found she was properly classified as a Corrections Program Specialist, Senior.

4. Wyetta Fredericks, Deputy Commissioner, met with Grievant on October 22, 2003, for a Level III conference. In her decision denying the grievance, dated October 23, 2003, Ms. Fredericks informed Grievant she would ask the Division of Personnel to conduct a desk audit.

5. It is unclear from the record when this job audit was conducted, but the Division of Personnel informed CORR of the results on November 3, 2003, and found Grievant to be classified properly as a Corrections Program Specialist, Senior.

6. Grievant is the lowest paid Corrections Program Specialist, Senior, and is also the least senior employee within this classification.

7. At the time Grievant applied for the position, the duties of the position were listed in the posting dated March 21, 2001. This posting states, "Grievance Coordinator is responsible for the division wide coo[r]dination of the Division of Corrections' inmate Grievance/Administrative remedy process." Additionally, the posting noted the successfulapplicant would be the Commissioner's designee for inmate disciplinary grievances. Further, the successful applicant would be required to develop a tracking system for inmate grievances and to assist with any other administrative functions as required by the Commissioner. DOP Exh. No. 1 at L III. These are the duties Grievant is currently performing, and her duties have changed little since she started in the position.

8. Although Grievant stated on her Position Description Form that she supervises others, she does not.

9. Within the correction system there are two grievance processes. In one process, inmates can grieve disciplinary action they received ("disciplinary grievance"), for example, the removal of good time for failure to follow the rules of the institution. In the second process, inmates can grieve actions by the institution they think are incorrect ("inmate grievance"). An example of an inmate grievance could be the failure to provide kosher foods. Both these grievance procedures have multiple steps.

10. Within the disciplinary grievance procedure, a Hearing Officer conducts a hearing, takes testimony, and renders a written decision. If the inmate does not like this decision, he may file an appeal to the warden, who then renders a decision at Level II. If the inmate is still not satisfied, he may appeal to the Commissioner, and Grievant reviews a limited record and issues a written decision.

11. Grievant is not the supervisor of the Hearing Officers, and there was no indication from the record that she has input into their evaluations.

12. The Hearing Officers used to be called magistrates and were classified in Pay Grade 10. These positions were upgraded in order to find better qualified individuals. 13. Within the inmate grievance procedure, an inmate files a grievance and the first level response is from the Unit Manager. If the inmate is not satisfied, he then files to the Warden or Administrator of the facility. If the inmate is still not satisfied, he may appeal to the Commissioner, and Grievant reviews a very limited record and issues a written decision.

14. Grievant's review is limited to a paper assessment. (See footnote 3) She does not conduct hearings, take testimony, and/or swear witnesses. (See footnote 4) She seldom reads or listens to the transcript/record developed below, and indeed there does not appear to be much of a record with the inmate grievances. As Grievant testified she receives and reevaluates approximately 1000 grievances a year, and this takes approximately two thirds of her time, her review must be perfunctory at best. (See footnote 5) Her Decisions are approximately a half page long.

15. Grievant is also required to answer constituent mail addressed to the Commissioner. This activity takes approximately one third of her time.

The pertinent sections of the classification specifications at issue are written below:

CORRECTIONS PROGRAM SPECIALIST, SENIOR

Nature of Work

Under general supervision, performs advanced and lead work in the implementation and evaluation of, and technical assistance for, programs/services characteristic of the Division of Corrections or the Regional Jail and Correctional Facility Authority. Performs work ensuring compliance with federal, state, and local regulations relating to the program or service area. Performs the full range of specialized tasks relating to the program area to include analysis and comprehension of program/service regulations, development and implementation of action plans to achieve desired results, coordination and collaboration with inter-and intra-agency personnel, writing program procedure manuals, compilation of regular and special reports on program status, and the assigning and review of work to support staff or other specialists. Although regulations, methods, and procedures in the program area are available, employee may exercise independent judgement and latitude in the work performed. Performs related work as required.

Distinguishing Characteristics

The Corrections Program Specialist, Senior is distinguished from the Corrections Program Specialist by the broader scope of administrative oversight and responsibility for the planning and operational aspects of a program or technical area. In addition, this level may function in a regularly assigned lead or supervisory capacity over professional, paraprofessional, and clerical classes. The Corrections Program Specialist, Senior is distinguished from the Corrections Program Supervisor by the absence of comprehensive responsibility for a particular program or technical area.

Examples of Work

Interprets federal and state laws, regulations, and guidelines for staff.

Consults with other program or technical area staff, supervisors, or managers concerning projects and priorities.

Develops rules, policies, and legislation regarding specific work projects.

Evaluates program or technical area effectiveness.

Informs director of technical area or program deficiencies and recommends improvements.

Reads, reviews, and responds to correspondence or distributes to appropriate staff.

Develops research, information, or training programs.
Writes, edits, or contributes to policy and procedure manuals.

Has contact with federal, state, local program representatives and officials, Division of Corrections or Regional Jail and Correctional Facility Authority management and staff, and legislature.

Plans and develops budget requests and short-and-long-range work plans.

May lead or supervise professional and support staff.

CORRECTIONS HEARING OFFICER (See footnote 6)

Nature of Work

Under general supervision, conducts and renders decisions in formal inmate

disciplinary hearings in a state correctional facility. An employee in this class is responsible for conducting administrative fact finding hearings on reports issued on inmates for alleged commission of misconduct, including criminal acts. Work is performed with considerable independence but is subject to review upon completion by the institution Warden. Work may involve supervising the work of a bailiff and clerk in records preparation, hearing procedures and decision implementation activities. Exercises general independence and judgement in evaluating evidence and rendering decisions based on established and detailed guidelines and regulations. All rulings are appealable to the institution Warden who must approve any ruling involving loss of good time. In the most serious cases, rulings may be reviewed by the Commissioner of Corrections. Performs related work as required.

Examples of Work

Conducts quasi-judicial disciplinary hearings to ensure inmates due process and the full presentation and consideration of all available evidence.

Determines extent of rule violation by evaluating physical evidence, testimony, written statements and written incident reports, and by applying established Department of Corrections guidelines.

Researches existing policies, procedures, rules, and regulations, administrative decisions, legal precedence, court decisions, and criminal procedures, pertaining to cases heard.

Prepares and signs all hearing reports including final decision, supporting documentation and specified or recommended disciplinary guidelines.

Schedules hearings by reviewing correctional officer violation reports; approves witness lists; coordinates schedule based on witness and inmate availability; assembles documents for hearing; prepares or directs the preparation of hearing files and notices; ensures that inmate is aware of legal representation rights.

Reviews and studies Department of Corrections disciplinary actions such as privileges restrictions with correctional officers and/or bailiff to ensure that ruling is properly executed.

May testify in court proceedings.

May provide information or discuss findings with Warden in cases of rule interpretation problem or decision appeal.

May supervise the work of a clerk and/or bailiff in records preparation, hearing procedures and case reporting.

May attend staff meetings to discuss disciplinary procedures, problems and rules.

HEARINGS EXAMINER

Nature of Work

Under limited supervision, performs advanced professional work adjudicating administrative hearings for a state agency. Issues addressed stem from agency regulatory responsibilities such as denial of social and economic services. Researches cases, reviews physical, financial or employment information, and drafts decisions. May supervise some paraprofessional or office support staff. Makes decisions based on admissible evidence. Performs related work as required.

Distinguishing Characteristics

Positions in this classification adjudicate first level appeals for individuals who have been determined to be no longer eligible for financial assistance, disability benefits, licenses or other social benefits. Candidates must be familiar with the federal guidelines and state law, and precedents relevant to the area of jurisdiction.

Examples of Work

Receives notice of departmental actions applying sanctions under regulatory responsibilities; advises parties at interest of right of appeal and appeal procedures.

Presides over and conducts hearing on claims and other appeals of cases relating to services or benefits of the agency.

Travels the state to conduct hearings.

Administers oaths, examines witnesses, and receives testimony in hearing cases; determines credibility of witnesses and weights evidence.

Studies proposed regulations, performs necessary research, prepares reports and makes recommendations based on law and facts, supervises and participates in the drafting of and orders.

Interviews attorneys, company officials, physicians, and the general public; answers correspondence on matters relating to legal matters of the department.

Directs the gathering of additional facts and data to objectively evaluate cases.

Serves as professional legal resource person to the departmental administrative personnel and advises on interpretation of laws and regulations and the problems involved in their application.

May make rulings affecting the competency, relevancy, and the materiality of evidence and motions to be presented and render final decisions, orders, or awards.

Issues and Arguments

Grievant makes several assertions. First, she maintains she is conducting appellate reviews of the grievance decisions, and must be classified as a Hearing Examiner. Second, she notes that since she is reviewing the work of the Hearing Officers, who are classified at a Pay Grade 14, and her position is at a Pay Grade 13, her classification must be upgraded. Additionally, Grievant maintains she did not know she would be required to answer the Commissioner's mail, and the addition of this activity requires her reallocation to a higher Pay Grade. Grievant also makes an equal pay for equal work argument, and asserts it is improper for her to "supervise" employees, the Hearing Officers, when she is in a lower Pay Grade.

The Division of Personnel maintains Grievant is properly classified, and the work she performs is within her class specification. The Division of Personnel notes the clerical work Grievant does for the Commissioner actually dilutes the level of complexity ofGrievant's duties. Additionally, there is no regulation that requires the supervisor to be in a higher pay grade. In this case, CORR deferred the Decision to the undersigned Administrative Law Judge and did not defend or support this grievance.

Discussion

W. Va. Code § 29-6-10 authorizes the Division of Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as CORR which utilize such positions, must adhere to that plan in making their employees' assignments. Toney v. W. Va. Dep't of Health & Human Res., Docket No. 93-HHR-460 (June 17, 1994).

A. Classification

Grievant asserts her position is misclassified, and she has requested her position be reallocated and placed in a higher pay grade. DOP's Rule 3.78 defines "Reallocation" as "[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or level of duties and responsibilities assigned to the position." The key in seeking reallocation is to demonstrate "a significant change in the kind or level of duties and responsibilities." An increase in number of duties and the number of employees supervised does not necessarily establish a need for reallocation. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96- HHR-301 (Mar. 26, 1997). "An increase in the type of duties contemplated in the

[current] class specification, does not require reallocation. The performing of a duty not previously done, but identified within the class specification also does not require reallocation."

Id. Additionally, in order for Grievant to prevail upon a claim of misclassification, she must prove by a preponderance of the evidence that her duties for the relevant period more closely match another cited Personnel classification specification than the one under which she is currently assigned. See generally, Hayes v. W. Va. Dep't of Natural Res., Docket No. NR-88-038 (Mar. 28, 1989). Personnel specifications are to be read in "pyramid fashion," i.e., 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. Atchison v. W. Va. Div. of Health, Docket No. 90-H-444 (Apr. 22, 1991). See generally, Dollison v. W. Va. Dep't of Employment Security, Docket No. 89-ES-101 (Nov. 3, 1989). The key to the analysis is to ascertain whether a grievant's current classification constitutes the "best fit" for her required duties. Simmons v. W. Va. Dep't of Health and Human Res./Div. of Personnel, Docket No. 90-H-433 (Mar. 28, 1991). The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990). Finally, Personnel's interpretation and explanation of the classification specifications at issue should be given great weight unless clearly erroneous. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993). Under the forgoing legal analysis, the West Virginia Supreme Court of Appeals' holding in Blankenship presents employees contesting their current classification and/or pay grade with a substantial obstacle to overcome in attempting to establish that they are currently misclassified.

Further, as stated in Division of Personnel Rule 4.4, "Class Specifications":

> The Director shall consider the class specification in allocating positions and shall interpret it as follows:
>
> (a) Class specifications are descriptive only and are not restrictive. The use of a particular expression of duties, qualifications, requirements, or other attributes shall not be held to exclude others not mentioned.
>
> (b) In determining the class to which any position shall be allocated, the

specifications for each class shall be considered as a whole. The Director shall give consideration to the general duties, specific tasks, responsibilities required, qualifications and relationships to other classes as affording together a picture of the positions that the class intended to include.

(c) A class specification is a general description of the kinds of work characteristics of positions properly allocated to that class and not as prescribing what the duties of any position are nor as limiting the expressed or implied authority of the appointing authority to prescribe or alter the duties of any position.

(d) The fact that all of the actual tasks performed by the incumbent of a position do not appear in the specifications of a class to which the position has been allocated does not mean that the position is necessarily excluded from the class, nor shall any one example of a typical task taken without relation to the other parts of the specification be construed as determining that a position should be allocated to the class.

Lowell Basford, Assistant Director of Classification and Compensation, testified at Levels III and IV that Grievant was correctly classified. He stated Grievant's position did not warrant reallocation because there had been no significant change in her duties, and her current duties were within the Corrections Program Specialist, Senior classification. Mr. Basford testified the Hearing Examiner classification was developed for the employees who conduct hearings and perform all the related work, such as administering oaths, examining witnesses, receiving testimony during the hearing, determining the credibility of witnesses, and weighing the evidence, as well as writing decisions based on law and facts after conducting the proper research. Mr. Basford properly noted Grievant does not perform these tasks. Mr. Basford also noted the Corrections Program Specialist, Senior was the "best fit" because Grievant does perform advanced work in the implementation and coordination of the inmate grievance programs of CORR. He notes Grievant insures the program is in compliance with CORR's regulations, and she collaborates with inter- and intra-agency personnel to complete her tasks. Grievant also insures the grievance database is updated and replies to letters concerning inmates and their concerns. These are duties contemplated by Grievant's classification and the posting. Broaddus, supra. Additionally, Mr. Basford noted many of Grievant's duties are those of clerical or secretarial nature and these duties dilute the overall complexity of Grievant's position.

After a review of Grievant's Position Description Form, Grievant's testimony, and the rules and

regulations governing reallocation, the undersigned Administrative Law Judge finds Grievant is correctly classified as Corrections Program Specialist, Senior, and this classification is the best fit for her duties. While Grievant may perform some duties that are outside her class specification, this is to be expected. Since these are not predominant, this difference is acceptable and covered under the catchall phrase which is the last line of the "Nature of Work" Section. As noted by Mr. Basford, the duties Grievant performs fall within those identified in her classification specification. Further, Grievant has not demonstrated "a significant change in the kind or level of duties and responsibilities" that would indicate a need to reallocate her position. DOP Rule 3.78.

B. Equal pay for equal work

The West Virginia State Personnel Board, a part of Personnel, was created in 1989 to replace the former Civil Service Commission. W. Va. Code § 29-6-6 (1989). The duties and responsibilities of the former Director of the Civil Service Commission were alsotransferred to the Director of Personnel. W. Va. Code § 29-6-9 (1989). Pursuant to W. Va. Code § 29-6-10(1), the State Personnel Board has been delegated the discretionary authority to promulgate, amend, or appeal legislative rules governing the preparation, maintenance and review of a position classification plan for all positions within the classified service based upon a similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class.

The Personnel Board has the same authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2). The Personnel Board has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner. Also, the rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Fike v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR-155 (Aug. 28, 1998); Trimboli v. W. Va. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997); Moore v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-126 (Aug. 26, 1994). See, State ex. rel Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

This standard of entitlement to substantial weight applies when a grievant attempts to review Division of Personnel's interpretation of its own regulations and classificationspecifications to determine if Division of Personnel's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR-052 (July 10, 1995). “There is no question [Division of Personnel] has the authority to establish pay grades within a pay plan.” Stephenson v. W. Va. Bureau of Employment Programs, Docket No. 92-DOP-447 (Aug. 12, 1993).

An employee who challenges the pay grade to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. Blankenship, supra; Bennett v. Dep't of Health and Human Res., Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Res., Docket No. 94-HHR-206 (June 15, 1995); Thibault v. Div. of Rehab. Serv., Docket No. 94- RS-061 (May 31, 1995); Frome v. Dep't of Health and Human Res., Docket No. 94-HHR- 140 (Nov. 29, 1994). See O'Connell v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR-251 (Oct. 13, 1995). The standard of review is the arbitrary and capricious standard. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989).

"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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel.Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Unless a grievant presents sufficient evidence to demonstrate the Division of Personnel's interpretation of the pay grade is clearly wrong or the result of an abuse of discretion, an administrative law judge must give deference to the Division of Personnel's interpretation and find

that the pay grade assignment was correct. Farber, supra; O'Connell, supra.

Grievant has not met her burden of proof and demonstrated the Division of Personnel's decision is arbitrary and capricious. The Division of Personnel has concluded the Hearing Officer and the Hearing Examiner classifications are entitled to higher pay grades because of an increased level of complexity and difficulty. It is noted Grievant does not have to travel, deal with inmates and prison settings directly, and does not have to perform all the duties attendant to conducting a hearing.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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. The predominant duties of the position in question are class-controlling. Broaddus v. W. Va. Div. of Human Serv., Docket Nos. 89-DHS-606, 607, 609 (Aug. 31, 1990).

3. Grievant has not demonstrated by a preponderance of the evidence that she is misclassified or that the position of Corrections Program Specialist, Senior is not the "best fit" for her normal duties, as the majority of the tasks she performs fall within the class specifications for her position.

4. Grievant has not demonstrated by a preponderance of the evidence that her duties warrant reallocation. Kuntz/Wilford v. Dep't of Health and Human Res., Docket No. 96-HHR-301 (Mar. 26, 1997).

5. The Personnel Board has the authority and responsibility to establish a pay plan for all positions within the classified service, guided by the principle of equal pay for equal work. W. Va. Code § 29-6-10(2), and has wide discretion in performing its duties, although it cannot exercise its discretion in an arbitrary or capricious manner.

6. The rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Fike v. W. Va. Dep't of Health and Human Res., Docket No. 95- HHR-155 (Aug. 28, 1998); Trimboli

v. W. Va. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997); Moore v. W. Va. Dep't of Health and Human Res., Docket No. 94-HHR-126 (Aug. 26, 1994). See State ex. rel Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). 7. The Division of Personnel's determination of its own regulations and classification specifications matters is within its expertise, and these determinations are entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985); Farber v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR-052 (July 10, 1995).

8. "There is no question [Division of Personnel] has the authority to establish pay grades within a pay plan." Stephenson v. W. Va. Bureau of Employment Programs, Docket No. 92-DOP-447 (Aug. 12, 1993).

9. An employee who challenges the pay grade or classification to which his or her position is assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1995); Bennett v. Dep't of Health and Human Res., Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Res., Docket No. 94-HHR-206 (June 15, 1995); Thibault v. Div. of Rehab. Serv., Docket No. 94-RS-061 (May 31, 1995); Frome v. Dep't of Health and Human Res., Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dep't of Health and Human Res., Docket No. 95-HHR- 251 (Oct. 13, 1995). The standard of review is the arbitrary and capricious standard. See Kyle v. W. Va. State Bd. of Rehab., Docket No. VR-88-006 (Mar. 28, 1989).

10. Grievant has not met her burden of proof of proof and demonstrated the Division of Personnel's determination about her pay grade was arbitrary and capricious. Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which thegrievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 22, 2004

Footnote: 1

The Level I Decision was held in abeyance to allow Grievant to complete a Position Description Form to submit to the Division of Personnel.

Footnote: 2

Grievant was represented by Jeffrey Blades, Esq., the Division of Corrections was represented by John Boothroyd, Esq., and the Division of Personnel was represented by Darlene Ratliff-Thomas, Assistant Attorney General.

Footnote: 3

Occasionally, Grievant calls an institution to ask for further information, including affidavits. Grievant calls these actions conducting an investigation.

Footnote: 4

Although Grievant can request the tape of the Level I disciplinary grievance hearing, she seldom does this. Test. George Janice, Level IV Hearing.

Footnote: 5

Grievant's testimony on the amount of time these grievances takes has varied through these proceedings. At one point she testified the grievances took one third of her time. Since at Level IV she stated they took two thirds of her time, this is the number the undersigned Administrative Law Judge used. In scrutinizing the numbers, it appears Grievant gets approximately 20 grievances a week, and she would have approximately 25 hours to review these 20 records, investigate the issues and facts, call for further materials, review this additional material, write the decision, and then copy and mail it.

Footnote: 6

At Level IV, Grievant asserted she should be classified as either a Hearing Officer or Hearing Examiner, but during the Level III hearing and in her Level IV proposals Grievant only addressed the Hearing Examiner classification. Accordingly, this class specification is only included to demonstrate the duties of the employees Grievant states she "supervises."