VINCEN WAYNE WHITE,

_____Grievant,

v. Docket No. 98-CORR-423

WEST VIRGINIA DIVISION OF CORRECTIONS/
ANTHONY CORRECTIONAL CENTER,

Respondent.

DECISION

Vincen Wayne White (Grievant) is employed by the West Virginia Division of Corrections (CORR), as a Chief Correctional Officer, holding the classification Correctional Officer VI (CO VI), and the rank of Captain, at the Anthony Correctional Center (ACC). He filed this action on September 10, 1998, alleging that he was wrongly denied promotion to Chief Correctional Officer, CO VII, and the rank of Major (Chief Correctional Officer/Major). This grievance was denied at Level I, on September 15, 1998, by Deputy Warden Mark Williamson (Williamson). This grievance was denied at Level II, also on September 15, 1998, again by Williamson. This grievance was appealed to Level III, and a hearing was conducted on October 5, 1998, before Hearing Evaluator Clinton Semmler. At this hearing, Grievant was represented by Bader C. Giggenbach, Esq., and CORR was represented by ACC Warden Scott Patterson (Patterson). This grievance was denied at Level III, on October 20, 1998, by Commissioner William K. Davis. Grievant appealed his claim to Level IV, and a Level IV hearing was held on December 22, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was again represented by Bader C. Giggenbach, Esq., and CORR was represented by AssistantAttorney General Leslie K. Tyree. The parties requested one week to decide whether to submit proposed findings of fact and conclusions of law. By letter dated

January 11, 1999, the undersigned gave the parties until January 20, 1998, to submit such proposals. The parties declined to submit such proposals, and this grievance became mature for decision at that time.

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

FINDINGS OF FACT

1. Grievant has been employed at ACC as a Correctional Officer (CO) for more than 27 years. He has served as Chief Correctional Officer for some 25 years. He has received no disciplinary actions. (See footnote 1) **Grievant is currently a CO VI, and is ranked as Captain.**

2. CORR's annual evaluations of Grievant used six categories: unsatisfactory, marginal, satisfactory, good, very good, and exceptional. Grievant's evaluations included three "good' ratings. All of his other evaluations rated him "very good" or "exceptional." CORR has not evaluated Grievant since 1991.

3. Grievant is viewed by his peers and subordinates as a very highly qualified CO.

4. Grievant is a veteran of the armed forces of the United States, having served for two years in Panama, in the Army infantry, during the Vietnam era. He was honorablydischarged.

5. Grievant formerly held the rank of major at ACC, until positions there were reclassified, based on the number of inmates held at ACC.

6. On April 9, 1998, due to the expansion of ACC, CORR posted statewide a vacancy at ACC for a Chief Correctional Officer, CO VII, ranked as Major. The deadline for applications was April 22, 1998.

7. Grievant was the only applicant. He was told by then-Superintendent James Rubenstein that he would receive the position if he passed the test. Grievant passed the test, but did not receive the position.

8. Patterson became Warden (See footnote 2) **of ACC on or about June 1, 1998. He re-posted the position on June 12, 1998, to obtain a larger pool of candidates. Seven individuals applied, and four, including Grievant, passed the test. Lieutenant Tim Murphy (Murphy) was selected to fill the new position.**

9. Murphy declined the position and, on October 9, 1998, it was posted a third time. (See footnote 3)

10. Murphy is classified as a CO V. His evaluations were not considered as part of the selection process. Murphy has never been a Chief Correctional Officer, has never been ranked as a Major, and has never worked at ACC. The record is silent as to hisdisciplinary record.

11. CORR's policy mandates a selection process consisting of a three member review board, which assesses candidates in the areas of a promotion test (10 quality points maximum), seniority (10 quality points maximum), in-service training (five quality points maximum), apprenticeship (five quality points maximum), and interview/exercises (50 quality points maximum), so that a perfect candidate would score 80 quality points.

12. The promotion test has a maximum raw score of 100, and CORR policy mandates that a candidate's score be divided by ten to determine his or her number of quality points.

13. In the seniority category, a candidate earns one quality point for every two years of seniority, to a maximum of ten quality points for twenty years of seniority.

14. The interview/exercises consisted of an interview with ten questions, worth three points each, for a possible total of 30 quality points, and written exercises. The written exercises were worth a possible 20 quality points.

15. CORR's policy requires that each interview question must have a range of responses prepared to assist board members in consistent scoring.

16. CORR's policy provides review boards with an example of such a range of responses, designated Policy Directive 413.01, Attachment "A". This document contains a sample question worth five points. It gives two examples of answers that would merit four or five points, two examples of answers that would merit two or three points, and two examples of answers that would merit zero or one point.

17. CORR's policy also requires use of a specific score sheet for theinterview/exercise portion of the selection process, designated Policy Directive 413.01, Attachment "B," and an "Accumulative Tally Sheet," designated Policy Directive 413.01, Attachment "C."

18. CORR's policy requires that each applicant must be provided written notice prior to the interview. **(See footnote 4)**

19. CORR's policy requires that each written exercise must be completely objective and measurable through a point system.

20. CORR's policy requires that each written exercise be scored and signed by all

members of the review board.

21. CORR's policy requires that the candidate with the highest point total must be selected.

22. CORR's policy requires that the performance evaluations of applicants have a final rating of at least satisfactory for the previous two performance evaluation periods.

23. The review board for the second posting of the Chief Correctional Officer/Major position consisted of Patterson, the Commissioner's representative, Karen H. Shumaker (Shumaker), and the Corrections Academy representative, Colonel James Randy Perdue. Warden Patterson chaired the committee.

24. Murphy scored seven and four-tenths quality points on the promotion test,two and one-half quality points for seniority, (See footnote 5) five quality points for in-service training, five quality points for apprenticeship programs, 28 quality points for his interview, and 15 quality points for his written exercise, for a total of 63 of the 80 possible quality points.

25. Grievant scored eight quality points on the promotion test, ten quality points for seniority, five quality points for in-service training, one quality point for apprenticeship programs, 21 quality points for his interview, and nine quality points for his written exercise, for a total of 53 of the 80 possible quality points.

26. Of the four candidates, Grievant and Murphy had the two highest scores.

27. CORR failed to provide the review board with a range of responses for each question to assist board members in consistent scoring.

28. CORR failed to provide each applicant with written notice prior to his (See footnote 6) interview.

29. CORR failed to provide that each exercise was completely objective and measurable through a point system.

30. The review board members failed to individually score and sign each exercise.

___31.___CORR failed to compare the performance evaluations of the candidates for the Chief Correctional Officer/Major position. 32. Grievant received no veterans' preference points during any part of the selection process for the Major position.

___33. At a meeting attended by Mark Williamson and Superintendent Patterson, someone remarked that ACC had a lot of old dinosaurs. Williamson responded "[y]ou know what

happened to the dinosaurs; they became extinct."

34. Grievant raised his discrimination claim, for the first time, at Level IV.

DISCUSSION

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. 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 him as Chief Correctional Officer/Major was arbitrary and capricious, in that he was both the most qualified and the most senior candidate, and that, as a veteran, he was entitled to additional points on his promotion test. Grievant also argued, for the first time at Level IV, that he was the victim of age discrimination. Grievant seeks instatement into the Chief Correctional Officer/Majorposition and backpay from the first posting or, in the alternative, the second posting. Corrections responds that its selection process was applied equally to all applicants, and that veterans are only awarded extra points on entering the classified service, and not on every subsequent test.

DISCRIMINATION

___Grievant argues that he was subjected to age discrimination as part of the selection process for the Chief Correctional Officer/Major position. This new claim was first raised at Level IV. Grievant bases this claim on remarks made at a meeting attended by Williamson and Warden Patterson, where someone remarked that ACC had a lot of old dinosaurs, and Williamson responded "[y]ou know what happened to the dinosaurs; they became extinct." These remarks were testified to by three witnesses at the Level IV hearing, and this testimony was not contradicted by Patterson. Grievant does not claim that he was treated differently

than one or more specified similarly situated individuals.

When new claims are raised at Level IV, the following statutes govern:

> **Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to the evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance is measured from the date of such ruling. W. Va. Code § 29-6A-3(j).**

Similarly, "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." W. Va. Code § 29-6A-3(k).

The West Virginia Supreme Court of Appeals and this Grievance Board have consistently held that a grievance may not be granted at Level IV unless the theory upon which relief was awarded was developed at the lower levels. Hess v. W. Va. Dept. of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993), Nebel v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-422 (May 8, 1998), Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995), Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (April 13, 1995). As in this case, the lower level transcripts in Hess revealed no discussion of evidence related to the grievant's new theory, and no decision by any hearing examiner to incorporate the new issue into the grievance. CORR has not been afforded an opportunity to develop evidence concerning Grievant's new theory. Accordingly, Grievant will not be permitted to raise his age discrimination claim for the first time at Level IV.

VETERANS PREFERENCE POINTS

Grievant next argues that, as a veteran, he was entitled to additional points on his promotion examination. Grievant is a veteran of the armed forces of the United States, having served for two years in Panama, in the Army infantry, during the Vietnam era. He was honorably discharged.

W. Va. Code § 29-6-10, entitled Rules of Division, states:

> **The board shall have the authority to promulgate, amend orrepeal rules, according to chapter twenty-nine-a [§ 29A-1-1 et seq.] of**

> **this code, to implement the provisions of this article:**
>
> **(3) For open competitive examinations to test the relative fitness of applicants for the respective positions in the classified service. Such examinations need not be held until after the rules have been adopted, the service classified and a pay plan established, but shall be held not later than one year after this article takes effect. Such examinations shall be announced publicly at least fifteen days in advance of the date fixed for the filing of applications therefor, and may be advertised through the press, radio and other media. The director may, however, in his or her discretion, continue to receive applications and examine candidates long enough to assure a sufficient number of eligibles to meet the needs of the service and may add the names of successful candidates to existing eligible lists in accordance with their respective ratings.**
>
> **<u>An additional five points shall be awarded to the score of any examination successfully completed by a veteran.</u> A disabled veteran shall be entitled to an additional ten points, rather than five points as aforesaid, upon successful completion of any examination. (emphasis added)**

The Administrative Rule of the West Virginia Division of Personnel promulgated under the authority of this statute defines veterans' preference points as follows:

> **Veterans' Preference Points: An additional 5 points added to the final passing score of any veteran as defined by this rule. An additional 5 points are available to those veterans who also have a current and compensable service connected disability or who have received a Purple Heart award. To receive veterans' preference points, separation from active duty must have been under honorable conditions. 143 CSR 3.100.**

This preference is reiterated at 143 CSR 6.6.(b): "[a]ny veteran (as defined in Section 3 of this Rule) who claims veteran's preference and who has made a passing grade in an examination shall have five points added to his or her final earned score."

A veteran is defined as:

> **Any person who fulfills the requirements of one of the following conditions:. . .**

> **b. Served on active duty anytime between July 2, 1955 and October 14, 1976 or a Reservist called to active duty between February 1, 1955 and October 14, 1976 and who served for more than 180 days;**

> **c. Entered on active duty anytime between October 15, 1976 and September 7, 1980 or a Reservist who entered on active duty between October 15, 1976 and October 15, 1982 and received a Campaign Badge or Expeditionary Medal or is a disabled veteran. . . 143 CSR 3.99.**

Grievant meets this definition.

Section 6 of the Rule, entitled Applications and Examinations, provides as follows:

> **(a) Examinations for entrance in the classified service shall be conducted on an open competitive basis. Examinations shall be practical in nature, shall be constructed to reveal the capacity of the applicant for the particular position for which he or she is competing, and shall be rated objectively. . .**

> **(b) Examinations shall, to the extent possible, be developed on the basis of objective analysis of the job. . .**

> **c) All examination scoring procedures shall be objective. Test weights shall be established to reflect the relative importance of duties performed in the job class. Test weighting and scoring procedures shall be applied consistently to the examinations of all applicants.**

This Grievance Board has not previously decided this issue, and the undersigned has been unable to find any instance of veterans preference points being addressed by the West Virginia Supreme Court of Appeals. However, the language of the statute seemsclear: in any successfully completed examination (See footnote 7) **to test the relative fitness of applicants for a position in the classified service, an honorably discharged veteran shall have either five or ten points added to his or her final score.**

CORR argued, during the Level IV hearing, that veterans preference points are only awarded on entering the classified service system, and not on every subsequent examination.

However, CORR presented no evidence to support this argument, and cited no statute, regulation, policy, or rule to support it. It does not appear to be clearly supported by the language of the statute and regulations. The only language tending to support CORR's theory occurs in 143 CSR 6.1(a) (above), which refers to "[e]xaminations for entrance in the classified service." However, this general language regarding entrance examinations likely does not control over the several, specific references to veterans' preference points in the regulations, and in the statute, which twice refers to "any examination." It is a general rule of statutory construction that a specific statute will be given precedence over a general statute relating to the same subject matter if the two cannot be reconciled. UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984). For example, a general venue provision "must yield to the more specific." Vance v. Ritchie, 178 W. Va. 155, 157, 358 S.E.2d 239, 241 (1987).

However, because the interpretation of the above-cited statutory and regulatory provisions urged by CORR appears to be the basis for the Division of Personnel's existing practice of awarding veterans preference points only on examinations for entry into theclassified service system, and because a decision on this issue is not necessary to the outcome of this grievance, the issue of whether Grievant should have been awarded veterans preference points will not be decided. The Division of Personnel and CORR are urged to consider clarifying this issue in future rulemaking, in order to avoid additional confusion over the awarding of veterans preference points.

ARBITRARY AND CAPRICIOUS

Grievant contends that the decision not to select him as Major was arbitrary and capricious, in that CORR did not properly apply statutory selection criteria regarding seniority, and because CORR failed to follow its own policies concerning the selection of personnel for promotion.

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 he was the most qualified and most senior candidate for the Chief Correctional Officer/Major 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).

From the record in this grievance, it is clear that the selection of Murphy for the Chief Correctional Officer/Major position, instead of Grievant, was arbitrary and capricious. Although, as CORR stipulated, both candidates were qualified for the position, Grievanthad at least three years, and perhaps as many as 22 years, (See footnote 8) **greater seniority than Murphy.**

> **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 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. W. Va. Code § 29-6-10(4).** (See footnote 9)

Of course, 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). In this case, however, the less-senior candidate, Murphy, did not have greater qualifications. Lewis, supra. Grievant is ranked as a Captain, while Murphy is ranked as a Lieutenant. Grievant is classified as a CO VI, while Murphy is classified as a CO V. Grievant has served as a Chief Correctional Officer for some 25 years, and the record does not reflect that Murphy has ever served as a Chief Correctional Officer. Grievant has worked at ACC, where the Chief Correctional Officer/Major position is to be located, forsome 27 years. Murphy has never worked at ACC. Grievant is viewed by his peers and subordinates as a very highly qualified CO. (See footnote 10) **A candidate who worked with the crew he would be supervising on a day-to-day basis for several years, was well respected by the crew, and had more supervisory experience, may reasonably be found to be the most qualified candidate. Blake v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 97- DOH-416 (May 1, 1998), Lewis, supra.**

Grievant has previously served as a Major, and the record does not reflect that Murphy has ever served as a Major. Nearly all of Grievant's evaluations rated him "very good" or "exceptional." The record is silent as to Murphy's evaluations. In fact, the only evidence that Murphy is more qualified than Grievant comes from the scores they were assigned as part of CORR's selection process. For reasons set forth below, those scores were not reliable indicators of the relative qualifications of the two candidates.

In arguing that the selection process for the Chief Correctional Officer/Major position was arbitrary and capricious, Grievant also alleges that CORR failed to follow its own policies concerning the selection of personnel for promotion. Grievant's argument is well taken.

Division of Personnel policies, as noted above, require that:

> **c) All examination scoring procedures shall be objective. Testweights shall be established to reflect the relative importance of duties performed in the job class. Test weighting and scoring procedures shall be applied consistently to the examinations of all applicants.**

CORR's policies, as well, require that examination scoring procedures be objective. Specifically, CORR's policies require that each written exercise must be completely objective and measurable through a point system, Policy Directive 413.01 §2.05 B. 4.c., and that each interview question must have a range of responses prepared to assist board members in consistent scoring. Policy Directive 413.01 §2.05 B. 3.

The review board's scoring of the interviews for the Chief Correctional Officer/Major position illustrates the need for such policies. Both Patterson and Shumaker gave Murphy perfect scores of three points in each of the 10 questions of the interview. They gave Grievant much lower scores, and Patterson did not give Grievant a score of three for any question. A comparison of Grievant's and Murphy's answers to the interview questions, and the scores assigned to those answers, shows the need for some means of assuring objective, consistent scoring.

Question Six of the interview was: "It is brought to your attention that a staff member is negatively talking about another staff member. What do you do?" Interviewer Patterson's notes recorded Murphy's answer as "[c]all the person in + counsel them or delegate to level of vested authority;[.]" Patterson awarded Murphy three points for this answer. Grievant answered "[c]all in staff member + address it w/staff member; get them both together. If can't work it out, take corrective action." Patterson awarded Grievant one point for this answer.

Question Nine of the interview was: "[w]hat one leadership quality do you feel best exemplifies your leadership abilities? Explain." Interviewer Patterson's notes recorded Murphy's answer as "[d]edication. Weakness = takes criticism poorly." Patterson awarded Murphy three points for this answer. Grievant answered "[d]on't expect subordinate to do anything I wouldn't do. Procrastinating on paperwork is a weakness." Patterson awarded Grievant one point for this answer.

Question Ten of the interview was: "[i]f selected as Chief Correctional Officer, what goals or objectives would you establish?" Interviewer Patterson's notes recorded Murphy's answer as "[w]ould see what needs are before setting goals." Patterson awarded Murphy three points for this answer. Grievant answered "[w]ant ACC to work better as a unit. CCO can help that along by setting example." Patterson awarded Grievant one point for this answer.

Question Seven of the interview was: "Policy Directive 400.00 is Employee Standards of Conduct and Performance. Explain what this policy means." Interviewer Patterson's notes recorded Murphy's answer as "[s]ets conduct standards for employee; three categories of rules and punishments;" Patterson awarded Murphy three points for this answer. Grievant answered "[o]utlines expected conduct; describes less v. more serious infractions; progressive discipline = verb, writ, susp, dism; can skip if endangers facility security." Patterson awarded Grievant two points for this answer.

Question Three of the interview was: "[h]ow do you promote development for employees that work under your supervision?" Corrections Academy representative Perdue's notes describe Murphy's answer as "[s]ame has no clue or don't understandquestion. He bs'd his way through." Interviewer Perdue awarded Murphy one point for his answer. Interviewer Patterson recorded Murphy's answer as "[f]air + honest + firm; apprenticeship program; develop post orders; establish trust w/subordinates; promote teamwork." Patterson awarded Murphy three points for this answer. Patterson recorded Grievant's answer as "[d]aily contact w/ subord; improving/recognizing weaknesses; set example; (talked about TQM when asked);[.]" Patterson awarded Grievant one point for this answer.

Although reasonable people could differ on the grading of these answers, the undersigned finds it impossible to believe that Grievant's answers, which were often more responsive, more knowledgeable, and more complete, merited only one-third the points that Murphy's answers did. When the representative of the Corrections Academy finds an answer to be "bs," and another board member gives it a perfect score, some means of assuring objective and consistent scoring is plainly needed. CORR's failure to follow its own policies regarding objective and consistent scoring resulted in scores that were not reliable indicators of the relative qualifications of the two candidates. It is noteworthy that CORR's subjective and inconsistent scoring was outcome-determinative: Grievant led Murphy by a score of 24 quality points to 19.9 at the beginning of the interview/exercise portion of the selection process. During the interview/exercise, as a result of the sort of scoring shown above, Grievant scored 30 quality points to Murphy's 43. CORR violated its own policy when it failed to provide the review board with a range of responses for each question to assist board members in objective and consistent scoring.

Patterson's testimony at Level IV confirmed that CORR failed to follow its ownpolicies. (See footnote 11) He conceded that the selection questions were not completely objective, and that no other review board members helped him score the interviews and exercises. Patterson testified that he could score the interviews and exercises any way he wanted to, based on his own standards, stating "it's all subjective." Warden Patterson also testified that he didn't know that W. Va. Code § 29-6-10(4) mandates that seniority be considered in determining which of two similarly qualified candidates shall be awarded promotion.

It is perplexing that Patterson failed to employ Policy Directive 413.01, Attachment "A", which is intended to provide review boards with a range of responses, to assist in consistent scoring. Its use is plainly mandated by CORR's policy. Attachment "A" is stapled within CORR's Policy Directive 413.01, after the text of the policy, but before the score sheet for the interview/exercise portion of the selection process, designated Policy Directive 413.01, Attachment "B," and the "Accumulative Tally Sheet," designated Policy Directive 413.01, Attachment "C," which are also required to be used by the policy. For whatever reason, Patterson properly used Attachments "B" and "C," but failed to use Attachment "A."

Grievant also proved, by a preponderance of the evidence, that CORR failed to provide each applicant with written notice prior to his interview, failed to provide that each exercise was completely objective, failed to provide that each exercise was scored and signed by all members of the review board, and failed to determine that the performance evaluations of the candidates had a final rating of at least satisfactory for the previous twoperformance evaluation periods. These are all violations of CORR's policy.

An administrative body must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959), Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). This Grievance Board has held that the professional employees of university and county boards of education are entitled to rely on the policies established by their employers. Pauls v. Bd. of Directors/West Liberty State College, Docket No. 98-BOD-242 (Nov. 30, 1998), Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271, (Oct. 15, 1997), Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997), Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995). The reasoning behind this principle also applies to CORR, which shall be

required to follow its own policies.

CORR failed to do so. This resulted in a selection process which did not rely on relevant factors that were intended to be considered, reached a decision that is so implausible that it cannot be ascribed to a difference of view, and was not legally sufficient. CORR has failed to explain why Grievant was not the most qualified candidate for the Chief Correctional Officer/Major position. From the record in this grievance, it is clear that Grievant was, by a preponderance of the evidence, both the most senior and the most qualified candidate for the Chief Correctional Officer/Major position, and CORR's decision not to select him for the position was arbitrary and capricious.

As relief, Grievant seeks instatement into the Chief Correctional Officer/Major position and backpay from the date of the first posting or, in the alternative, the second posting. The West Virginia Supreme Court of Appeals recently ruled that when a schoolboard posts a notice of vacancy, and one or more qualified applicants apply, the board must select an applicant from those who applied during the posting period, even if only one candidate applied. Jones v. Mingo County Bd. of Educ., No. 24968 (Dec. 15, 1998). This is the factual scenario Grievant faced during the first posting.

The Court's ruling was based on the following language in W. Va. Code § 18A-4-7a: "[i]f one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the posting period." Unfortunately for Grievant, W. Va. Code § 29-6-24, which controls the posting of job openings within the classified service of the state, contains no similar language. It is also noted that Grievant did not file a grievance when he was not promoted pursuant to the first posting.

Accordingly, Grievant will be instated to the Chief Correctional Officer/Major position, effective the date Murphy was selected for the position pursuant to the second posting; and awarded all back pay and benefits, including interest, to which he would have been entitled as Chief Correctional Officer/Major. See Frantz/Devaul v. Employment Security, Docket No. 89-ES-050/186 (July 25, 1989).

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. ofEduc., 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 grievance may not be granted at Level IV unless the theory upon which relief was awarded was developed at the lower levels, or unless the respondent consents to the new theory being raised at Level IV. Hess v. W. Va. Dept. of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993), Nebel v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-422 (May 8, 1998), Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995), Crawford v. Mercer County Bd. of Educ., Docket No. 94- 27-958 (April 13, 1995).

3. Grievant failed to raise his age discrimination claim before Level IV.

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. Thibault, supra.

6. 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).

7. 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 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. W. Va. Code § 29-6-10(4).

8. 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). 9. CORR must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959), Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977), See Pauls v. Bd. of Directors/West Liberty State College, Docket No. 98-BOD-242 (Nov. 30, 1998), Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271, (Oct. 15, 1997), Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997), Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995).

10. CORR failed to comply with the requirements of its own policies by omitting several procedures which were designed to assure objective and consistent scoring during the selection process for the Chief Correctional Officer/Major position. See CORR Policy Directive 413.01.

11. Grievant was, by a preponderance of the evidence, both the most senior and the most qualified candidate for the Chief Correctional Officer/Major position, and CORR's decision not to select him for the position was arbitrary and capricious.

Accordingly, the grievance is GRANTED, and Respondent CORR is ORDERED to instate Grievant to the Chief Correctional Officer/Major position, effective the date Murphy was selected for the position; and award him all back pay and benefits, including interest, to which would have been entitled as Chief Correctional Officer/Major.

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 EmployeesGrievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated February 3, 1999

Footnote: 1

CORR's Policy Directive 413.01, which establishes CORR's policy for promotion, does not provide for consideration of a candidate's disciplinary record as part of its criteria for selection of officers for promotion. However, because Grievant presented evidence at Level IV as to his disciplinary record, it has been noted in this decision.

Footnote: 2 ***Due to the expansion of ACC, the title of its highest official changed from Superintendent to Warden.***

Footnote: 3 ***This selection resulting from this posting is the subject of a pending grievance.***

Footnote: 4 ***CORR's Policy Directive 413.01-2.05-B.4 discusses procedures for conducting the written exercises. However, the requirement that written notice be provided prior to an interview is contained within it, at Policy Directive 413.01-2.05-B.4a.***

Footnote: 5 ***It is unclear from the record how this score, which reflects five years seniority, was obtained. Grievant stated on his Level I grievance form that, upon information and belief, Murphy had some 24 years***

experience. The record contains no other evidence of Murphy's seniority, and he was not called as a witness.

Footnote: 6 ***All four candidates were male.***

Footnote: 7 ***143 CSR §3, entitled "Definitions," defines "Assembled Examination" and "Unassembled Examination," but fails to define "Examination."***

Footnote: 8 ***Reference is made to Footnote 5.***

Footnote: 9 ***It is noted that CORR's selection policy, Policy Directive 413.01, does not, in all cases, result in the comparison of seniority mandated by W. Va. Code § 29-6- 10(4). This is because CORR's policy limits consideration of an applicant's seniority to 20 years. This failure is evident in this grievance, where Grievant's 27 years of seniority was effectively reduced to 20 years by CORR's policy.***

Footnote: 10 ***At Level IV, Donald Taylor, a retired Deputy Chief Correctional Officer who worked under Grievant for 21 years, testified that he was "absolutely qualified" for the Chief Correctional Officer/Major position. Grievant also submitted glowing testimonial letters from ten employees of ACC. Although hearsay, these letters are entitled to some weight, particularly in the absence of any evidence that Murphy is viewed positively by his co-workers.***

Footnote: 11 ***Warden Patterson was called as a witness by Grievant. Respondent CORR called no witnesses.***