NANCY CUTHBERT,

_____ Grievant,

v. Docket No. 98-RS-514

DIVISION OF REHABILITATION SERVICES,

Respondent.

DECISION

Nancy Cuthbert (Grievant) is employed by the West Virginia Division of Rehabilitation Services (DRS), as a Rehabilitation Office Supervisor at DRS' Fayetteville branch office. She filed this action on June 12, 1998, alleging that she was wrongly denied the position of Rehabilitation Office Supervisor of the Beckley branch office. This grievance was denied at Level I, on July 14, 1998, by Immediate Supervisor Judy Riffe. This grievance was denied at Level II, on July 21, 1998, by John P. Harrison. This grievance was appealed to Level III, and a hearing was conducted on October 2, 1998, before Grievance Evaluator Michael T. Smith. At this hearing, Grievant was represented by Jerry A. Wright, Esq., and DRS was represented by Senior Assistant Attorney General Robert Nunley. This grievance was denied at Level III on December 23, 1998. Grievant appealed her claim to Level IV, where the parties agreed to submit this grievance on the record developed at the lower levels. The parties were given until April 16, 1998, to submit proposed findings of fact and conclusion of law, and Grievant did so. This grievance became mature for decision on that date.

The following Findings of Fact pertinent to the resolution of this matter have beendetermined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant has been employed at DRS for some 22 years. She is a Rehabilitation Office

Supervisor at DRS' Fayetteville branch office.

2. On March 13, 1998, DRS posted the position of Rehabilitation Office Supervisor for the Beckley branch office.

3. The position required a Masters degree in Rehabilitation counseling, or substitute experience in vocational rehabilitation, including two years in an administrative or supervisory capacity.

4. Grievant, Annette Jennings (Jennings), and Darla Waldren applied for the position. All three applicants met the minimum requirements of the posting, and were employed by DRS.

5. The applicants were interviewed by District Manager Judy Riffe (Riffe) and her immediate supervisor, Senior Manager of Client Services Charles Lovely (Lovely). Riffe had the primary decision making responsibility.

6. Riffe and Lovely gave the greatest weight to an interview they conducted with the applicants. The interview consisted of a prepared set of questions. Each candidate was asked the same questions, and each was scored on a range of one to five points for each question.

7. Riffe assigned Jennings an interview score of 65 and one-half, and Grievant 58. Lovely assigned Jennings an interview score of 70, and Grievant 59.

8. Riffe and Lovely gave the second greatest weight to supervisory experience,and the third greatest weight to educational achievement. Community networking received the fourth greatest weight, and knowledge of leadership and management the fifth greatest weight. Riffe considered seniority as a factor.

9. Of the three candidates, Grievant and Jennings had the two highest scores.

10. Although it was “a close contest” between Grievant and Jennings, Jennings was selected for the position.

11. Grievant had approximately 22 years of experience with DRS, including seven years as a Rehabilitation Office Supervisor. She had a Bachelor's degree in education. Her evaluations were all satisfactory or better. She had never been disciplined. She had attended a considerable number of seminars, training sessions, and conferences. 12. Jennings had approximately two years of experience with DRS, and 14 years of supervisory experience, having been director of social work at Raleigh General Hospital. She had a Masters degree in counseling and guidance, was a licensed professional counselor and certified social worker.

Her evaluations were all satisfactory or better. She had never been disciplined. She had attended fewer seminars, training sessions, and conferences than Grievant.

13. Riffe and Lovely felt that Jennings was the most suitable and most qualified candidate, based on her supervisory experience, educational background, professional certification, extensive community networking, and her responses to interview questions regarding community networking, leadership, and management.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden ofproving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant contends that the decision not to select her for the position of Rehabilitation Office Supervisor of the Beckley branch office was arbitrary and capricious; that she was both the most qualified and the most senior candidate; and that DRS did not properly apply statutory selection criteria regarding seniority.

Unless proven arbitrary or capricious, or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

In applying the "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v.

Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg,169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). Furthermore, in matters of non-selection, the grievance process is not that of a "super-interview," but rather serves as a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

Generally, an 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).

Grievant argues that she was the most qualified and most senior candidate for the Beckley Rehabilitation Office Supervisor position. Both quality of service and length of service are to be considered in filling such a position. "Whenever practical and in the best interest of the service, an appointing authority shall fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the career service upon the basis of the employees' demonstrated capacity and quality and length of service. . . .". W. Va. Administrative Rule, Section 11.01 (July 1, 1998).

Grievant contends that DRS did not properly apply W. Va. Code § 29-6-10(4), which provides as follows:

> **When any benefit such as a promotion, wage increase ortransfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit.**

Grievant argues that the phrase "substantially equal or similar qualifications" controls here, and that because Grievant and Jennings have similar qualifications, the statute

mandates that Grievant's 20 years greater seniority entitle her to the position. While it is true that their qualifications were similar, as it was a "close contest" between them, the statute only commands that "consideration shall be given" to seniority, which is "a factor." The record reflects that, contrary to Grievant's assertion, Riffe, who had primary decision making responsibility, gave consideration to Grievant's seniority as a factor, calling it "important, but. . . not the sole determining factor."

Seniority is merely a factor to be considered, and is not determinative. An employer certainly retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dep't of Admin., Docket No. 96-DOA-027 (June 7, 1996); See Blake v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-416 (May 1, 1998). That is what happened here.

The record reflects that Riffe and Lovely reasonably considered Jennings to be the applicant with the greatest qualifications. In the interview, which was weighted most heavily, both interviewers decided that Jennings outscored Grievant by a substantial margin. Jennings had eight more years of supervisory experience, the second mostimportant factor, than Grievant. Jennings' Masters degree, although in a different but closely related field, prevailed over Grievant's Bachelor's degree in a less related field. Based upon her superior answers to interview questions on community networking, leadership, and management, which carried the fourth greatest weight, Jennings won this factor. Her two professional licenses also weighed in her favor.

As noted above, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull, supra. Riffe and Lovely reasonably concluded that, although it was "a close call," Jennings was the best candidate, and the undersigned declines to disturb their decision. From the record in this grievance, it is clear that the selection of Jennings for the Beckley Rehabilitation Office Supervisor position, instead of Grievant, was not arbitrary and capricious, or clearly wrong.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1.

In a non-disciplinary grievance, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or jobtermination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit. W. Va. Code § 29-6-10(4).

3. Seniority is a factor to be considered and is not determinative. An employer retains the discretion to select a less-senior applicant with greater qualifications. Lewis v. W. Va. Dep't of Admin., Docket No. 96-DOA-027 (June 7, 1996), See Blake v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-416 (May 1, 1998).

4. Unless proven arbitrary or capricious, or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

5. In applying the "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286. Hill and Cyrus v. Kanawha County Bd. of Educ.,Docket No. 96-20-362 (Jan. 30, 1997). In matters of non-selection, the grievance process is not that of a "super-interview," but rather

serves as review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). An agency's decision as to who is the most qualified applicant will be upheld unless shown by the Grievant to be arbitrary and capricious or clearly wrong. Id.

6. Grievant failed to prove, by a preponderance of the evidence, that Respondent's failure to select her for the position of Rehabilitation Office Supervisor was in violation of W. Va. Code § 29-6-10(4), or was arbitrary and capricious or clearly wrong.

Accordingly, the 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 the grievance 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.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated April 22, 1999