THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN KEITH WESTFALL,

Grievant,

v. **Docket No. 2009-0339-DOT**

**WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,**

Respondent, and

HARRY B. HUTCHISON III,

Intervenor.

DECISION

Brian Keith Westfall, Grievant, is employed by the Department of Transportation/Division of Highways ("DOH") at District Three in Parkersburg, West Virginia. Grievant is classified as a Transportation Engineering Technician-Senior and works as a Finals Supervisor[1] in the District's Highways Construction section. On September 10, 2008, Mr. Westfall filed a grievance alleging favoritism because the DOH did not fill a position of Utilities Supervisor with one of the two applicants that met the minimum qualifications for the position. The original posting took place on November 5, 2007. The position was reposted on July 8, 2008, after an applicant that did not meet the

[1] As a Finals Supervisor, Grievant performs advanced duties in finalization of District construction projects. Grievant performs a wide variety of duties related to documentation, quality control and funding of district projects including insuring that field and office procedures are performed to DOH Standards and Specifications regarding project documentation. Respondent's Exhibit 2.

minimum qualifications in the first posting upgraded his certification to qualify for the job.[2] As relief, Grievant seeks "Level V Classification with the 10% pay increase, back pay and made whole."

A level one conference was held on October 1, 2008, and the grievance was denied by a decision dated October 20, 2008. On October 21, 2008, Harry Hutchison filed the necessary form with the West Virginia Public Employees Grievance Board to intervene in the grievance.[3] A level two mediation session was held on February 23, 2009, and Grievant appealed to level three on February 25, 2009. A level three hearing was held at the Charleston office of the Grievance Board on June 30, 2009. Grievant and Harry Hutchison ("Intervenor") both appeared pro se. DOH was represented by Robert Miller, Esquire, DOH Legal Division. The parties agreed to submit fact/law proposals to be mailed no later than August 14, 2009. All parties submitted proposals and the grievance became mature for decision upon receipt of those proposals on August 14, 2009.

Synopsis

Grievant complains that instead of filling a posted supervisory position with one of the applicants who met the position's minimum qualifications, DOH allowed an unqualified applicant to remain in the position in an acting capacity. DOH waited until the unqualified applicant completed a certification to meet the minimum qualifications, then reposted the same position and filled it with that applicant. Grievant avers that this action constituted

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[2] Grievant Westfall was one of the two applicants that met the minimum qualifications for the position when it was originally posted.

[3] Mr. Hutchison was the successful applicant for the position that Grievant contends should have been filled when it was originally posted.

favoritism and was arbitrary and capricious. Respondent asserts that DOH has discretionary authority to refrain from filling any posted position. Respondent chose not to fill this position because it felt that the person in the acting capacity had more relevant experience than either of the other applicants and was therefore more qualified for the job. Respondent's actions were arbitrary and capricious and the grievance is GRANTED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. In September of 2007, Intervenor Harry Hutchison was given the temporary position of Acting Utilities Supervisor for the DOH District Three Office when Keith Lynch transferred out of that position.

2. Prior to his appointment to the supervisory position, Intervenor was serving as a Transportation Engineering Technician[4] in the Utilities Section of the DOH District Three Office. This is a level III position. Intervenor Hutchison had served in that position continuously since September of 2003, except for a short period when he was previously upgraded to Acting Supervisor.[5]

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[4] There are different levels of Transportation Engineering Technicians ranging from I to III. A Transportation Engineering Technician-Senior is at level IV and a Transportation Engineering Technologist is at level V. Each level involves an increase in pay grade. To move from level III to level IV one must hold a certificate confirming that he or she has completed the appropriate course work. Likewise, a level V certificate is required for an employee to move to a level V classification. Level V positions are supervisory jobs.

[5] Intervenor served as the Acting Utilities Supervisor prior to the employment of Keith Lynch from November 2005 to April 2006.

3. Beginning in September 2002, Intervenor worked for DOH in the District Three Finals Section as a Finals Technician in the Transportation Engineering Technician classification until he moved to the Utilities Section in 2003.

4. From April 1999 until he was employed by the DOH in 2002, Intervenor worked for private engineering firms as a Resident Project Representative on Public Service District Projects and an Engineering Consultant on roadway surface construction.

5. Grievant Westfall is also employed by the DOH in District Three and he has worked there since August 1994. In September 2007, he began serving as a Finals Supervisor which is classified as a Transportation Engineering Technician-Senior.

6. Between December 1998 and September 2007, Grievant Westfall worked as a Transportation Engineering Technician level III with the title of Resurfacing Office Technician.

7. From August 1994 until December 1998, Grievant worked as a Transportation Engineering Technician on new bridge and roadway projects. During this period, Grievant was performing mostly field work which included occasionally working with utility companies in the relocation of utilities to accommodate the construction projects.

8. On November 5, 2007, DOH posted the Utilities Supervisor position that was made vacant by the transfer of Keith Lynch. The posting was distributed in DOH Bulletin # 610 for a period from November 5, 2007, through November 20, 2007. The position was listed as a Transportation Engineering Technologist and included the following requirement:

Minimum Qualifications: Certification as an Engineering Technologist by Fairmont State College.[6]

Grievant's Exhibit 1.

9. Three employees of DOH District Three applied for the Utilities Supervisor position posted in Bulletin # 610: Grievant Westfall, Rick Collins and Intervenor Hutchison.

10. Mr. Collins and Grievant both held Bachelor Degrees from Fairmont State College in Engineering Technology and both held Transportation Engineering Technologist Certification from the same school. Grievant earned that certification on February 24, 2006.

11. Intervenor Hutchison holds a Bachelor Degree in Applied Technology from WVU-P[7] and Bachelor of Arts Degree from Marietta College. At the time Bulletin #610 was posted, Intervenor did not have the Transportation Engineering Technologist Certification which was a minimum qualification for the position.

12. On December 16, 2007, James Roten, District Engineer/Manager of DOH District Three, requested that Intervenor Hutchison be granted a temporary upgrade by the Division of Personnel from a level III Transportation Engineering Technician to a Transportation Engineering Technician-Senior so that he could receive additional compensation while he served as the Acting Utilities Supervisor. The temporary upgrade was granted and became effective January 16, 2008.

13. Grievant Westfall and Rick Collins were interviewed for the Utilities Supervisor position on February 28, 2008. The interviews were conducted by Debbie

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[6] The Engineering Technologist certification is also commonly referred to as a level V certification. Fairmont State College has since been renamed Fairmont State University. Both names will be used herein.

[7] West Virginia University - Parkersburg

Farnsworth, District Three Administrative Services Manager and George Shinsky, Assistant District Engineer in charge of construction.[8] Both applicants met the minimum qualifications for the position and Grievant had some experience in the area of utilities.

14. Intervenor Hutchinson was not interviewed for the posted position because he did not meet the minimum qualifications for the job.

15. Debbie Farnsworth and George Shinsky did not fill the position with either of the two candidates because Intervenor Hutchinson was serving as the Acting Supervisor and they believed he was more qualified for the job than either of the two applicants who met the minimum qualifications.[9]

16. On June 16, 2008, Intervenor Hutchison received his Certificate as a Transportation Engineering Technologist from Fairmont State University.

17. The position of Utilities Supervisor was reposted on July 7, 2008 in DOH Bulletin #623, for the period from July 7, 2008 through July 22, 2008. The content of this posting was exactly the same as the original posting for the position. Two District Three Employees applied for the position: Grievant Westfall and Intervenor Hutchison.

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[8] George Shinsky has recently retired from employment with the DOH after approximately 33 years of service.

[9] Both Mr. Shinsky and Ms. Farnsworth testified that since neither applicant had as much utilities experience as Hutchison, they decided to leave Hutchison in the acting capacity even though both applicants were qualified for the job.

18. The position was reposted in early July 2008, because Mr. Shinsky was aware that Intervenor Hutchison had just completed his Transportation Engineering Technologist Certification and now met the minimum qualifications for the job.[10]

19. On July 11, 2008, Grievant Westfall sent an e-mail to Jeff Black, DOH Director of Human Resources. Grievant complained to Director Black that the Utilities Supervisor position was being reposted even though two qualified applicants had applied for the job. He noted that it appeared that the interviewers reposted the job so an applicant who did not qualify the first time could be given the job. He ended the e-mail by asking, "do I have a grievable matter."

20. Director Black responded to Grievant by e-mail on July 14, 2008, which stated:

> I do not believe you have a grievable event until the position is actually filled. At that point, the actions taken to fill the job (beginning with the initial posting) can be called into question.

Grievant's Exhibit 1.

21. Grievant relied upon this response from Director Black and did not file a grievance contesting the failure of Respondent to fill the Utilities Supervisor position until a successful applicant was chosen.

22. Both Intervenor Hutchison and Grievant Westfall were interviewed on August 11, 2008, by Mr. Shinsky and Ms. Farnsworth. Both applicants filled out Application for Examination forms detailing their experience and education and they were each asked

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[10] When asked on cross examination why the dates of Intervenor's certification and the reposting were so close together, George Shinsky stated: "I was probably aware of when Harry Hutchison's certification would come up." Level three hearing.

identical questions by the interviewers. Each applicant was scored in six areas and given an overall evaluation score. The six areas were: (1) Education, (2) Relevant Experience, (3) Knowledge Skills and Abilities, (4) Interpersonal Skills, (5) Flexibility/Adaptability, (6) Presentability. Each applicant received a score of "Does Not Meet," "Meets," or "Exceeds" for each area.

23. Grievant Westfall received "Exceeds" in Education and "Meets" in all other areas for an Overall Evaluation of "Meets."

24. Intervenor Hutchison received "Exceeds" in Education and Relevant Experience and "Meets" in all other areas for an overall evaluation of "Meets."

25. Mr. Shinsky and Ms. Farnsworth testified that they recommended Intervenor Hutchison because he knew the job from working in the Utilities section for five years and because he had more supervisory experience.[11] The interviewers also liked the Intervenor's answers better when asked why he wanted the promotion.[12]

26. Intervenor was hired for the position of Utilities Supervisor on September 1, 2008, and this grievance was filed on September 10, 2008.

Discussion

Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.

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[11] Shinsky and Farnsworth admitted that most of Intervenor's supervisory experience was gained while he was serving in the Acting Supervisor capacity after the position was not filled in the first posting.

[12] Grievant indicated that he wanted the promotion because there are not many level V positions available and one must bid on them if he wants to better himself. Intervenor stated that the job was a logical next step in the department and he wanted to make a difference.

1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the grievant has not met its burden. *Id.*

Grievant made it very clear that he is not contesting the actions that took place after the second posting. His position is that Respondent's failure to fill the position after the first posting was the result of favoritism or was arbitrary and capricious. Respondent did not raise the issue of timeliness at or before level two. Therefore the issue was waived. W. VA. CODE § 6C-2-3(c)(1).[13]

Grievant does not dispute that DOH policy gives Respondent the discretion to decide not to fill a position after it has been posted. Division of Highways Administrative Operating Procedures at Chapter 14 Section II Paragraph E, states the following:

> The decision regarding whether a vacancy which exists in any organization at any given time will be filled is the inherent right of management.

However, this decision like all discretionary decisions must be exercised in a reasonable manner.

The Grievance Board recognizes selection decisions are largely the prerogative of

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[13] Grievant asked the DOH Director of Human Resources about the grievance and was told that he did not have a grievable event until the job was actually filled. He relied upon that representation and waited until September 2008 to file his grievance, even though the event giving rise to his grievance was the Respondent's decision not to fill the job after the first posting. That event took place in July 2008. Grievant reasonably relied upon the representation of an agent of the Respondent as to the appropriate time to file his grievance. *See Bradley v. Williams,* 195 W.Va. 180 at 185, 465 S.E.2d 180 at 185 (1995).

management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). The decision not to fill a position with any of the applicants who apply is essentially a selection decision. 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*. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Generally, an agency's 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). 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).

There is nothing in statute or the DOH rules which specifically states that a position must be filled once it is posted. It is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer. *Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999). This practice has been upheld in a number of Grievance Board decisions. *See Staggers, supra* (where the only applicant would not

agree to the salary restrictions placed upon the job); *Law/Bragg v. W. Va. Dep't of Health and Human Resources*, Docket No. 95-HHR-452 (July 17, 1997) (where the department's administrator changed after the original posting and the position was reposted so the new administrator could participate in the interview and selection process); *Sell v. W. Va. Dep't of Health & Human Res./Hopemont Hospital*, Docket No. 06-HHR-444 (June 26, 2007) and *Ash v. Div. of Juvenile Serv.,* Docket No. 04-DJS-409 (June 3, 2005) (where the committees did not fill the position because they did not feel any of the applicants met the necessary qualifications for the job); *McCauley v. Civ. Of Corr./Huttonsville Corr. Ctr.,* Docket No. 00-CORR-244 (Aug. 2, 2001) (where the position was filled by a transfer and the posting was withdrawn). On the other hand, the employer's decision to not fill a job was reversed as unreasonable when the position was filled on a temporary basis with a politically connected applicant rather than permanently filled with one of the applicants from the original posting. *Lowther v. W. Va. Dept. of Transp*., Docket No. 01-DOH- 589 (Mar. 27, 2002).

While the reason for not filling the posted position in this case is not as nefarious as political patronage, the decision was not based upon the comparative qualifications of the applicants at the time the position was posted. The DOH must apply the following guidelines when comparing candidates:

W. VA. CODE § 29-6-10(4) states:

> For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable.

Additionally, as cited in the Division of Personnel's Administrative Rules at Section 2, "Preamble":

> The general purpose of the Division of Personnel is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its employees, and other incidents of state employment. *All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness.*

(Emphasis added). 143 C.S.R. 1 § 2 (2007)

Further, as cited in the Division of Personnel's Administrative Rules at Section 11.1 (a), "Method of Making Promotions":

> In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on *demonstrated capacity and quality and length of service.*

(Emphasis added). 143 C.S.R. 1 § 11.1 (a)

This job posting required that an applicant had to hold “Certification as an Engineering Technologist by Fairmont State College” to be minimally qualified to fill the position of Utilities Supervisor. This position is in the Transportation Engineering Technologist classification and this certification is a minimum requirement established by the Division of Personnel in cooperation with the DOH. *See* Division of Personnel Classification Specifications. Three DOH District Three employees applied for the position: Grievant Westfall, Rick Collins, and Intervenor Hutchison. Only Grievant and Mr. Collins held the Transportation Engineering Technologist certification when the job was first posted. Intervenor Hutchison did not hold the certification and was not interviewed

because he did not meet the minimum qualifications for the position. Rather than fill the position with one of the applicants that met the minimum qualifications for the position, Respondent chose to leave Intervenor in the position because he had experience in the Utilities section. Essentially, Respondent decided that Intervenor's experience made him more qualified for the job than the other applicants.

Employers are obligated to select applicants who qualify under the terms established by DOP classification and specifications. *Farley v. Dep't of Health & Human Res.*, Docket No. 07-HHR-161 (June 10, 2008); *Dunford v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 97-PEDTA-546 (June 24, 1998); *Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 97-PEDTA-426 (May 7, 1998). Choosing to keep Intervenor in the position on a temporary basis ignored this basic rule. Certainly, Intervenor's experience would be a legitimate factor in choosing between candidates who are all minimally qualified. However, choosing to keep Intervenor in the position over two qualified applicants when he did not meet the minimum qualifications for the position, ignored the required criteria for filling the position and was arbitrary and capricious. *See Bedford Memorial Hospital, supra.*

An interesting contrast to this present matter can be found in *Farley v. Dep't of Transp./Div. of Highways*, Docket No. 04-DOH-308 (Jan. 12, 2006). In that case, DOH refused to consider the grievant's many years of experience because she did not hold a certification that was a minimum requirement for the posted position. The ALJ upheld the decision noting that, "DOH is required to follow the minimum qualifications listed in the class specification." That requirement is no less relevant in this case.

Grievant also alleges that Respondent's decision to keep Intervenor as the acting supervisor constituted favoritism. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly situated employee(s);
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52 (2007). *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Morgan v. Dep't of Transp./Div. of Highways,* Docket No. 2008-1714-DOT (May 13, 2009).

Grievant was similarly situated with Intervenor and Mr. Collins in that they were all DOH employees applying for a posted supervisory position. Intervenor, however, was not similarly situated to Grievant and Mr. Collins inasmuch as he did not meet the minimum qualifications for the job (the level V certification) and subsequently, was not allowed to interview for the position. Since all three were internal applicants, it is expected that they would all be measured according to the same standard which is the class specification for the position. In that respect, Intervenor was treated differently. While he was excluded from the interview process because he did not meet the minimum qualifications, he was allowed to keep the job for over two fully qualified applicants. Intervenor was given this advantage because he had more experience in the Utilities section. It is difficult to say that

this reason for the different treatment is not related to the actual job responsibilities. Therefore, the action does not meet the statutory definition of favoritism. But, as stated above, it certainly is not consistent with the rules related to filling classified positions and is therefore arbitrary and capricious; thus, the grievance is granted.

There remains the question of remedy. Grievant has demonstrated that the decision to leave Intervenor in the position when there were qualified applicants for the position was arbitrary and capricious. Grievant has also proven that he was more qualified for the position than Intervenor when the job was originally posted. Respondent improperly kept Intervenor in the job at that time. Consequently, Respondent is required to place Grievant Westfall in the position of Utilities Supervisor. Additionally, Grievant must be paid at the paygrade appropriate for the Utilities Supervisor, plus back pay, interest and benifits, beginning April 1, 2008. The date April 1, 2008 is selected because the interviews were conducted on February 28, 2008, and it is reasonable to conclude that Respondent would have made a selection within one month of the completion of the interviews had they not chosen to keep Intervenor in the job. Since the improper decision was made when a less qualified applicant was left in the position, that is the date the proper decision should have been made to place Grievant in the position. *See generally Vance v. Dep't of Transp./Div. of Highways,* Docket No. 06-DOH-418 (Jan. 24, 2007).

Conclusions of Law

1. Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. There is nothing in statute or the DOH rules which specifically states that a position must be filled once it is posted. It is permissible for an agency to withdraw a posting and re-post it, prior to the extension of any employment offer. *Staggers v. Div. of Highways*, Docket No. 98-DOH-505 (Apr. 30, 1999). However, this decision like all discretionary decisions, must be made in a manner that is reasonable and not arbitrary and capricious. *See Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

3. Generally, an agency's 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). 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).

4. Respondent’s decision to leave an unqualified applicant in the position because he had more experience than two applicants who were fully certified for the position, was arbitrary and capricious. The decision ignored the minimum requirements for

the position set out in the Division of Personnel Specifications for the Transportation Engineering Technologist Classification.

5. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. *See* W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

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6. Grievant failed to prove that the Respondent's failure to fill the position after the first posting met the statutory definition of favoritism.

7. Grievant proved that he was more qualified than Intervenor for the Utilities Supervisor position when the position was originally posted.

Accordingly, the grievance is GRANTED. Respondent is Ordered to place Grievant Westfall in the position of Utilities Supervisor for DOH District Three and increase his pay at the appropriate pay grade for that position, plus back pay, appropriate statutory interest and benefits beginning April 1, 2008.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: OCTOBER 30, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE