**TOMMY BURCHELL,**

**Grievant,**

**v.**

**DOCKET NO. 02-HEPC-139**

**HIGHER EDUCATION POLICY**

**COMMISSION/MARSHALL UNIVERSITY,**

**Respondent.**

**D E C I S I O N**

Grievant, Tommy Burchell, filed the following Statement of Grievance on March 28, 2002, with the Higher Education Policy Commission/Marshall University ("Marshall"), stating, "Marshall violated 18b-7-1(d) [sic] of the State Code. I feel that I am the most qualified and most senior candidate for the position." Relief Sought was "promotion to the PG -11 Painter's Position."

This grievance was denied at all lower levels, and Grievant appealed to Level IV on May 16, 2002. A Level IV hearing was held in the Grievance Board's Charleston, West Virginia, office on July 11, 2002. At the request of the parties, a view of the hands-on exhibit was conducted at Marshall on July 15, 2002. (See footnote 1) This matter became mature for decision on September 6, 2002, upon receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Lt. Terrence E. Olson, and Marshall was represented by Jenndonnae Houdyschell, Assistant Attorney General.

**Issues and Arguments**

Grievant asserts he was the most qualified and most senior candidate for the painter's position, and he was discriminated against when he was not selected. The statutory provision Grievant relies upon, W. Va. Code §18B-7-1(d), states as follows:

A nonexempt classified employee, including a nonexempt employee who has not

> accumulated a minimum total of one thousand forty hours during the calendar year or whose contract does not extend over at least nine months of a calendar year, who meets the minimum qualifications for a job opening at the institution where the employee is currently employed, whether the job be a lateral transfer or a promotion, and applies for same shall be transferred or promoted before a new person is hired unless such hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. If more than one qualified, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at the state institution of higher education shall be awarded the position.

Respondent contends Jarrel McSweeney was the most qualified candidate for the position; therefore, it was not bound to award the position to Grievant based upon his seniority. Respondent notes this Code Section requires the positions be awarded to the "best-qualified nonexempt classified employee," and seniority only comes into play whenever the top candidates are equally qualified for the position in question. Respondent asserts that while Grievant was more senior than the successful applicant, he was not the most qualified for the position, and the best applicant was selected.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Grievant has been employed by Marshall since 1983.

2. In February 2002, Respondent posted a vacant Painter's position at Marshall University, and Grievant submitted an application for the position.

3. The job posting listed the position's minimum qualifications:

> Requires a high school diploma plus at least one year of work experience as a painter. Prefer 18 months of post-high school training such as obtained in a technical or vocational program. Requires familiarity with a variety of painting techniques, coating types, surface preparation, use of various types of applicators, applicator cleaning, etc. Must be able to perform simple mathematical functions required to determine area sizes. Must be able to lift and move materials and equipment of significant weight. Must be able to work from heights. Duties: Cleans and prepares surfaces for painting utilizing various methods. Prepares drywall. Uses chemical paints removers, scrapers, burners, dusters, sanding machines, and sandpaper. Mixes paints and related products, assembles and dissembles scaffolding and ladders, cleans and stores equipment.

4. Marshall's Department of Human Resources decided four of the internal candidates met the minimum requirements for the position and recommended these employees be interviewed.

5. Grievant was found qualified for the position and was interviewed.

6. Because of past problems of applicants indicating they had certain skills that they did not in actuality possess, the administration in the Physical Plant decided to institute skills tests for all positions. The tests contain two sections. One section consists of questions and responses, and the other section consists of a hands-on test.

7. For the painting test, John Bailey, Supervisor of the Paint Shop, prepared 13-questions each candidate was to answer orally, and organized an actual hands-on test. The oral and hands-on tests included questions and situations related to the duties and qualifications identified in the posting. The hands-on test included drywalling, painting, and spray painting.

8. The interview committee was made up of Dale Osburn, Assistant Director of the Physical Plant; Mike Dunn, Supervisor of the Carpenter Shop; John Bailey, Supervisor of the Paint Shop; and Anita Hill, who works in the Physical Plant office. Each committeemember listened to the answers to the questions and observed the work during the hands- on section and rated the candidates separately.

9. The Interview Committee determined Mr. McSweeney, the successful applicant, answered the questions more accurately and completely than Grievant. He demonstrated a greater knowledge of painting, surfaces, preparation, equipment, and materials, than Grievant. On the hands-on portion of the test, Mr. McSweeney demonstrated a greater ability to perform the tasks cleanly, using the proper equipment, materials, and technique, than Grievant. (See footnote 2) Mr. McSweeney had been employed by Marshall for approximately fourteen years. (See footnote 3)

10. Neither Grievant or Mr. McSweeney had vocational training as a painter. Both had part-time painting experience, of approximately 20 - 25 years, and both had painted in their prior positions with Marshall. Grievant had painted more during his time with Marshall, as he had painted the parking lots and curbs for many summers.

11. All applicants are required to be rated on the Interview Rating Form which is used by all departments. This form is not well suited for many positions in the Physical Plant. Test. Harris, Level IV Hearing. The following factors are rated: "Motivation";"Breadth of Interest and Thinking"; "Maturity - Responsibility"; "Poise"; "Ease of Expression"; "Interest in Personal Improvement"; "Preparation -

Technical/Educational"; "Preparation - General Knowledge of Job and Institution"; "Initiative"; and "Employment Record." The possible ratings for these categories were "Outstanding," "Above Average," "Average," and "Below Average."

12. All members of the Interview Committee believed the successful applicant was the best qualified, and ranked him higher than Grievant on the questions and hands- on test.

13. The members of the Interview Committee were confused as to how to apply the Rating's Form's categories to the duties of the position and the candidates, but their choice was clear as to who was the best qualified candidate, as reflected by the Additional Comments Section.

14. The following comments were made about the successful applicant: "General Knowledge - Mr. McSweeney did an excellent job on both parts of the interview, he answered all questions correctly and did the hands-on part of the interview in an excellent manner, completing all. We recommend him for the position."

15. The following comments were made about Grievant: "General Knowledge - he did not answer all questions correctly and could not perform the dry wall task correctly. Did not cut in around trim work very well. During spraying he did not wear any safety equipment or ask for any safety equipment during use. Did not meet basic requirements for job." 16. At the time of Grievant's application and interview, Grievant had been on Workers' Compensation since December 17, 2001, with a knee injury. At the time of the Level IV hearing Grievant was still off work, and it was unclear when he would be released to return to work. Grievant had not asked his physician if it would be possible for him to climb high ladders and work on scaffolding upon his return to work. Grievant was still allowed to apply for the position, but was not required to demonstrate his ladder climbing ability. (See footnote 4)

## 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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 Resources, 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.

**I. Selection** Both Grievant and Respondent are correct in their interpretation of W. Va. Code §18B-7-1(d). This provision requires that institutions of higher education transfer or promote their internal, nonexempt classified employees to vacant positions, as opposed to hiring outside candidates, if the internal candidates are minimally qualified. However, if there is more than one minimally qualified, internal candidate, the institution may decide who shall be promoted or transferred based upon a “best-qualified” standard. Only when the institution decides two or more internal candidates are equally qualified is seniority determinative. Fry v. Bd. of Trustees/Marshall Univ., Docket No. 95-BOT-376 (Mar. 24, 1996). The real question here is whether Respondent erred in determining that Mr. McSweeney was better qualified for the position than Grievant.

In deciding this case, it must be noted that the undersigned Administrative Law Judge may not play the role of a "superinterviewer" and substitute her judgment for that of Respondent in determining who was the most qualified candidate for the position. The role of the undersigned is to review of the legal sufficiency of the selection process, at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). It is recognized that a determination of whom is the most qualified for a position necessarily results from a subjective decision-making process. See, Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). "The exercise of administrative judgment by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong." Sloan v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1989), at 6. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). 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)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [an institution]. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievant has failed to establish sufficient evidence to support a conclusion that Respondent abused its discretion or acted arbitrarily or capriciously in selecting Mr. McSweeney for the position in question. Mr. McSweeney was clearly the best qualified candidate for the position, and he demonstrated his qualifications through his performance on both the oral and a hands-on test.

**II. Discrimination**

However, the inquiry does not end there. Grievant has alleged he was discriminated against in the scoring of the test, especially by his upper level supervisor, Mr. Osburn. He also alleges Mr. Osburn influenced the votes of others. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code §§ 18-29-2(m), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate

reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215(Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

The evidence at Level IV demonstrated the following ratings for Grievant: Mr. Osburn's ratings were two "Goods," two "Fairs," and nine "Poors." Mr. Dunn's ratings were four "Goods," one "Fair," and eight "Poors." Ms. Hill's ratings were one "Good," seven "Fairs," and four "Poors." Mr. Bailey's ratings were six "Goods," five "Fairs," and two "Poors."

The evidence at Level IV demonstrated the following ratings for the successful applicant: Mr. Osburn's ratings were twelve "Goods," one "Fair," and no "Poors." Mr. Dunn's ratings were six "Goods," six "Fairs," and one "Poor." Ms. Hill's ratings were thirteen "Goods," no "Fairs," and no "Poors." Mr. Bailey's rating sheet could not be found, but he testified he rated Mr. McSweeney higher than Grievant because of his greater fund of information and his better hands-on ability. These views were similarly reflected in the Interview Committee's comments about the hands-on section. Accordingly, the members of the Interview Committee separately found Mr. McSweeney to be better qualified than Grievant. There was no evidence that Mr. Osburn influenced the Interview Committee's decision.

Although there must be some latitude given for the fact that different raters will rate applicants differently, Mr. Osburn rated Grievant not in keeping with his own stated standard on one question. He testified he would rate an applicant with a "Fair" if they knew part of the answer to the question, but on one question, he rated Grievant as "Poor" even though he had some knowledge of the information needed. He was unable to explain howthis had happened other than to say, "He didn't give me what I was looking for." Accordingly, Grievant has shown discrimination in one of Mr. Osburn's ratings.

Grievant also asserted the Interview Committee rated him inaccurately on the Interview Rating Form. While the form did not seem to fit well with the areas that were of key importance for the duties of a painter, the ratings on this form do reflect the Interview Committee's assessment of the candidates, that Mr. McSweeney was the best qualified applicant.

The role of the undersigned is to review of the legal sufficiency of the selection process, at the

time it occurred, and she may not play the role of a "superinterviewer" and substitute her judgment for that of the Interview Committee in determining the most qualified candidate. Stover, supra. Determination of whom is the most qualified is necessarily a subjective, decision-making process. Harper, supra.

After all is said and done, it is clear Respondent had legitimate reasons to select Mr. McSweeney over Grievant, and the Interview Committee stated these reasons on the Rating Form. Mr. McSweeney was clearly the best qualified candidate, and Respondent has demonstrated a legitimate, non-pretextual basis for his selection. The limited discrimination here did not result in a substantial inequity because Grievant was not the best qualified candidate for the position, and the outcome would not be different if the discrimination were corrected and the one rating was changed. "The exercise of administrative judgment by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capriciousor clearly wrong." Sloan supra. No showing of arbitrary and capricious decision-making has been demonstrated in this selection process.

Consequently, although Grievant was treated slightly differently than Mr. McSweeney, no substantial inequity resulted. Grievant has failed to show the selection process was significantly flawed to the point that the outcome would have been different had the flaw not occurred. Additionally, it should be noted that Mr. McSweeney is a Marshall employee just like Grievant, and he is entitled to be selected for the position since he is the best qualified.

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 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 (2002); Howell v. W. Va. Dep't of Health & Human Resources, 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. W. Va. Code §18B-7-1(d), states as follows:

> If more than one qualified, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the nonexempt classified

employee with the greatest amount of continuous seniority at the state institution of higher education shall be awarded the position.

3. The role of the undersigned is to review of the legal sufficiency of the selection process, at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (Jun. 26, 1989).

4. "The exercise of administrative judgment by appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong." Sloan v. W. Va. Univ., Docket No. BOR-88- 109 (Sept. 30, 1989), at 6.

5. Mr. McSweeney was the best qualified candidate for the painter's position.

6. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such f the employees or agreed to in writing by the employees."

7. To establish a prima facie case of discrimination under W. Va. Code §§ 18-29-2(m), a grievant must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

8. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievantmay show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

9. Grievant established a prima facie case of discrimination by showing that one member of the Interview Committee rated him more harshly, without adequate explanation, on one question.

10. Grievant has failed to establish Respondent's selection process, was sufficiently flawed such that a correction of this flaw would have resulted in a different result. Sloan, supra.

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 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.

**JANIS I. REYNOLDS**

**ADMINISTRATIVE LAW JUDGE**

**Dated: September 30, 2002**

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*Footnote: 1*

*During the Level IV hearing this exhibit was called "the wall."*

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*Footnote: 2*

*This judgment includes the undersigned Administrative Law Judge's assessment of "the wall." Even to the untrained eye, the successful applicant's work was neater, cleaner, and smoother.*

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*Footnote: 3*

*Grievant noted Mr. McSweeney's uncle had worked in Marshall's paint shop for some time as a foreman, and had probably coached him about various skills and information. Since Mr. McSweeney's uncle was no longer employed by Marshall, there was no indication he had given Mr. McSweeney the answers to the test, and since the test did not exist during the uncle's employment, the undersigned Administrative Law Judge cannot see how this could represent any discrimination or any other negative act to Grievant.*

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*Footnote: 4*

*Grievant did not allege any discrimination in relation to his injury or his Workers' compensation status in this selection process.*