

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MYCAH AUVILLE,  
Grievant,**

**v.**

**Docket No. 2022-0731-WooED**

**WOOD COUNTY BOARD OF EDUCATION,  
Respondent.**

**DECISION**

Grievant, Mycah Auville, is employed by Respondent, Wood County Board of Education. On April 11, 2022, Grievant filed this grievance against Respondent attaching an eighty-eight page document relaying a complicated history between the parties, which is incorporated herein by reference.

Following the April 22, 2022, level one hearing, an undated level one decision was rendered denying the grievance. Grievant appealed to level two on May 16, 2022. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on July 20, 2022. A level three hearing was held over three days on September 15, 2022, June 26, 2023, and December 21, 2023, before the undersigned. The hearings on September 15, 2022 and June 26, 2023, were held in person at the Grievance Board's Charleston, West Virginia office. The December 21, 2023, hearing was held via video conference. At the beginning of the hearing, the undersigned clarified that the only issue that could be addressed in the grievance was Grievant's non-selection for the Director of Vocational Education position at Wood County Technical Center. Grievant appeared personally and was represented by Benjamin Auville. Respondent appeared by Superintendent Christie Willis on June 26, 2023, and December 21, 2023, by Assistant Superintendent John Merritt on September 15, 2022, and was represented by counsel,

Richard S. Boothby Bowles Rice, LLP. This matter became mature for decision on February 27, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").<sup>1</sup>

### **Synopsis**

Grievant grieved her nonselection for the Director of Vocational Education at the Wood County Technical Center. Grievant failed to prove that she was the most qualified candidate, the selection decision was due to reprisal, the decision was a result of favoritism, or the selection process was fatally flawed. Both parties alleged but failed to prove that the other had engaged in bath faith. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

### **Findings of Fact**

1. Grievant is employed by Respondent as a Multicategorical Special Education Classroom Teacher and has been so employed since August 2019.
2. On December 21, 2021, Grievant filed a citizen's complaint with Respondent regarding her own child's education.
3. On February 8, 2022, the Board accepted the retirement of the Director of Vocational Education of the Wood County Technical Center effective February 18, 2022.
4. Respondent posts positions through a weekly list of vacancies distributed to work sites and through electronic postings on a web application called Search Soft.

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<sup>1</sup> The parties agreed to submit PFFCL by January 31, 2024, but due to a delay in providing the hearing recordings to Grievant the due date was extended until February 23, 2024.

5. On February 16, 2022, Robin Cross, a secretary/coordinator within Respondent's Human Resources department, entered the position of Director of Vocational Education on Search Soft as pending and placed it on the draft vacancies list to be posted later that day.

6. Either Assistant Superintendent Merritt or his administrative assistant, Stephanie Cunningham, reviews all postings before they are distributed.

7. On February 16, 2022, after reviewing the draft postings, either Assistant Superintendent Merritt or Ms. Cunningham instructed Ms. Cross to remove the vacancy from the postings. It was not unusual for Ms. Cross to be instructed to remove a draft posting.

8. Ms. Cross immediately removed the posting from the vacancies list but forgot to remove it from Search Soft.

9. The posting was removed from the vacancies list before the list was distributed but remained open on Search Soft due to Ms. Cross' error.

10. Before the posting could be taken down on Search Soft, Grievant applied for the position. Grievant was the only applicant.

11. On February 23, 2022, the position was posted correctly to Search Soft and to the distributed vacancies list.

12. Sixteen applicants applied for the position, including Grievant.

13. Then Superintendent William Hosaflook formed a selection committee consisting of central office administrators Ken Cook, Keith Palmer, and Mike Fling.

14. The selection committee chose to interview only those applicants that possessed Career and Technical Education ("CTE") experience, whether as an

administrator or an instructor. The committee reviewed the candidates' applications to determine which candidates had CTE experience.

15. Five applicants were interviewed: Kaleb Lawrence, Jeffrey Mennillo, Autumn Queen, Jared Voldness, and Kari Brown.

16. Grievant was not selected for an interview as her application did not contain any CTE experience.

17. The selection committee discussed the interview questions, Mr. Cook drafted the questions, and the two other committee members reviewed and approved the questions.

18. The interview questions were typical of those used in such selection decisions and were relevant to the position.

19. Following the interview, the selection committee recommended Kaleb Lawrence for the position.

20. Superintendent Hosaflook disagreed with the selection committee's recommendation as he believed Mr. Menillo was the most qualified candidate.

21. As was his typical practice, Superintendent Hosaflook sent a memo to the Board members in advance of the March 27, 2022, Board meeting. In the memo, he stated, "Approval of Jeff Menillo as WCTC director- There were 16 applicants for this position. We narrowed it down to four candidates. Jeff Menillo, Caleb Lawrence, Jared Voldness, and Kari Brown. I believe Jeff Menillo, currently, is the most qualified candidate for the job. However, I believe Caleb Lawrence will be ready in the future when Mr. Menillo retires."

22. During the March 22, 2022, Board meeting, the Board went into executive session and multiple discussions were had among various Board members separately during the executive session regarding the position. Some Board members were concerned about Mr. Mennillo's attendance and complaints they had received from teachers. Another was concerned that the selection committee had recommended Kaleb Lawrence and not Mr. Menillo. It was also discovered that the position had not been posted on the West Virginia K-12 Public Education Job Bank.

23. Ultimately, the Board decided the vacancy should be reposted so that it could be posted on the West Virginia K-12 Public Education Job Bank to attract additional candidates.

24. Upon return to open session, the Board unanimously voted to remove the hiring for the position from the agenda.

25. On March 23, 2022, the position was again posted to Search Soft and the weekly printed vacancies list and was additionally posted to the statewide job bank. The listing stated that previous applicants need not apply.

26. Dr. Jason Hughes, Michael Miller, Jennifer Null, Kari Rice, and Adam Wilson applied. A number of the previous applicants also applied despite the instruction not to apply, including Grievant.

27. The same selection committee interviewed Dr. Hughes using the same questions used during the first round of interviews and ultimately recommended Dr. Hughes for the position.

28. The selection committee recommended Dr. Hughes be hired for the position and Superintendent Hosaflook agreed.

29. At the April 12, 2022, Board meeting, Superintendent Hosaflook recommended Dr. Hughes for the position and the Board approved his hire.

30. Dr. Hughes holds the following degrees: Bachelor of Science in Agriculture, Master of Science in Agricultural Education, and a Doctor of Philosophy in Curriculum and Instruction

31. Dr. Hughes' application and Curriculum Vita listed the following experience: two months as the Assistant Program Director of Agriculture and Natural Resources for West Virginia State University Extension, five months as an Instructor in Agricultural Education for Kansas State University, two years as a Virtual School Teacher for the Department of Education, twelve years as the Lead Coordinator of Agriculture, Food, and Natural Resources for the Department of Education Office of Career and Technical Instruction, one and a half years as the Coordinator of Career and Technical Education with the Department of Education Office of Institutional Education Programs, nine and a half years as an Agricultural Sciences Teacher at a public high school, and almost three years as an Agricultural Sciences Teacher at the Wood County Technical Center.

32. In addition, Dr. Hughes listed numerous CTE related honors, leadership activities, memberships, presentations, and professional development.

33. Grievant holds the following degrees: Bachelor of Behavioral Science in Early Childhood Education, Master of Science in Education, and a Doctor of Education in PK-12 Educational Leadership.

34. Grievant's application listed the following experience: two years and four months as Administrative Director of "Non-Profit Preschool," four years as the Lead Teacher of the same, one year as a Kindergarten teacher in a public school, three years

as a substitute teacher in a public school, one year part time as the Lead Teacher of a private preschool, one year in her position with Respondent as a high school Multicategorical Special Education teacher, and one month as an Adjunct Professor at Trident University International. The remainder of Grievant's listed experience was for student teaching/internship.

35. Jeffrey Menillo holds the following degrees: Bachelor of Arts in Social Studies and a Master of Science in Administration Supervision.

36. Mr. Menillo's application listed the following experience: sixteen years as an Assistant Principal; three years as the Director of the Caperton Center, directing five CTE programs on the campus of WVU-Parkersburg; and thirty-four years of teaching experience.

37. Kaleb Lawrence holds the following degrees: Associate of Arts, Bachelor of Science in Physical Education, Master of Arts in Educational Leadership, and Master of Arts in Physical Education.

38. Mr. Lawrence's application listed the following experience: six- and one-half years as a high school Assistant Principal, including two- and one-half years overseeing CTE, seven months experience as a middle school Assistant Principal, one year as a Long Term Industrial Arts Instructor, two and one half years as a high school physical education teacher, and four and one half years as a high school Athletic Director.

39. All held appropriate certifications, but Mr. Lawrence and Mr. Menillo held the specific Career Technical Education Administrator certificate while Grievant and Dr. Hughes did not. Further, Grievant's certifications were provisional, not permanent.

40. Mr. Menillo had the far greater seniority of twenty years, with Mr. Lawrence at four years, and Dr. Hughes' and Grievant at three years.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues she was entitled to the position because she was the most qualified candidate. Grievant argues that she was denied the position because she was excluded from consideration due to reprisal and favoritism. Grievant argues further that the selection process was fatally flawed. Respondent denies any impropriety in the selection process and asserts that it selected the most qualified candidate. Both parties allege that the other engaged in bath faith in the grievance process and Respondent moved for an allocation of costs.

As there are disputed facts, credibility determinations are necessary. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing



the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Robin Cross was credible. Her demeanor was professional and she was forthcoming in her answers to questions. She maintained good eye contact. Her attitude towards the proceeding was appropriately serious. There was no evidence of interest or bias or any indication that Ms. Cross had been pressured to give certain testimony. Her explanation that what occurred was an error is plausible and explains why the posting was present on Search Soft but not the printed list. Although neither Assistant Superintendent Merritt nor Ms. Cunningham were called to testify regarding the reason for removing the notice, it appears most likely that the notice on February 16<sup>th</sup> was premature because the former Director's resignation was not effective until February 18<sup>th</sup>.

Of the selection committee, only Keith Palmer was called to testify. Mr. Palmer was credible. His demeanor was quiet, serious, and professional. His answers to questions appeared forthright and he maintained an appropriate attitude towards the proceedings. He exhibited no bias or interest in the matter. His testimony was plausible and was not contradicted. Mr. Palmer credibly explained that the hiring committee had

reviewed all the applications and had chosen to interview only those candidates who possessed CTE experience. As will be discussed fully below, Grievant's application did not have CTE experience listed. Grievant's assertion that Mr. Palmer and Superintendent Hosaflook lied about her experience or that Superintendent Hosaflook somehow hid her experience from the committee is based on her incorrect interpretation of what constitutes CTE experience.

Superintendent Hosaflook was credible. He had an appropriate attitude towards the proceeding and testified with a professional and serious demeanor. Although he asked for clarification for some questions during cross examination, he did not attempt to evade questions. Grievant asserts Superintendent Hosaflook is biased against her because of the citizen's complaint she filed and that he has an interest in covering up his alleged wrongdoing. Grievant asserts that Superintendent Hosaflook manipulated the entire process to exclude Grievant and that he provided false testimony to cover it up. As is discussed below, these contentions are simply not supported by the record.

Mr. Palmer offered credible testimony that it was the hiring committee that determined to interview only those candidates that possessed CTE experience and that it was the hiring committee who reviewed the applications to determine which candidates had that experience. Grievant did not have CTE experience so Superintendent Hosaflook did not lie when he said she did not have that experience. Although Superintendent Hosaflook incorrectly testified that Grievant lacked administrative experience, it is more likely than not that he simply misremembered Grievant's administrative experience rather than lied about it. Lying about such an easily proven fact would have no purpose whereas simply not remembering the qualification of one of more than twenty candidates for one

hiring recommendation out of hundreds that Superintendent Hosaflook made would be expected. Grievant's contention that Superintendent Hosaflook lied about his recommendation of Mr. Menillo is a mere semantic argument based on the difference between a formal recommendation and the discussion of his intended recommendation. In no way did Superintendent Hosaflook attempt to conceal the fact that he intended to recommend Mr. Menillo as the most qualified candidate. He readily testified to that on direct examination. However, in the end, Superintendent Hosaflook did not recommend Mr. Menillo because that item was removed from the agenda and never formally occurred.

Board members, Richard Olcott, Ronald Tice, and Judy Johnson, were credible.<sup>2</sup> The members all appeared forthcoming in their testimony and had appropriate attitudes towards the proceeding. They appeared to have an appropriate memory of events and gave consistent testimony regarding the events. Although Grievant asserted that the members' testimony was too similar, seemingly implying their testimony was rehearsed, the undersigned does not find that to be so. The members' testimony had an appropriate level of similarity and difference for a group of people remembering an unusual and somewhat contentious event. The members and Superintendent Hosaflook's testimony agreed that Superintendent Hosaflook intended to recommend Mr. Menillo, the Board was concerned about it, but that the recommendation never formally occurred because it was removed from the agenda so that the position could be posted on the statewide job bank.

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<sup>2</sup> Justin Raber and Deborah Hendershot were also called to testify but their testimony was quite brief and not at issue.

The facts to which Grievant testified are generally not in dispute but Grievant was credible. Grievant's demeanor was professional, calm, and serious. She had an appropriate attitude towards the proceeding. She answered questions in a forthright manner without evasion. Although Grievant testified that she has CTE experience and she does not, that is a difference in interpretation as to the meaning of experience. Grievant did not attempt to say that she had taught CTE courses when she had not but, rather, asserts she has CTE experience because of her experience in early childhood education that would qualify her for certification.

The analysis now turns to the application of facts to the law. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017

(4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

“A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications....” W. VA. CODE § 18A-4-7a(a).

In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

- (1) Appropriate certification, licensure or both;
- (2) Amount of experience relevant to the position...
- (3) The amount of course work, degree level or both in the relevant field and degree level generally;
- (4) Academic achievement;

- (5) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to performing the duties of the job;
- (7) Past performance evaluations conducted pursuant to §18A-2-12 and §18A-3C-2 of this code...
- (8) Seniority;
- (9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged....<sup>3</sup>

W. VA. CODE § 18A-4-7a(b). “When filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant’s qualifications....” W. VA. CODE § 18A-4-7a(c).

Grievant failed to prove she was the most qualified candidate. Grievant created her own “hiring matrix” in which she assigned one point to each factor and scored herself higher than all candidates except Dr. Hughes, with whom she tied. Grievant is understandably proud of her accomplishments and eager to continue her career in administration. Grievant does possess superior education to all candidates but Dr. Hughes and does possess several years of administrative experience as the director of a private preschool. She has worked hard to obtain multiple certifications in a short time since relocating to West Virginia. She has performed excellently as a teacher for Respondent. However, Grievant discounts the accomplishments of the other candidates and fails to recognize that Respondent has the clear authority and substantial discretion to choose how to weigh the hiring criteria to hire the most qualified candidate in its own estimation.

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<sup>3</sup> For clarity, provisions relating only to classroom teaching positions have been omitted.

The position at issue is the director of a secondary CTE school. Respondent chose to value most highly in this selection decision the possession of CTE experience. Respondent's choice to weigh CTE experience most highly for this position is certainly reasonable and soundly within its discretion. Unlike Grievant, who possesses no CTE experience, the successful candidate possesses an extensive and unique combination of CTE experience, education, scholarship, and outreach.

Grievant asserts she does have CTE experience because the Department of Education recognized that she had four years CTE experience. Grievant provided the West Virginia Career and Technical Education Endorsement and Testing Manual in support of this contention. Grievant's assertion is incorrect as these are two separate types of experience. Early childhood education experience is accepted as qualifying experience to obtain a career/technical permit and career/technical certificate to enable a teacher to teach CTE courses in early childhood education. Grievant did later receive a Career Technical certificate, after the selection decision in this matter, but that only certified Grievant as eligible to serve as CTE instructor in early childhood education.<sup>4</sup>

Grievant further argued that her experience as a professor at Trident University International should be considered CTE experience as she teaches students how to start their own preschool. However, at the time of application, Grievant had only one month of experience as a professor. Grievant has never served as a CTE instructor or as an administrator over a CTE program or facility. Therefore, Grievant lacked any of the experience Respondent reasonably deemed most important for the position.

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<sup>4</sup> The Center does not offer early childhood education courses.

In contrast, Dr. Hughes majored in Agricultural Education and his master's thesis was regarding agricultural education. Dr. Hughes served as a CTE instructor for twelve- and one-half years, including three years at the Center. He left teaching to join the West Virginia Department of Education as a CTE administrator for thirteen- and one-half years.<sup>5</sup> He first served as the Coordinator of Career and Technical Education for the Office of Institutional Education Programs coordinating all CTE programs in the state's institutional facilities. In that role, he implemented new CTE programs and curriculum and conducted CTE program evaluations. He then served as the Lead Coordinator of Agriculture, Food, and Natural Resources for the Office of Career and Technical Instruction where he developed and coordinated Agricultural Education curriculum statewide. Additionally, he conducted classroom visits to teachers, evaluated programs, and developed, facilitated, and coordinated teacher professional development and mentoring for new teachers. While serving as a Graduate Teaching Assistant at Kansas State University, Dr. Hughes supervised student teachers and developed and taught Master of Arts in Teaching Agricultural Education courses and CTE courses. In sum, Dr. Hughes had twenty-six years of CTE experience, of which thirteen- and one-half years was administrative experience. Grievant had no years of CTE experience and her two years of administrative experience was as the director of a private preschool.

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<sup>5</sup> Grievant argues Dr. Hughes does not have qualifying administrative experience because his experience was not gained as the administrator of a school. Respondent has the discretion and expertise to evaluate what is considered qualifying experience and Respondent's position on this issue is reasonable.



As to the other qualifications, Grievant and Dr Hughes were either tied or Dr. Hughes was superior. Both possess a doctorate obtained with a 4.0 G.P.A.<sup>6</sup> However, Dr. Hughes demonstrated greater scholarship in his numerous presentations and in writing numerous successful grants as opposed to Grievant's lone publication. Both possessed three Professional Administrative Certificates, although Dr. Hughes' certificates were permanent while Grievant's were provisional. Grievant possessed more Professional Teaching Certificates: five to Dr. Hughes' three, but again, Dr. Hughes held a vocational certificate and Grievant did not.<sup>7</sup> Both possessed similar seniority at around three years, although Dr. Hughes had a few months more seniority.<sup>8</sup> Therefore, Dr. Hughes was by far the most qualified candidate.

Grievant also failed to prove she was more qualified than Mr. Lawrence or Mr. Menillo. Like Dr. Hughes, Mr. Lawrence and Mr. Menillo possessed CTE experience.

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<sup>6</sup> Grievant argued that Dr. Hughes' doctorate should not be considered because he did not seek reciprocity with the Department of Education. Grievant did not cite any support for this contention. Alternately, Grievant argued that she should receive more credit for her doctorate as she had held it longer than Dr. Hughes. "The date that respective doctorates were awarded does not create any order of precedence among competing candidates." *Jones v. Monroe Cty. Bd. of Educ.*, 190 W. Va. 646, 648, 441 S.E.2d 367, 369 (1994).

<sup>7</sup> Grievant provided her license issued November 17, 2022, which lists an additional Career Technical Certificate and Temporary Career Technical Certificate. However, those certificates were obtained after the selection decision in this matter so cannot be considered.

<sup>8</sup> Grievant disputed Dr. Hughes' seniority date of June 2019, as listed on the September 14, 2022, professional seniority list. Grievant is incorrect as Dr. Hughes did have three years of seniority from 1993 to 1996 from his prior employment at the Wood County Technical Center. The date on the list reflects the date of calculated years of seniority and not the date the employee was hired. "Any professional employee whose employment with a county board of education is terminated either voluntarily or through a reduction-in-force shall, upon reemployment with the same board of education in a regular full-time position, receive credit for all seniority previously accumulated with the board of education at the date the employee's employment was terminated." W. VA. CODE § 18A-4-7b(c).

Further, both Mr. Lawrence and Mr. Menillo had significantly more administrative experience than Grievant, Mr. Menillo had specific experience as the director of a CTE school, and Mr. Lawrence oversaw CTE programs as an Assistant Principal. Both also had the most relevant certification and more seniority.

Grievant further asserts the process was fatally flawed because the third posting of the position that resulted in Dr. Hughes' hiring was improper, because Respondent failed to use a hiring matrix, and because Grievant was denied an interview. Grievant argues that Respondent was not permitted to post the position three times and was required to fill the position by April 6, 2022. Dr. Hughes was hired on April 22, 2022, from the third posting, which Grievant argues renders Dr. Hughes' hiring invalid.

Postings are governed by the West Virginia Code as follows:

(1) Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. At their discretion, boards may repost an opening for a classroom teacher after the first posting in order to attract more qualified applicants subject to the following:

(A) Each notice shall be posted in conspicuous working places for all professional personnel to observe for at least five working days which may include any website maintained by the county board;

(B) At least one notice shall be posted within 20 working days of the position openings and shall include the job description;

(C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;

(D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and

(E) Job postings may not require criteria which are not necessary for the successful performance of the job

and may not be written with the intent to favor a specific applicant;

(2) No vacancy may be filled until after the five-day minimum posting period of the most recent posted notice of the vacancy;

(3) If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within 30 working days of the end of the first posting period....

W. VA. CODE § 18A-4-7a(q).

The vacancy was published to the Search Soft application in error and was not an official posting as established by Ms. Cross' credible testimony. Although the posting was not available as an exhibit, Ms. Cross testified that the posting was marked as "pending," as was her practice. Although the posting remained on the Search Soft application for some time, the posting was not distributed on the weekly vacancies list. Although the statute permits a Board to post notice of job openings through a website, Respondent provides notice of openings by listing it on Search Soft and by distributing it on the vacancies list. It appears most likely that the posting was marked as "pending" as Ms. Cross testified because Grievant was the only person to apply whereas the posting that was posted properly through both Search Soft and the distributed vacancy list received sixteen applications.

"A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 179 W. Va. 605, 328 S.E.2d 356 (1985). The Board must correct its legal mistake because to do otherwise would discriminate against the Board's other employees. *Bd. of Educ. v. Dawson*, 895 S.E.2d 66, 73 (W. Va. 2023) (memorandum

opinion). As the notice was not properly posted pursuant to Respondent's procedure, which would have denied employees the opportunity to apply, the posting was invalid and should not be considered the first posting for purposes of the thirty-day timeframe to fill the position. Therefore, the first posting for purposes of the statutory timeframe was on February 22, 2022, and the position was filled within thirty days of the closing of that posting. The posting from which Dr. Hughes was hired, March 23, 2022, was proper as the statute clearly allows Respondent to post professional positions more than once.

Grievant next asserts Respondent was required to use a "hiring matrix" in the selection decision and that the selection decision is invalid because a matrix was not used. A hiring matrix is a document in which the § 18A-4-7a(b) factors are listed and the comparison of the applicants based on the factors is recorded. Grievant failed to prove Respondent was required to use a "hiring matrix." Although it is common to use such a document and Respondent has used such a document in some of its selection decisions, that practice is not required by statute. If Respondent had any policy or procedure requiring the use of that document, the same was not entered into evidence. The statute only requires that Respondent "consider" each factor and does not prescribe a particular procedure to do so.

Grievant asserts she was entitled to be interviewed for the position. Grievant argues both that Respondent improperly limited interviews to those applicants who possessed CTE experience, and that Respondent improperly failed to recognize her CTE experience. As discussed above, Grievant did not have CTE experience. As to the denial of an interview, again, the statute does not require Respondent to interview all candidates. See *Spatafore v. Harrison County Bd. of Educ.*, Docket No. 2017-0980-

HarED (July 26, 2017). It is not improper for Respondent to limit interviews to those applicants it viewed to be the most qualified. It was reasonable for the selection committee to view CTE experience as the most qualifying experience for the director of a CTE school. In doing so, Respondent did not add additional qualifications to the job description but rather narrowed the field of minimally-qualified candidates to the most qualified by considering which candidates had the most relevant experience for purposes of selecting candidates to interview.

Grievant also asserts Superintendent Hosaflook was motivated by favoritism to recommend Mr. Menillo and Dr. Hughes to the Board. While it is understandable that Grievant would find the recommendation of Dr. Menillo to be suspicious given that the selection committee had chosen Mr. Lawrence, ultimately it is a superintendent's responsibility to recommend to a board the person he or she believes is the most qualified. "The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent...." W. VA. CODE § 18A-2-1(a).

There is nothing that requires a superintendent to engage a selection committee to select a non-classroom teacher professional candidate much less to require a superintendent to recommend the candidate the selection committee recommended. Further, Mr. Menillo was a very well-qualified candidate. Mr. Menillo had thirty-four years of experience as an educator, three years of experience as the director of a CTE school, sixteen years of administrative experience as an Assistant Principal, and held a permanent authorization as a Career Technical Education Administrator. Regardless, as the Board exercised its discretion to remove the hiring decision from the agenda, the Superintendent's intended recommendation of Mr. Menillo is ultimately irrelevant.

As to Dr. Hughes, the only evidence offered of favoritism was Superintendent Hosaflook's testimony that he had known and worked with Dr. Hughes for a long time. This testimony only related to Superintendent Hosaflook's familiarity with Dr. Hughes in his role with the State Department of Education. There was nothing to indicate the Superintendent had a close personal relationship with Dr. Hughes that influenced his recommendation of Dr. Hughes. Dr. Hughes was clearly the most qualified candidate and should have been recommended to the Board.

The entire grievance is underpinned by Grievant's belief that she has been blacklisted in reprisal for filing a citizens complaint regarding her child's education and that Superintendent Hosaflook was dishonest and unethical in attempting to cover up this blacklisting. Reprisal is defined 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." W. VA. CODE § 6C-2-2(o). 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;
- (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.

See *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994). "[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). An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. See *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21, 2013).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); See also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

It appears the citizen's complaint would be considered a protected activity and Superintendent Hosaflook was aware of the complaint. There is no direct evidence of retaliatory motive, but the action did occur within a short time of Grievant's nonselection for the position at issue here. However, Respondent has clearly rebutted any

presumption of retaliatory action by providing credible evidence that Grievant was excluded from interviewing because of her lack of CTE experience, which was reasonable and within Respondent's discretion.

Grievant's testimony regarding her belief that she was blacklisted and her repeated unfounded accusations of Superintendent Hosaflook's dishonesty are not sufficient to prove that Respondent's actions were a mere pretext.<sup>9</sup> Despite the undersigned admonishments that the grievance procedure was not the proper forum, Grievant throughout the grievance process repeatedly accused Superintendent Hosaflook of criminal misconduct. In her PFFCL, Grievant accused Superintendent Hosaflook of false swearing stating that he had lied in his testimony regarding recommending Mr. Menillo and regarding Grievant's experience and qualifications. This claim was once again based on Grievant's misinterpretation of CTE experience as discussed above, quibbling over semantics, and conflating mistake with intention.

In sum, the Board has substantial discretion in its hiring decisions and is entitled to determine the appropriate weight to apply to each hiring criteria. Although there were some irregularities in the hiring process, ultimately, the selected candidate was clearly the most qualified candidate based on the reasonable decision to weigh CTE experience most heavily. Grievant failed to prove that the selection decision was retaliatory, as the result of favoritism, or that the selection process was fatally flawed.

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<sup>9</sup> Grievant additionally offered the testimony of Mr. Olcott regarding a "blacklist" of substitute teachers that was resolved through the grievance process. The substitute "blacklist" was merely a practice that allowed principals to block certain substitutes from substituting in that principal's school. That practice has no connection to the allegation that Superintendent Hosaflook blacklisted Grievant for her citizen's complaint.



Lastly, both parties argued that the other engaged in bad faith. “The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs.” W. VA. CODE § 6C-2-4. Neither party proved the other engaged in extreme bad faith such that the award of costs would be warranted. The grievance was not frivolous. There were irregularities in the hiring process and Grievant made legitimate arguments and presented relevant evidence, although ultimately unpersuasive, why she should be considered the most qualified candidate. Although the litigation in this matter was protracted and difficult, that is to be expected given the contentious relationship between the parties, the allegations of serious impropriety, and Grievant’s representatives’ lack of familiarity with the grievance process. Respondent’s vigorous defense of the allegations of impropriety and attempts to limit discovery and the presentation of evidence were not a show of bad faith but rather an unsurprising response to Grievant’s repeated accusations of criminal and unethical conduct. Therefore, the request for costs must be denied.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993),

*aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

3. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. “[T]he “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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210

W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. “A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications....” W. VA. CODE § 18A-4-7a(a).

In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

- (1) Appropriate certification, licensure or both;
- (2) Amount of experience relevant to the position...
- (3) The amount of course work, degree level or both in the relevant field and degree level generally;
- (4) Academic achievement;
- (5) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to performing the duties of the job;
- (7) Past performance evaluations conducted pursuant to §18A-2-12 and §18A-3C-2 of this code...
- (8) Seniority;
- (9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged....

W. VA. CODE § 18A-4-7a(b).

6. “When filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant’s qualifications....” W. VA. CODE § 18A-4-7a(c).

7. Postings are governed by the West Virginia Code as follows:

(1) Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. At their discretion, boards may repost an opening for a classroom teacher after the first posting in order to attract more qualified applicants subject to the following:

(A) Each notice shall be posted in conspicuous working places for all professional personnel to observe for at least five working days which may include any website maintained by the county board;

(B) At least one notice shall be posted within 20 working days of the position openings and shall include the job description;

(C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;

(D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and

(E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant;

(2) No vacancy may be filled until after the five-day minimum posting period of the most recent posted notice of the vacancy;

(3) If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within 30 working days of the end of the first posting period....

W. VA. CODE § 18A-4-7a(q).

8. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 179 W. Va. 605, 328 S.E.2d 356 (1985).

9. The Board must correct its legal mistake because to do otherwise would discriminate against the Board's other employees. *Bd. of Educ. v. Dawson*, 895 S.E.2d 66, 73 (W. Va. 2023) (memorandum decision).

10. West Virginia Code § 18A-4-7a does not require a superintendent, or the superintendent's designee, to interview all candidates. See *Spatafore v. Harrison County Bd. of Educ.*, Docket No. 2017-0980-HarED (July 26, 2017).

11. "The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent...." W. VA. CODE § 18A-2-1(a).

12. Reprisal is defined 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." W. VA. CODE § 6C-2-2(o). 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;
- (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.

See *Cook v. Div. of Natural Res.*, Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-154 (Apr. 8, 1994).

13. “[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). An inference can be drawn that Respondent’s actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. See *Frank’s Shoe Store v. W. Va. Human Rights Comm’n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep’t of Health & Human Res.*, Docket No. 2012-0986-DHHR (Oct. 21, 2013).

14. “An employer may rebut the presumption of retaliatory action by offering ‘credible evidence of legitimate nondiscriminatory reasons for its actions . . . .’ *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); See also *Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464.” *W. Va. Dep’t of Nat. Res. v.*

*Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

15. “The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs.” W. VA. CODE § 6C-2-4.

16. Grievant failed to prove that she was the most qualified candidate, her nonselection was due to reprisal, the decision was a result of favoritism, or the selection process was fatally flawed.

17. Neither party proved that the other party acted in bad faith that would warrant the allocation of costs.

Accordingly, the grievance is denied.

Any party may appeal this decision to the Intermediate Court of Appeals.<sup>10</sup> Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party

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<sup>10</sup> On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**DATE: April 9, 2024**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**