THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AMY WHIPKEY,

Grievant,

v. **DOCKET NO. 2008-0234-NCC**

WEST VIRGINIA NORTHERN COMMUNITY COLLEGE,

Respondent.

DECISION

Amy Whipkey ("Grievant") filed a grievance on July 22, 2008, alleging West Virginia Northern Community College ("Respondent") incorrectly determined that she did not meet the minimum qualifications for an executive secretary position. As relief, Grievant seeks the position.

This grievance was denied at Level One. A Level Two mediation was unsuccessful. A Level Three hearing was conducted before the undersigned on February 3, 2009, at the Grievance Board's office in Westover, West Virginia. Grievant appeared in person and through her representative Zac Wycherley. Kristi A. McWhirter, Assistant Attorney General, represented the Respondent. This matter became mature for decision on or about February 23, 2009, the date proposed findings of fact and conclusions of law were due. Both parties submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant applied for, and was not interviewed for, an executive secretary position at West Virginia Northern Community College. The Director of Human Resources determined that Grievant did not meet the minimum qualifications for the position. After receiving a request from the Grievant that her resume be submitted to the Search

Committee anyway, the Search Committee determined that the Grievant did not meet the minimum qualifications for the position.

Grievant generally challenges the Respondent's finding that she did not meet the minimum qualifications for the position. Respondent claims that this grievance is untimely and Grievant did not meet the minimum qualifications for the position.

In light of the particular factual scenario presented, this grievance is untimely. Even assuming timeliness, Grievant did not have the requisite type of experience to meet the minimum qualifications for the position. She has never worked as an executive secretary or administrative assistant and has only served as an accounting clerk. This grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following Findings of Fact:

Findings of Fact

1. Respondent first employed Grievant in 2003 as an Accounting Clerk. Level One, Exhibit 12. At the time she filed this grievance, Grievant was employed as an Accounting Clerk 2.

2. As Human Resources Director of West Virginia Northern Community College, Peggy Carmichael is responsible for numerous personnel matters including managing the selection process for vacant positions.

3. Mrs. Carmichael posts job vacancies, accepts applications, evaluates the minimum qualifications of applicants,[1] schedules interviews for search committees and

[1] 135 C.S.R. 39 § 5.1 states in its entirety:

attends search committee meetings and applicant interviews. However, Mrs. Carmichael is not a voting member of any search committee unless the vacancy is in her department. Level Three, Testimony of Peggy Carmichael.

4. On June 2, 2008, Vicki Riley, Vice President of Administrative Affairs, drafted the job description, specifically a Position Information Questionnaire ("PIQ"), for a secretarial position in the Academic Affairs office. Mrs. Riley would serve as the immediate supervisor for this position. Level Three, Testimony of Vicki Riley; Level One, Exhibit 11, (pp. 1 and 12-13).

5. On June 3, 2008, Mrs. Carmichael reviewed the PIQ and, pursuant to her authority as Human Resources Director, slotted the PIQ as an executive secretary pay grade 14 position. Level One, Exhibit 11, (p. 1).

6. Pursuant to Respondent's *Posting of Classified Position Vacancies* policy, internal and external postings of job vacancies may occur concurrently "to facilitate the efficient and timely recruitment of candidates" and must be posted no less than seven (7) consecutive days to "provide employees adequate time to make application" for the vacancies. Level Three, Exhibit 6.

7. On June 11, 2008, Respondent internally posted the new classified, non-

---

> Pursuant to W.VA. CODE [§] 18B-7-1(d), non-exempt classified employees who apply for and meet the minimum qualifications as determined by the *institutional human resources director* or other designee of the president for a posted non-exempt position within an institution and are currently employed at the institution shall be hired into the posted position prior to hiring someone from outside the institution.

(Emphasis added).

exempt, pay grade 14 executive secretary position. Level Three, Testimony of Peggy Carmichael.

8. On June 15, 2008, Respondent externally advertised the same position. *Id*.

9. Grievant applied for the executive secretary position on June 20, 2008. Level Three, Exhibit 12.

10. The deadline for submitting an application for the executive secretary position was June 25, 2008. Level Three, Exhibit 7.

11. Pursuant to the job posting, the minimum qualifications for the executive secretary position are:

> Associate degree in office administration, business, or directly related discipline; **three plus years experience in a professional business environment working as an executive level secretary or administrative assistant**; excellent written and oral communication skills; must maintain confidentiality at all times and deal with the public in a confidential professional manner; ability to operate a personal computer utilizing a variety of software packages and programs including Microsoft Word, Outlook, Excel and PowerPoint; ability to multi-task and perform in a fast paced office environment while maintaining a well organized office; keyboarding skills of 60 wpm; ability to take and transcribe minutes including dictation; thorough knowledge of correct English, grammar, spelling and punctuation; ability to draft correspondence narrative and reports; ability to edit documents; ability to make decisions and act independently within parameters, provided; ability to work under limited supervision.

Level Three, Exhibits 3 and 7 (emphasis added). The experience requirement for the executive secretary position is important because of the level of work required for the job and because the employee in the position will be responsible for managing and supporting the administrative functions of the Academic Affairs offices as well as overseeing the day-to-day operations of the office. Level One, Testimony of Peggy Carmichael (pp. 6 and 20); Level Three, Testimony of Peggy Carmichael and Vicki Riley.

12. Accounting and budgetary duties comprise only a small part of the executive secretary duties.

13. Pursuant to Respondent's practice, when determining minimum qualifications of applicants, every one year of related experience can be substituted for each year of required education; however, additional years of education cannot be substituted for years of experience. Level Three, Testimony of Peggy Carmichael.

14. Including Grievant, three of Respondent's employees applied for the executive secretary position. Level One, Testimony of Peggy Carmichael (p. 10). Of the three internal candidates, Mrs. Carmichael determined that only one met the minimum qualifications for the position. *Id*.

15. Grievant's application does not show that she "has three plus years experience in a professional business environment working as an executive level secretary or administrative assistant" as required in the minimum qualification of the executive secretary position posting. Level One, Exhibit 12. Her resume and cover letter indicate that she has experience in purchasing and budgeting. However, Grievant has never performed a majority of the duties listed on the executive secretary job posting. Level One, Testimony of Amy Whipkey (pp. 11-19).[2] Accordingly, Mrs. Carmichael determined that Grievant did

---

[2] Responsibilities for the posted position included: "Provide administrative office support to the Vice President of Academic Affairs including preparation, distribution and follow up of correspondence, meeting minutes and reports; organize, plan and schedule meetings, projects and functions; sort and organize mail; screen calls and visitors; maintain and organize all files; maintain daily and master schedule of regular meetings, memberships and other various functions; make travel arrangements; assist with gathering information and preparing report documents; maintain official inventory of all academic programs; maintains official web page for Academic Affairs; assist with explaining steps in College policies, rules and regulations in response to initial inquiries. Assist in monitoring budget expenditures, preparing annual budget request, compiling expenditure trends and

not have the requisite three plus years of experience working as an executive level secretary or administrative assistant or the equivalent. Level Three, Testimony of Peggy Carmichael; Level Two, Exhibit 14.

16. Mrs. Carmichael based her decision on Grievant's cover letter, prior job charters (job descriptions), Grievant's resume, the job posting, the executive secretary PIQ, her own personal knowledge of Grievant's current job duties, and the representation of Larry Bandi, Grievant's immediate supervisor, that Grievant does *not* perform "executive level" work for him.

17. On June 26, 2008, Mrs. Carmichael notified Grievant in writing and verbally that she did not meet the minimum qualifications for the executive secretary job vacancy. Level Three, Exhibit 15; Level Three, Testimony of Peggy Carmichael (pp. 4 and 7).

18. Pursuant to Grievant's request, and although she was not required to do so, Mrs. Carmichael submitted Grievant's resume to the Executive Secretary Search Committee ("Search Committee"). Level Three, Exhibit 16; Level Three, Testimony of Peggy Carmichael (pp. 7-8).

19. Vicki Riley served as Chair of the Executive Secretary Search Committee. Ultimately, the executive secretary would work directly under Mrs. Riley.

---

projections, and maintaining financial records; make purchases and complete required purchasing documentation; serve as primary credit card holder for department; maintain and reconcile purchasing card transactions; access, generate and review class schedule information, student registration and record information, institutional research reports, assessment data and other information using institutional data systems, and other systems as required to provide data and information used by the vice President of Academic Affairs in decision making; distributes signed forms appropriately; provide guidance, training and establish work assignments for work study student or other clerical personnel for specified projects." Level One, Exhibit 3.

20. During a regular meeting, the Search Committee reviewed Grievant's resume and unanimously determined that she did not meet the minimum qualifications for the position. Level Three, Testimony of Vicki Riley.

21. On July 1, 2008, Mrs. Carmichael sent Grievant a letter advising her that the Search Committee had reaffirmed Mrs. Carmichael's June 26, 2008, decision that Grievant did not meet the minimum qualifications for the executive secretary position. Level Three, Exhibit 17.

22. Grievant filed this grievance on July 22, 2008.

Discussion

This grievance was not timely filed and there is no indication that the Respondent's finding that the Grievant did not meet the minimum qualifications for the position was arbitrary and capricious. Ergo, this grievance must be denied.

The first consideration is whether the grievance was timely filed.[3] The burden of proof is on a respondent to prove the affirmative defense of untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If a respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timeliness. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not

[3] The issue of timeliness, though not mentioned in the Respondent's proposed findings of fact and conclusions of law, was raised via Respondent's *Motion to Dismiss the Grievance as Untimely Filed at Level I or in the Alternative Request to Submit on the Level One Record* filed on or about November 14, 2008.

be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH- 060 (July 16, 1997).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the timelines for filing a grievance and states:

> Within fifteen days[4] following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing ... .

"A grievant is excused for his delay in filing a grievance when the untimely filing 'was the result either of a deliberate design by the employer or actions that an employer should unmistakably have understood would cause the employee to delay filing his charge.' *Naylor v. W.Va. Human Rights Comm'n*, 378 S.E.2d 843 (1989)." *Davisson v. Lewis County Bd. of Educ.*, Docket No. 05-21-112 (July 27, 2005). The questions to be considered are (1) what is the precise grievable event and (2) when does the clock start running for the purpose of timeliness.

---

[4] Pursuant to WEST VIRGINIA CODE § 6C-2-2(c) "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." When determining whether fifteen days passed in this scenario, this ALJ does not count the July 4, 2008, holiday.

On June 26, 2008, Mrs. Carmichael notified Grievant in writing and verbally that she did not meet the minimum qualifications for the executive secretary job vacancy. Level Three, Exhibit 15; Level Three, Testimony of Peggy Carmichael (pp. 4 and 7). It was Mrs. Carmichael's legal duty and obligation to determine the minimum qualifications of applications. 135 C.S.R. 39 § 5.1. Pursuant to the WEST VIRGINIA CODE OF STATE RULES, this was not the obligation of the Search Committee. Mrs. Carmichael's decision was the grievable event. This grievance was not filed within fifteen working days of Mrs. Carmichael's decision and is therefore untimely.[5] This grievance was filed seventeen working days after the grievable event and this ALJ must maintain fidelity to the law. This grievance was not timely filed. However, regardless of the timeliness issue, this grievance still must be denied upon the merits.

Assuming *arguendo* that the filing of this grievance was timely, dismissal is still appropriate because Grievant did not prove the Respondent's finding that she was not minimally qualified for the position was arbitrary and capricious. Because this grievance is not disciplinary in nature, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Bucklew v. West Virginia Univ.*, Docket No. 89-BOR-551 (Dec. 29, 1989). "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,

---

[5] This ALJ is not persuaded by the argument that the July 1, 2008, letter is the grievable event. This letter merely provided additional confirmation of Mrs. Carmichael's decision. *See generally Rose v. Raleigh Co. Bd. Of Educ.*, 199 W.Va. 220, 483 S.E.2d 566 (1997)(recognizing the concept of "additional confirmation" in the context of timeliness).

1993). Where the evidence equally supports both sides, a grievant has not met her burden. *Id*. *See Burchell v. Bd. of Trustees/Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Generally, pursuant to WEST VIRGINIA CODE § 18B-7-1(d)[6]:

> A nonexempt classified employee, who applies and *meets the minimum qualifications* for a nonexempt job opening at the institution where currently employed, whether the job is a lateral transfer or a promotion, shall be transferred or promoted before a new person is hired … .

(Emphasis added). *See also* 135 C.S.R. 39, § 5.1 (providing that it is the duty of the director of human resources to determine if an applicant meets the minimum qualifications for the position). Hence, under the statute, where an internal, nonexempt classified employee meets the minimum qualifications of a nonexempt position, he or she must be transferred or promoted into a vacancy before a new person is hired. *See Bush v. Bd. of Directors, Southern W.Va. Comm. College et al.*, Docket No. 94-BOD-1137-R (Aug. 30, 1996)(recognizing the minimum qualification requirement and utilizing the plain meaning approach when examining the qualification requirements of a posting).

When determining whether the Respondent erred in refusing to consider Grievant for the position, the analysis hinges upon whether the Grievant met the initial minimum qualifications of the position. Meeting the minimum qualifications is a prerequisite to being considered or placed into the posted position.

The general standard of review used in nonselection grievances applies in this

[6] The parties do not dispute that Grievant is a nonexempt classified employee; that the job opening would be a lateral transfer or promotion; or that the hiring is not affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. *See* W. VA .CODE § 18B-7-1(d)(1) and (2).

scenario. *Booth v. W. Va. Bd. of Trustees at Marshall Univ.*, Docket No. 94-BOT-066 (July 25, 1994). Indeed, the initial determination that an applicant meets the minimum qualifications for a position is the initial step in selecting the successful candidate. In a selection case, the grievance procedure is not intended to be a "super interview," but rather a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29,1994). Selection decisions are largely the prerogative of management; in the absence of unlawful, unreasonable, or arbitrary and capricious behavior, they will not generally be overturned. *Skeens-Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3,1998). An agency's decision as to who is the best qualified, or in this case minimally qualified, applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault, supra*.

The "clearly wrong" and "arbitrary and capricious" standards of review are deferential ones which presume that an agency's action is valid as long as the decision is supported by substantial evidence or by a rational basis. *In re Queen*, 196 W. Va, 442, 473 S.E.2d 483 (1996). *See Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001). "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 [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

"Generally an action by an institution of higher learning is arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely

ignored important aspects of the problem or situation, 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). *See Snodgrass v. Kanawha County Bd. of Educ.*, Docket No., 97-20-255 (Mar. 19, 1998). *See generally Cutright v. Bd. of Directors/West Virginia University at Parkersburg*, Docket No. 95-BOT-090 (Nov. 3,1995)." *Baker v. Bd. of Trustees/West Virginia Univ.-Parkersburg*, Docket No., 97-BOT-359 (April 30, 1998).

Grievant was not considered for the position because she did not meet the minimum qualifications, as determined by the Director of Human Resources. Mrs. Carmichael found that Grievant did not meet the minimum qualification for experience because Grievant had *no* experience as an executive level secretary or administrative assistant.[7] Although Grievant has been employed by Respondent since 2003, she has worked in only two positions that are primarily budgetary, purchasing and accounting in nature and which are limited in focus to those types of functions. Mrs. Carmichael found that Grievant only performed limited, basic secretarial and clerical duties such as mailing, filing and faxing. Mrs. Carmichael based her decision on the minimum qualifications listed on the job posting (as determined by the executive secretary PIQ), her own personal knowledge of Grievant's job duties, Grievant's job titles as set forth in her resume, Grievant's overall application, the representations of Grievant's immediate supervisor and Grievant's job charters. Although the selection committee is not charged with determining minimum qualifications for

[7] Grievant has not specifically articulated an argument comparing her actual experience to that of an administrative assistant. The record does not include the duties or responsibilities of an administrative assistant position.

applicants,[8] all members of the selection committee likewise found that Grievant did not meet the minimum qualifications for the position.

Grievant presented no evidence either in the form of written hiring procedures or verbal testimony that Mrs. Carmichael's reliance on the aforementioned violated some rule, regulation or policy.[9]

Although Grievant submitted three examples of what she believed to be executive secretary level work at the Level Three hearing to support her claim she meets the minimum qualifications for the position, those items cannot be considered because Mrs. Carmichael did not have those items before her at the time she made her decision. In promotion and tenure cases this Grievance Board has held that "[t]he [Administrative Law Judge], is limited to considering the record before the decision-maker at the time of the decision. An applicant is responsible for informing the decision-maker of [her] qualifications ... . If [she] does not do so at the appropriate time, such data cannot be considered later by an Administrative Law Judge, as the purpose of a … grievance is to assess the institution's decision at the time it was made, utilizing the data it had before it. *Baker, supra*. *See also Castiglia, supra*." *Karle v. Bd. of Trustees/Marshall Univ.*, Docket No. 98-BOT-258 (Apr. 9, 1999). The same reasoning applies in this matter. Respondent cannot be expected to evaluate an employee's minimum qualifications on information that

---

[8] *See* Footnote 1, *supra*.

[9] Grievant asserts that had she been granted an interview with the Search Committee she would have been able to prove she was minimally qualified for the position. Grievant's assertion, however, is contrary to law. Pursuant to the WEST VIRGINIA CODE OF STATE RULES, Mrs. Carmichael as Human Resources Director, not the Search Committee, is responsible for determining minimum qualifications. *Id*. Furthermore, Grievant, as the applicant, is responsible for supplying information in her application showing that she is minimally qualified for the position.

is not before it. Nor should this Grievance Board base its decision on things not before Mrs. Carmichael, Respondent's decision-maker in this case, at the time she made her decision. Furthermore, Grievant presumably reviewed the job posting prior to submitting her cover letter and application and was therefore aware of the minimum qualifications.[10] Grievant submitted a detailed resume with her letter of intent but did not include the examples of alleged executive secretary duties presented at Level Three in any of the job

---

[10] Grievant alleges that Respondent's *Posting of Classified Vacancies Policy,* which allows for the concurrent posting of vacancies internally and externally, violates the West Virginia Higher Education Policy Commission's *Chancellor's Interpretive Memorandum No. 3* ("Memo"). Grievant has failed to prove Respondent violated a statute, rule or policy when posting the position. The July 3, 2000, Memo provides, in pertinent part, that "[a]ccording to § 18B-7-1, non-exempt classified job openings at the institution are to be advertised internally to provide an opportunity for non-exempt employees to apply and be laterally transferred or promoted before a new person is hired." *See* Level Three, Exhibit 9. In 2004, the West Virginia Council for Community and Technical College Education (hereinafter "Council") became an independent governing body of West Virginia community and technical colleges. The Council was given rulemaking power by the West Virginia Legislature. It was also given the power to adopt or continue in effect any order, rule, regulation, resolution or policy of the WVHEPC, without promulgating the rule pursuant to the procedures established for the Council. W. VA. CODE § 18B-1-3(h)(2) (2004). All "orders, resolutions, policies and rules" that were not changed or generally altered by the Council remain in effect. *Id*.

Hence, in recognition of WEST VIRGINIA CODE § 18B-1-3(h), analysis under the Chancellor's Interpretative Memo is appropriate. Nothing in the Chancellor's Interpretative Memo specifically prohibits the concurrent internal and external posting of job vacancies. It does provide that the position must be posted internally. In this case, Respondent posted the vacancy internally for nearly four days before advertising outside the institution. It continued to post the vacancy internally throughout the entire fourteen calendar day posting period. In light of facts presented, it cannot be said that the posting violated the Memo.

Relatedly, Grievant argues the posting violated WEST VIRGINIA CODE § 18B-7-1(d). WEST VIRGINIA CODE § 18B-7-1(d) does not articulate the precise mode in which a position must be posted. It merely provides that a minimally qualified internal applicant must be transferred or promoted into a position before a new person is hired. There is no indication that the Respondent violated WEST VIRGINIA CODE § 18B-7-1(d) when it posted the position internally and then, after a short time, posted the position both internally and externally.

Even assuming that some minimal violation occurred, the posting has no effect upon the outcome of this grievance as the Grievant timely applied for the position.

descriptions she placed on that resume.[11]

Grievant asserts that Respondent could not have effectively evaluated her minimum qualifications because she did not have an accurate PIQ on file in June 2008, the time of Mrs. Carmichael's decision. Grievant's claim is without merit. First, Mrs. Carmichael used Grievant's job charters that did list all of Grievant's duties absent the PIQ format. Second, an accurate PIQ would not have affected the outcome of Mrs. Carmichael's decision. Mrs. Carmichael and Mrs. Riley both testified that Grievant's new PIQ, written by the Grievant, did not change either's decision that she was not qualified for the position because the PIQ did not demonstrate that Grievant had three plus years experience working as an executive secretary or administrative assistant.

Related to her minimum qualification argument, Grievant alleges that Respondent has a "recent history of inconsistent enforcement and arbitrary application in reference to 'minimum qualifications' when granting interviews or offering employment." July 22, 2008, *Statement of Grievance*. Grievant's opinions without evidence however, do not support her grievance. Grievant presented no rule, regulation or policy requiring Respondent to substitute education for experience. Nor did she present any testimony showing that Respondent had done so in the past. There is no indication that the Respondent's finding that Grievant did not meet the minimum qualifications was arbitrary and capricious.

---

[11] Even when examining the evidence Grievant presented at Level Three, there would still be no adequate basis for overturning Mrs. Carmichael's decision. Grievant did not present any evidence that she has three years of executive secretary or administrative assistant experience. Both Mrs. Carmichael and Mrs. Riley testified that the work examples submitted by Grievant at Level Three represented either basic secretarial duties or were duties that fell within the scope of Grievant's accounting position, *i.e.*, the duties were primarily accounting and budgetary in nature. Performing one or two duties that are similar to those of a vacant position does not make an internal applicant minimally qualified and/or entitled to the vacant position.

Based on the aforementioned, this grievance was not timely filed. Further, assuming for the sake of the argument that the grievance was timely filed, Grievant has failed to meet her burden of proving by a preponderance of the evidence that Respondent's finding that she was not minimally qualified was arbitrary and capricious or clearly wrong.[12]

Conclusions of Law

1. The burden of proof is on a respondent to prove the affirmative defense of untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health and Human Resources*, Docket No. 98-HHR-334 (June 24, 1999); *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If a respondent meets its burden of proof, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timeliness. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997). If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

2. Pursuant to the requirements of WEST VIRGINIA CODE § 6C-2-4(1), a grievance must be filed within fifteen days of the event upon which it is based.

3. Grievant did not file her grievance within fifteen days of the grievable event, nor did she provide justification to excuse her untimely filing.

---

[12] Grievant asserted that her reclassification from a pay grade 10 job title to a pay grade 12 job title in the Fall of 2008 is evidence that she is minimally qualified for the executive secretary position. Grievant's assertion is misguided in that the job duties she performed, as listed on the PIQ, were not executive secretary or administrative assistant duties despite the reclassification in a higher pay grade. Had Grievant's duties been pay grade 14, executive secretary level duties, she would have been reclassified as such.

4. Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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 employe[e] has not met [her] burden. *Id*. *See Burchell v. Bd. of Trustees/Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

5. In reviewing the findings of a decision-maker to determine whether it acted in an arbitrary and capricious manner, the undersigned cannot substitute his judgment for that of the decision-maker. *Booth v. W. Va. Bd. of Trustees at Marshall Univ.*, Docket No. 94-BOT-066 (July 25, 1994). The inquiry is whether the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, 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). *See Snodgrass v. Kanawha County Bd. of Educ.*, Docket No., 97-20-255 (Mar. 19, 1998).

6. Respondent's determination that the Grievant did not meet the minimum qualifications for the executive secretary position was not arbitrary and capricious because Grievant did not possess the requisite three years of experience as an executive secretary or administrative assistant.

Accordingly, this grievance is **DENIED**.

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 Order. *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 WEST VIRGINIA 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 (eff. July 7, 2008).

Date: March 18, 2009

_____

Mark Barney
Administrative Law Judge