JOHN ROBINSON,

Grievant,

v. **Docket No. 02-CORR-321**

WEST VIRGINIA DIVISION OF

CORRECTIONS/ANTHONY

CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, John Robinson, filed this grievance against his employer, the Division of Corrections ("CORR"), on June 18, 2002. His Statement of Grievance stated:

> **On 14 June 2002, I discovered that the review Board held on 16 April 2002 for the position of Sargent (COIV) gave a competitor credit for the wrong employment date as defined under West Virginia Division of Corrections Policy Directive #132.02 "Correctional Officer Promotion". This error has lead (sic) to my competitor's selection as Sargent (COIV) instead of me being selected.**
>
> **Relief Sought: To be promoted to the position of Sargent (COIV) with all back pay, privileges, rights and position of seniority, to the time that my selection should have been made.**

This grievance was denied at all prior levels. (See footnote 1) **Grievant appealed to Level IV on October 4, 2002, and a Level IV hearing was held on November 18, 2002.** (See footnote 2) **This case became mature for decision on December 9, 2002, after receipt of Respondent's proposed findings of fact and conclusions of law.**

Issues and Arguments

Grievant asserts the successful applicant's years of service were wrongly calculated, and if this error were corrected, he would be entitled to the position at issue. (See footnote 3)

Respondent notes the successful applicant's years of service were initially incorrectly

calculated, but even after this error was corrected, the successful applicant's overall score was still higher than Grievant; thus, the successful applicant was offered the position.

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

Findings of Fact

1. CORR posted a position for a Correctional Officer IV at Anthony Correctional Center.

2. Grievant and several other candidates applied for the position.

3. On April 16, 2002, the Review Board members ranked the candidates. Grievant was third. His score was 62.22

4. The highest rated applicant refused the position, so it was given to the number two applicant, Stephen Dilly.

5. Mr. Dilly's years of service had been incorrectly calculated. When his score was recalculated to reflect the correct number for his years of service, Mr. Dilly's score was 62.78; thus, his final score was still greater than Grievant's.

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); 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).

In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes that selection decisions are largely the prerogative of management. While the individuals who are chosen should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources,

Docket No. 94-HHR- 070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89- WCF-208/209 (Aug. 7, 1989). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra. Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997). If the Grievant can demonstrate that the selectionprocess was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion this Board will require the employer to review the qualifications of the grievant versus the successful applicant. Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

"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 excellence 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

The facts in this case are clear. Although Mr. Dilly's score was initially incorrectly calculated, this error was corrected. While the change decreased Mr. Dilly's score, it didnot change the overall outcome of the selection process. Mr. Dilly still had the second highest score, and he was correctly offered the position of Correctional Officer IV after the top ranked

candidate refused the position. Grievant has failed to demonstrate Respondent violated the rules and regulations governing selection, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh, supra.

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 § 4.21 (2000); 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. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

3. Selection decisions are largely the prerogative of management, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989). 4. An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra.

5. A grievant's burden is to demonstrate the agency violated the rules and regulations governing selection, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR- 235 (Sept. 29, 1997). If the Grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion this Board will require the employer to review the qualifications of the grievant versus the successful applicant. Thibault, supra; Jones v. Bd. of Trustees/W.

Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

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 excellence 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 thefacts 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

7. Grievant failed to meet his burden of proof and demonstrate the selection decision violated the rules and regulations governing this process, Respondent acted in an arbitrary and capricious manner, or Respondent's decision was clearly wrong. Surbaugh, supra.

8. Even though Mr. Dilly's score was initially calculated incorrectly, the correction did not result in any change in the ranking of the candidates for the position.

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 suchappeal 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: January 14, 2003

Footnote: 1

The tape of the Level III hearing could not be found, but Grievant agreed to proceed to Level IV without a transcript, as he noted little testimony was taken at that level.

Footnote: 2

At the Level IV hearing, Grievant was represented by Officer Dennis Brackman. Respondent was represented by Assistant Attorney General Charles Houdyschell.

Footnote: 3

At the Level IV hearing, Grievant wished to amend his grievance to include a review of the entire selection process and the assigned scores in each of the five evaluated areas. Respondent objected. Given this change in the Statement of Grievance was objected to, this amendment was not allowed.