THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DIANA L. SHILLINGBURG
Grievant,

v. **DOCKET NO. 2011-0936-CONS**

WORKFORCE WEST VIRGINIA AND
DIVISION OF PERSONNEL,
Respondents.

DECISION

Two grievances were filed at level one of the grievance procedure by Grievant, Diana L. Shillingburg, against her employer, Workforce West Virginia. The first was filed on August 3, 2010, as is reflected by the postmark on the envelope by which it was delivered to the Grievance Board. The statement of grievance is somewhat lengthy, but can be summarized as a complaint that she should have been allowed the opportunity to receive a temporary upgrade rather than Bridget Walker, a co-worker with less experience, and that she was also performing the duties of a position in a higher pay grade, but had not received a temporary upgrade. Grievant claimed discrimination and favoritism. The relief sought by Grievant was that:

> Ms. Walker be returned to her former pay classification and job duties immediately; that the job be posted immediately if the department plans to fill this position, giving all qualified employees an opportunity to apply; and that the Division of Personnel conduct an investigation of the employment, compensation and promotion practices of our department, interviewing employees to determine if other discrepancies have occurred. . . . If the Grievance Board determines that the placement of Ms. Walker into this position on an interim basis with this additional compensation is allowable under WV Code, then I should be awarded this additional compensation, too, for the past few years I have also been doing these additional duties.

A hearing was held at level one on this grievance on August 25, 2010, and the grievance was denied at that level on September 15, 2010. Grievant appealed this grievance to level two on September 20, 2010.

A second grievance was filed by Grievant on December 20, 2010, alleging that she was not selected for a posted position in retaliation for filing a grievance. As relief Grievant sought, "to be made whole in every way including benefits, and salary and for the retaliation to stop. Grievant asks that she receive the salary of the new position plus 10% interest." The parties agreed to waive level one, and asked that the two grievances be consolidated. The grievances were consolidated, and a mediation session was held on January 4, 2011. Grievant appealed to level three on January 10, 2011, and a level three hearing was held before Administrative Law Judge Carrie H. LeFevre, on November 22, 2011, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Anita Mitter, West Virginia Education Association, Workforce West Virgina was represented by Katherine A. Campbell, Esquire, Assistant Attorney General, and the Division of Personnel was represented by Karen O'Sullivan Thornton, Assistant Attorney General. This matter became mature for decision on January 9, 2012, on receipt of the last of the parties' proposed findings of fact and conclusions of law. Respondent Division of Personnel declined to submit written proposals. This matter was transferred to the undersigned Administrative Law Judge for administrative reasons on May 15, 2012.

Synopsis

Grievant believes she should have been temporarily upgraded rather than another employee who had less seniority and experience than she, and that she should have been selected for a posted position. Respondent demonstrated that the first grievance was not

timely filed. As to the selection grievance, Grievant did not demonstrate a flaw in the selection process, or that she was the best candidate for the position.

The following Findings of Fact are made based on the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by Workforce West Virginia ("WWV") as a Financial Reporting Specialist 3. She has a degree in Accounting, and in 2010, she had been employed by WWV for nine years, and worked in the private sector for 14 years before that.

2. Sometime in 2010, Bridgette Walker, an Accountant/Auditor IV, employed by WWV, was temporarily assigned to perform the duties of Larry Chancey, an Administrative Services Manager 3 ("ASM 3"), employed by WWV, while Mr. Chancey was assigned to a special project. The decision was made by Caren Jenkins, an Administrative Services Manager 4 for WWV, Director of Fiscal and Administrative Management, and Russell Fry, Acting Executive Director of WWV, to assign Ms. Walker these duties, because she was assigned to Mr. Chancey's unit, and was familiar with the work and the contacts, and would require less training than someone from outside the unit.

3. Grievant was not assigned to Mr. Chancey's unit.

4. Grievant had been employed at WWV much longer than Ms. Walker, and had more accounting experience than Ms. Walker. Ms. Walker had been a WWV employee for about 11 months.

5. Ms. Walker talked to Ms. Jenkins about receiving a temporary upgrade for performing Mr. Chancey's duties, and Ms. Jenkins told her she did not think that was

possible because Mr. Chancey had not been removed from his position. Ms. Walker took it upon herself to complete and submit the documentation for a temporary upgrade to ASM 3, and she was approved by the Division of Personnel for a temporary upgrade with a salary increase for a six month period. Her temporary upgrade began July 1, 2010, and ended December 31, 2010, at which time she was returned to her position at WWV. She performed Mr. Chancey's duties for approximately three or four months before receiving the temporary upgrade and salary increase. Ms. Walker is no longer performing any of Mr. Chancey's duties.

6. Grievant became aware that Ms. Walker had received a temporary upgrade on or about July 9, 2010, when she received an email from Charlotte Zornes, a WWV employee, notifying her of such. This email was in response to an inquiry from Grievant.

7. The grievance form is dated July 31, 2010, but was not postmarked until August 3, 2010, 17 working days after Grievant was made aware that Ms. Walker had received a temporary upgrade. Grievant was on vacation when she placed the grievance form in the mail. The record does not reflect when she began her vacation.

8. Sometime after receiving the July 9 email, Grievant accessed WWV records and determined that Ms. Walker had received a salary increase when she was temporarily upgraded.

9. Respondent raised a timeliness defense at level one.

10. Sometime during the summer of 2010, Grievant, Brock Jarrett, a Financial Reporting Specialist for WWV, Martha Wilcox, a Financial Reporting Specialist 1 for WWV, and Tammy Cogar, an ASM 2 for WWV, met with Ms. Jenkins to complain about Ms. Walker receiving the temporary upgrade rather than any of them, and to tell her that they

believed Ms. Walker had been falsifying her overtime requests. The basis for their belief that Ms. Walker was falsifying overtime requests was that they did not see Ms. Walker working overtime when any of them was on site working overtime.

11. During the meeting referenced in the preceding Finding of Fact, Ms. Jenkins told Grievant, "you *were* being groomed" for an ASM 3 position. Ms. Jenkins had told Grievant on more than one occasion prior to this that she was grooming her for an ASM 3 position. Grievant took Ms. Jenkins' statement during this meeting to mean that Ms. Jenkins no longer believed she should be placed in an ASM 3 position.

12. Ms. Jenkins reported the claim of overtime fraud to Mr. Fry, and she pulled timesheets for Ms. Walker and reviewed them. She asked Mr. Fry to institute a new practice of requiring card access to the building, and this request was denied. A new practice was instituted, and employees are now required to submit a detailed list of the projects they worked on when they were working overtime.

13. Inez Holland retired from her position as an ASM 3 in April 2010. After her retirement, Grievant was assigned to prepare the budgets for grant applications, which had been one of Ms. Holland's duties, comprising only a very small part of her job. Ms. Jenkins took on the remainder of Ms. Holland's duties. Grievant was not temporarily upgraded during this time.

14. Sometime in the fall of 2010, WWV posted Ms. Holland's ASM 3 position. Grievant applied, as did a number of other individuals, including Mr. Jarrett.

15. After Ms. Holland retired, Mr. Fry and Ms. Jenkins modified the duties of the position so that all financial units in WWV would report to this position, and this position

would be Ms. Jenkins' only back-up, rather than all three ASM 3 positions being her back-up. The posted ASM 3 position was a key position in the agency.

16. Grievant and Mr. Jarrett, as well as other employees of WWV and applicants from outside the agency, were interviewed by a four member interview team. The interview team members were Ms. Jenkins, Valerie Comer, Deputy Executive Director for WWV, Michael Moore, Director of Unemployment Compensation for WWV, and Ramona Dickenson.

17. Mr. Fry selected the interview team. Usually the agency uses a three-member interview team, but Mr. Fry wanted four people on this interview team because ASM 3's are considered Assistant Director positions at WWV. The agency has in the past utilized four-member interview teams for certain positions.

18. Mr. Moore was not aware that Grievant had a grievance pending at the time of the interview or during the selection process. Ms. Comer and Ms. Jenkins were aware of the grievance, but it was not discussed by the interview team. The record does not reflect whether Ms. Dickenson was aware of the grievance.

19. All those interviewed were asked the same questions during the interview, and were also given the same set of questions to answer in writing after the oral interview. These questions were finalized by Mr. Fry and Ms. Comer from questions suggested by the members of the interview team.

20. Each member of the interview team ranked those interviewed, and then discussed the individuals ranked in the top two or three by each member. The interview team then picked the top two candidates from the overall rankings, based on the answers to the interview questions, and those two individuals were interviewed again.

21. Grievant was not ranked in the top two candidates by any member of the interview team. Ms. Jenkins ranked Grievant third, Ms. Comer and Mr. Moore ranked Grievant seventh, and Ms. Dickenson ranked Grievant eighth.

22. Ms. Jenkins' first choice had the most accounting experience of any of the applicants, and all of it was in state government.

23. Ms. Jenkins had not completed formal evaluations for Grievant or any other employee she supervised for several years. The interview team did not consider evaluations in the selection process.

24. Mr. Jarrett was selected for the posted ASM 3 position.

25. Mr. Jarrett has a B.S. degree in Accounting, and is a Certified Public Accountant. He has 14 years of work experience as an Accountant, and has worked at WWV for three years.

Discussion

Respondents argued that the first grievance was not filed within the time period allowed by W. VA. CODE § 6C-2-4, and therefore it must be dismissed. Alternatively, Respondents argued that, since Ms. Walker's temporary upgrade ended December 31, 2010, and she was returned to her position, the first grievance is moot, because no relief can be granted.

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket

No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991). "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days 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. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). W. VA. CODE § 6C-2-3(a)(2) states that

> The specified time limits may be extended to a date certain by mutual written agreement and shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause for which the grievant has approved leave from employment.

Grievant became aware that Ms. Walker had been temporarily upgraded in the email she received on July 9, 2010. Although the grievance form is dated July 31, 2010, the envelope received by the Grievance Board with the grievance form was postmarked August 3, 2010. The procedural rules of the Grievance Board define the term file as follows:

> "File" or "filing" means to *place the grievance form in the United States Postal Service mail*, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard East, Charleston, West Virginia 25311, and (2) the agency's chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimilie transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark. All grievance forms shall be date stamped when received. Grievance forms may not be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules. Within two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

156 C.S.R. 1 § 2.1.4 (2009)(Emphasis added). This rule adopted the mailbox rule previously set forth in the case law in *McVay v. Wood County Board of Education*, Docket No. 95-54-041 (May 18, 1995). August 3, 2010, is the date the grievance was filed. This is 17 working days after the Grievant became aware of the temporary upgrade. The grievance was not timely filed.

Grievant stated that she was on vacation when she placed the grievance form in the mail. However, she did not state whether she was on approved leave on day 15, July 31, 2010. While it is not clear that the exception to timely filing found in W. VA. CODE § 6C-2-3(a)(2) would apply to approved annual leave for vacation, there is no evidence that Grievant was on approved leave on July 31, or any date between July 9 and July 31.

Grievant seemed to insinuate that she did not have to file a grievance until she knew, from checking her employer's records, that Ms. Walker had received a salary increase to go with the temporary upgrade. The purpose of a temporary upgrade is to provide the employee with a salary increase for performing duties outside his or her classification, as is clearly set forth in the Division of Personnel's Temporary Classifications Upgrades Policy. Although Grievant would not have known the exact amount of the salary increase, she knew the basic facts giving rise to the grievance on July 9, 2010. Grievant has not demonstrated an excuse for her failure to timely file the grievance. The first grievance must be dismissed as untimely filed. The issue as to whether the grievance is moot need not be addressed. However, the undersigned will briefly discuss the issues raised by Grievant.

Grievant has the burden of proving her grievances by a preponderance of the evidence. Procedural Rules of the 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). *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). "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).

With regard to the temporary upgrade of Ms. Walker, Grievant argued the position should have been posted. Grievant also appeared to argue that Ms. Walker could not be temporarily upgraded because there was no vacancy and you could not have two people in the same position. Grievant cited no authority to support her arguments. Respondents

pointed out that there was no vacancy to be posted, and the rules on temporary upgrades do not require that any posting and selection occur, rather, management has the discretion to determine who should be assigned the additional duties that result in the temporary upgrade.

Respondents are correct. The purpose of the Division of Personnel temporary upgrade policy is

> [t]o provide for the approval of a pay differential . . . for employees who, during a specified limited period of time, perform work on a full-time basis that is envisioned in a Division of Personnel job class of a higher rank as measured by salary range and an increased level of duties and/or responsibilities.

Division of Personnel's Temporary Classification Upgrades Policy, Respondent's level three Exhibit Number 2.

Employees who are in the classified service may only be upgraded to a classified service position, and the employee receives a 5% per pay grade increase up to 15%. "There is no indication in the policy that the position must be posted, and the only requirement in terms of qualifications is that '[e]mployees proposed for a temporary upgrade shall meet, or be within 3 months of satisfying, the minimum requirements of training and experience for the position to which they will be upgraded.' *Id."* *Carter v. Dep't of Envrt'l Protection*, Docket No. 06-DEP-341 (Mar. 30, 2007). Temporary upgrades are to be approved by the Division of Personnel. *Id.*

In essence, this grievance boils down to Grievant's disagreement with the decision to select Ms. Walker to perform Mr. Chancey's duties while he was on a special project. "This issue is a management decision, and this type of decision is judged by the arbitrary and capricious standard." *Carter, supra.*

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). 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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways,* Docket No. 96-DOH-141 (July 31, 1997). Here, Grievant did not meet that burden of proof. Grievant did not establish a violation of any rule, regulation, or statute, and she also did not demonstrate the decision to select Ms. Walker to perform Mr. Chancey's duties was arbitrary and capricious. Although Ms. Walker had not been

employed at WWV for long, she was an Accountant employed in Mr. Chancey's division, and was familiar with the work of the division and the contacts, while Grievant was not employed in Mr. Chancey's division and produced no evidence that she was familiar with the work of that division or the contacts. There is no evidence that Ms. Walker did not possess the skills necessary to perform the duties. Grievant's sole argument really is that she had more seniority with WWV than Ms. Walker. This is insufficient to demonstrate arbitrary and capricious conduct.

Finally, Grievant argued this situation constituted discrimination and favoritism. For purposes of the grievance procedure, discrimination, including an allegation of age discrimination, is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish 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., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant failed to demonstrate that she was similarly situated to Ms. Walker. Ms. Walker was in Mr. Chancey's division, and under his supervision, while Grievant was not, and there is nothing in the record to indicate that their job duties and responsibilities were the same.

Grievant also claimed discrimination because she was not temporarily upgraded several years ago when she was performing Mr. Chancey's duties, and that no one took care of getting her an upgrade, and because she was not temporarily upgraded when she was performing one of Ms. Holland's many duties. Ms. Jenkins acknowledged that Grievant was performing Mr. Chancey's duties when Ms. Jenkins began working for WWV. Ms. Jenkins also testified that she did not think Ms. Walker could be temporarily upgraded, and she had told her as much. Nonetheless, Ms. Walker took it on herself to complete the necessary paperwork and asked her supervisors to submit it. Nothing prevented Grievant from doing the same. This is not favoritism or discrimination. This was one employee being proactive while another employee was not. Perhaps this was another reason Ms. Walker was asked to step in for Mr. Chancey. As to the claim regarding a temporary upgrade for performing one of Ms. Holland's duties, this does not amount to the performance of "work on a full-time basis that is envisioned in a Division of Personnel job class of a higher rank," as is required for a temporary upgrade. (Division of Personnel's Temporary Classification Upgrades Policy.)

The issue in the second grievance is whether Grievant should have been selected for the posted position when Ms. Holland retired. In a selection case, a grievant must

prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. 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).

The Grievance Board recognizes selection decisions are largely the prerogative of 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). 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)).

"Also, as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005)." *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

Grievant produced no evidence from which the undersigned can conclude that she was the superior candidate for the position. In fact, the record contains sparse evidence of the qualifications of Grievant and Mr. Jarrett. The record reflects that Grievant was a dedicated, experienced employee, with more experience than Mr. Jarrett, but this is insufficient to demonstrate that she should have been selected for the position.

Grievant questioned the make-up of the interview team, specifically the presence of Ms. Comer and Ms. Jenkins, and the fact that there were four members, rather than three, as is the usual practice. WWV's witnesses explained that, although Ms. Comer was well aware of the first grievance, the posted position was considered an Assistant Director position, and WWV management believed a Deputy Executive Director should serve on the interview team for this type of position. Obviously, since this position was going to report to Ms. Jenkins, it was appropriate for her to serve on the committee. Grievant did not challenge the other two members of the interview team, both of whom ranked Grievant well down the list of candidates after the interview. As to the issue of there being four people on the interview team, WWV does sometimes use four people, and in this case, one would think this would be to Grievant's advantage since she found two of members objectionable.

Finally, Grievant alleged that the reason she was not selected was in reprisal for filing the first grievance. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

If a grievant makes out a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. *Id. See Mace v. Pizza Hut, Inc.,* 377 S.E.2d 461 (W. Va. 1988); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n,* 309 S.E.2d 342 (W. Va. 1983); *Webb v. Mason County Bd. of Educ.,* Docket No. 89-26-56 (Sept. 29, 1989). "Should the employer succeed in rebutting the *prima facie* showing, the employee must prove by a preponderance of the evidence that the reason offered by the employer was merely a pretext for a retaliatory motive." *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-

01-154 (Apr. 8, 1994). *See Sloan v. Dep't of Health and Human Res.*, 215 W. Va. 657, 600 S.E.2d 554 (2004).

Grievant failed to prove reprisal. First, the evidence presented demonstrated that the grievance was not discussed during the selection process, that one of the four members of the interview team definitely was not aware of the grievance, and there was no evidence presented as to whether Ms. Dickenson knew of the grievance. Second, Grievant did not demonstrate that there was any causal connection between the grievance and the selection decision. None of the members of the interview team thought Grievant was the best choice for the posted position, and Grievant produced no evidence that she was the best choice. In fact, Mr. Moore and Ms. Dickenson ranked Grievant as the seventh and eighth candidate respectively, based on the answers to the interview questions, and there is no evidence in the record that either Mr. Moore or Ms. Dickenson knew of the grievance or were otherwise out to get Grievant. Ms. Jenkins ranked Grievant higher than any of the other members of the interview team.

Grievant, in her written argument stated that Ms. Jenkins testified that experience was the most important factor in the selection. This is not accurate, and if it were, Grievant still would not have been the successful candidate. Ms. Jenkins said experience was important, and she also said that her first choice, who was not Grievant, had the most experience. Even if Grievant were the most experienced candidate, experience alone does not make her the best candidate for this position. As is noted above, the case law on state selections makes it clear that many factors may be considered in the selection process, including how the candidate performs during the interview.

Grievant also pointed out that even though evaluations is listed on the sheet for ranking the candidates, this criterion was not considered. Grievant believed her excellent evaluations from several years ago should have been considered. While the undersigned would question using such dated information in the selection of an individual for this type of high-level position, Grievant did not demonstrate that this would have pushed her to the top. No information was placed into the record regarding the evaluation of any other candidate for the position, and again, Grievant's rank among the candidates by three of the four members of the interview team after the interview was seventh and eighth. Grievant's evaluations were simply not going to propel her to the top.

Finally, Grievant found it significant that Ms. Jenkins had made a statement during the meeting with Grievant and others about Ms. Walker, that Grievant was being groomed for an ASM 3 position, concluding that Ms. Jenkins was saying Grievant would not be given such a position after this meeting. Grievant apparently had no problem with improper preferential treatment toward her when she was being told she was being so groomed. Regardless of what Ms. Jenkins meant by any of it, she was only one member of the interview team, and she ranked Grievant much higher than any other member. This statement is meaningless.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis

to excuse her failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

3. An employee must file a grievance

> Within fifteen days 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. . . .

W. VA. CODE § 6C-2-4(a)(1); W. VA. CODE § 6C-2-3(a)(1).

4. The procedural rules of the Grievance Board define the term file as follows:

> "File" or "filing" means to *place the grievance form in the United States Postal Service mail*, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard East, Charleston, West Virginia 25311, and (2) the agency's chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimilie transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark. All grievance forms shall be date stamped when received. Grievance forms may not be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules

156 C.S.R. 1 § 2.1.4 (2009)(Emphasis added).

5. The first grievance was not timely filed.

6. Grievant did not demonstrate an excuse for her failure to timely file the first grievance.

7. Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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). A preponderance of the evidence is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

8. In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). 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).

9. The Grievance Board recognizes selection decisions are largely the prerogative of 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). 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*.

10. 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)). "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 Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

11. "Also, as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005)." *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

12. Grievant failed to demonstrate that the selection process was flawed, or that she was entitled to the position at issue.

13. To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

14. Grievant did not demonstrate that reprisal played a part in her non-selection for the posted position.

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 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

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BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: June 26, 2012