

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**GREGORY TITLOW,
Grievant,**

v.

Docket No. 2024-0264-KanED

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

and

**RONNIE JOE CLARK,
Intervenor.**

DECISION

Grievant, Gregory Titlow, is employed by Respondent, Kanawha County Board of Education, as a Custodian IV. On October 3, 2023, Grievant filed this grievance stating, “State Code 18A-4-8B wasn’t followed for the hiring of the Custodial Supervisor job.” For relief, Grievant seeks “what’s rightfully due with years of service [and] seniority.” A level one hearing was conducted on January 8, 2024, following which a decision was entered denying Grievant relief.

Grievant appealed to level two on February 28, 2024. An Order of Unsuccessful Mediation was entered on April 17, 2024, and Grievant appealed on April 18, 2024. On June 5, 2024, Ronnie Joe Clark was granted Intervenor status in the grievance.

A Level Three hearing was held on February 26, 2025, before the undersigned Administrative Law Judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person and was represented by counsel, Michael J. Del Giudice of Ciccarello, Del Guidice & LaFon. Respondent appeared by Ronald Pauley, Executive Director of Human Resources for Kanawha County Schools, and was represented by

counsel, Lindsey D. C. McIntosh, General Counsel of Kanawha County Schools. Intervenor appeared in person and was represented by counsel, Anthony Brunicardi, General Counsel to the West Virginia Service Personnel Association. This matter became mature for decision on April 2, 2025, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Custodian IV. Grievant filed this grievance challenging his non-selection for a posted Supervisor of Maintenance position. Grievant requested to be placed in the position based on his years of service and seniority. Grievant failed to meet his burden of proof by a preponderance of the evidence that Respondent acted arbitrarily and capriciously or was clearly wrong in selecting Intervenor over Grievant for the position of Custodial Supervisor. 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

Grievant has been employed by Respondent (relatedly, "KCS") since 2006 when he began his career with KCS as a substitute custodian. Grievant went on to work up through the ranks to a Custodian IV position at South Charleston Middle School ("SCMS"), where he remains today.

As a Custodian IV, Grievant opens the building each morning and cleans the office area and female staff bathrooms before checking other areas of the building to ensure that other staff members are properly performing their duties.

He also consults with the Custodian III in the building and explains to other custodians how to use the supplies necessary for their jobs.

There are currently four custodians on the staff at SCMS, aside from Grievant.

By all accounts, Grievant does a very good job maintaining SCMS on a day-to-day basis and takes great pride in his work. He also works well with the other custodians in his building.

He has never been disciplined or had a complaint filed against him.

Grievant was one of five people asked by the West Virginia

Department of Education to help revise and update the test for custodial service personnel.

The KCS job description for “Custodian I, III, and IV” describes those in the position of Custodian IV as “head custodians” and states, “Custodian IV duties may include supervising other custodian personnel.”

Grievant has filled out evaluation forms for other custodians in the past. He then handed them off to his principal for her to review and sign. The principal also goes over the evaluations with the individual custodians.

At the time of the job posting at issue here, Intervenor was employed by Respondent as a roofer. At that point, he had worked continuously for KCS since 2015. Intervenor had previously worked as a Custodian III for KCS for six years before leaving to work outside of KCS until his return in 2015.¹

¹ Per West Virginia Code § 18A-4-8b(e)(2016), “For purposes of determining seniority . . . a service person[']s seniority begins on the date that he or she enters into the assigned duties.” So, Intervenor’s seniority did not pick up where it left off when departed KCS the first time.

On August 16, 2023, Respondent posted an opening for the position of Supervisor of Maintenance – Custodial Services. The job posting summarizes the position thus: “Supervise custodian program to ensure clean, orderly, and attractive conditions of buildings and grounds for all Board of Education property.” The qualifications call for “[a] minimum of five years significant supervisory experience, or a two year degree and two years significant supervisory experience, or a four year degree. (A minimum of a two year degree preferred.)”

Immediately after that, the posting emphasizes “[s]trong supervisory and communication skills as well as knowledge related to custodian responsibilities.” The posting stresses that “[p]revious supervisory experience [is] preferred.” It also stresses that the successful candidate “[m]ust have excellent communication skills.”

Otherwise, the qualifications listed were:

- a. Ability to schedule employee work assignment[s] in an efficient manner.
- b. Ability to interpret and dispense verbal and written instructions.
- c. Must have excellent communication skills.
- d. Ability to work effectively with others.
- e. Ability to be an Asbestos Supervisor.
- f. Ability to design, set-up[,] and teach various training and in-service activities for custodial staff.
- g. Ability to solve problems and provide assistance to custodial staff.

Both Grievant and Intervenor applied under the Supervisor of Maintenance posting.

Neither Grievant nor Intervenor was then or had ever previously held the classification of Supervisor of Maintenance.

Neither Grievant nor Intervenor held a degree.

Intervenor's online application for the Supervisor of Maintenance² position reflects that he "was a supervisor for C and O Motors for almost 9 years." It also notes his experience as a custodian for KCS.

Both Grievant and Intervenor were deemed by Respondent to meet the minimum qualifications for the job and were granted interviews, along with ten other applicants.³

None of the 12 candidates chosen for interviews were currently classified as Supervisor of Maintenance. Seven were custodians, one was an electrician, one was a painter, one was a carpenter, one was a roofer, and one was a cook.

Prior to interviews, Respondent prepared a matrix outlining the following information about the candidates: current KCS position, hire date, overall maintenance seniority, evaluation performance, and KCS attendance over the last three years.

Out of the 12 candidates who were granted an interview, David Newhouse, a painter, had the highest maintenance seniority at 22 years. Grievant had the

² Grievant submitted as an exhibit an online application for a softball coach position but did not submit his online application for the Supervisor of Maintenance position.

³ Applicant Jackie Simmons did not appear for his interview.

second highest seniority at 16 years. Two candidates followed with 11 years of seniority. Another candidate had nine years of seniority. Intervenor was next with six years of seniority.⁴

All candidates were asked the same, pre-prepared questions at their interviews. All the interviewers (there were three of them) were the same from one interview to the next, and the room conditions were the same for all interviews.

All the interviews were conducted on the same day.

The list of interview questions was not given to the interviewers until the day of the interviews. The questions were:

- a. How do you handle discipline?
- b. Describe a Customer service situation that you handled well. Describe a Customer service situation that you did not handle well and what you would do differently.
- c. A major responsibility of the Supervisor of Maintenance is to evaluate his/her subordinates. Please explain what your experience is in the performance evaluation process and then tell us the purpose of performance evaluations.
- d. Please describe the duties for this position as spelled out in the job description.
- e. As a Supervisor of Maintenance what could you do to make improvements in the areas of employee relations and customer relations?

⁴ The cook also had six years of seniority.

- f. Explain the procedure you follow upon receiving a school complaint.
- g. If you were told by your immediate supervisor to do something you didn't agree with, how would you handle the situation?
- h. What computer skills do you have and what programs are you comfortable using?
- i. What do you know about housekeeping?
- j. Let's say you lost track of a deadline. How would you recover to ensure that you completed your project on time?

Each question had talking points that the interviewers were to “look for” in the candidates’ answers to remove subjectivity from the process. These “look for” topics should be addressed in an ideal answer and included things such as candidates referring to KCS policy, cultivating positive relationships, collecting and recording information, responding to issues quickly, etc.

Follow-up questions were not allowed. Interviewers had to “stick to the script” for each candidate.

Answers to the interview questions were scored by each interviewer on a scale of one to ten, with ten being the highest score. For each question, the three interviewers’ scores were averaged. Score sheets were prepared for each candidate following the interviews.

Ronald Pauley, who is the Executive Director for Human Resources for KCS and was one of the interviewers, noted that Grievant either did not offer answers or did not give extensive answers for most of the questions. For instance, when candidates were asked how they would handle a customer complaint to which

Grievant responded, "I don't have customers." Asked about a time he couldn't take care of a customer, Grievant, again, responded that he does not have customers.

Grievant stood by that answer at the hearing, saying, "Customer Service is Walmart. I don't have customers."

Intervenor earned the highest interview score at 84.667 out of 100.

Grievant had the lowest interview score of all candidates at 13.667 out of 100.

The highest score he received on any individual question was three out of ten.

Mr. Newhouse, who had the most seniority, had an interview score of 38.667 out of 100.

Mr. Pauley did not follow up with the references for either Grievant or Intervenor.

Grievant is skeptical of the fairness of the interview process because Intervenor's then-supervisor was on the interview panel. However, because the panel of interviewers was drawn from current supervisors in maintenance positions, it would have been impossible to put together a panel that did not include the supervisor of at least one of the candidates. There were only four or five maintenance supervisors at the time, and the panel included two of them.

Intervenor's supervisor did not discuss his feelings about Intervenor in the interview room.

The score sheets identify the interviewers as "Int 1," "Int 2," and "Int 3." The scores for Intervenor were consistent across the board for each interviewer. That is, whichever interviewer was Intervenor's supervisor, his or her scores did not skew Intervenor's average score.

Grievant was also skeptical of the process because he was told that the retiring Supervisor of Maintenance had indicated to an Assistant Superintendent that Intervenor was who he wanted to see replace him.

The interview process was *a* factor in choosing the successful candidate for the position but was not *the* deciding factor. Likewise, seniority was *a* factor but was not *the* deciding factor.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 1561-3 (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 employer has not met its burden. *Id.*

Grievant argues that, pursuant to West Virginia Code § 18A-4-8b (2016), he is “rightfully due” the position of Supervisor of Maintenance – Custodial Services based upon his “years of service and seniority.” He also alleges favoritism, arguing “that the process for [Intervenor] was ‘greased’ before it ever got to the application stage.” Respondent argues that seniority “did not have to be the sole consideration” in selection because none of the candidates for the position met the statutory qualifications for the position. Further, Respondent argues that it has discretion in filling open positions.

The legislature has established seniority rights for service personnel, but seniority itself is not exclusive:

A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, *on the basis of seniority, qualifications and evaluation of past service.*

W. VA. CODE § 18A-4-8b(a) (2016)(emphasis added). That is, filling a vacant position or promotion does not begin and end with years of service. Rather, seniority is considered *in conjunction with* qualifications and past performance.

Moreover, this Grievance Board has long adhered to the precedent that “[c]ounty 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].” *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); *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).

Furthermore, in a selection case, the grievance procedure is not intended to be a “super interview”; rather, it serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). To that end, the Grievance Board recognizes selection decisions are largely the prerogative of management, and, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, selection decisions will generally not be overturned. *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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

First, we look at the sufficiency of the selection process in this particular case. Here, there is no dispute that the job was posted properly, and no one takes issue with the content of the posting itself. Once the posting closed, Respondent determined that 12 applicants were qualified to move forward to interviews. To be clear, for purposes of the statute, “qualified” means “the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies.” W. VA. CODE § 18A-4-8b(b) (2016). “Service personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy.” W. Va. Code § 18A-4-8g(j) (2007). In this case, neither Grievant nor Intervenor (nor any of the other candidates interviewed) held a classification title in the classification category of Supervisor of Maintenance. Grievant is a Custodian IV, which is “a person employed as a head custodian. In addition to providing services as defined in ‘Custodian III’ duties may include supervising other custodian personnel.”⁵ W. VA. CODE § 18A-4-8(i) (2024). Intervenor is a Roofer, which is “a person employed to install, repair, fabricate and maintain roofs, gutters, flashing[,] and duct work for heating and ventilation.” *Id.*

So, Respondent was left to consider the qualifications of the candidates, including Grievant and Intervenor, according to “the definition of the job title that relates

⁵ “Custodian III” duties include, “to keep buildings clean and free of refuse, to operate the heating or cooling systems[,] and to make minor repairs.” W. VA. CODE § 18A4-8(i) (2024).

to the promotion or vacancy, as defined in section eight of this article.” W. VA. CODE §18A48b(b) (2016).

“Supervisor of [M]aintenance” means a skilled person who is not a professional person or professional educator as defined in §18A-1-1 of this code. The responsibilities include directing the upkeep of buildings and shops, and issuing instructions to subordinates relating to cleaning, repairs and maintenance of all structures and mechanical and electrical equipment of a county board[.]

W. VA. CODE § 18A-4-8(i) (2024). The job description created by Respondent in the job posting for the Supervisor of Maintenance – Custodial Services⁶ defines the position as one in which the successful candidate will “[s]upervise custodian program to ensure clean, orderly, and attractive conditions of buildings and grounds for all Board of Education property.” Of the 12 candidates chosen for interviews, seven were then custodians. Intervenor and the cook both had prior custodial experience.⁷ So, Respondent properly chose its candidates for interviews inasmuch as they had experience in “ensur[ing] clean, orderly, and attractive conditions of buildings and grounds.” There is no indication that candidates were chosen in an arbitrary fashion.

Prior to the interviews, Respondent prepared a matrix laying out five factors of qualification: current KCS position, hire date, overall maintenance seniority, evaluations,⁸ and KCS attendance over the last three years. The interview process

⁶ Respondent employs four to five “Supervisor of Maintenance” positions, breaking them down into subcategories based on specialized skills, such a “Custodial Services,” “Electricians,” “Carpenters,” etc.

⁷ The record does not make clear whether the remaining three candidates had custodial experience.

itself was uniform. All interviews were conducted on the same day. The three interviewers were the same for each candidate. The ten interview questions were pre-prepared and were the same for each candidate. Follow-up questions were not permitted in order to preserve the uniformity of the process. Again, it would seem that the interview process was legally sufficient and conducted in a fair way that did not signal any level of arbitrariness.

We are left, then, with the decision itself. If one were to consider seniority alone, then, yes, Grievant is the more qualified candidate as compared to Intervenor. However, even if one were to consider seniority alone, Grievant would still fail to meet his burden because he was not the *most* senior candidate. Painter David Newhouse had six more years of seniority than Grievant. Thus, under his own theory, Grievant could not prevail as the candidate “rightfully due” the position based on “years of service and seniority.” That would be Mr. Newhouse. But as discussed previously, seniority is not the only factor. There remains qualification and past performance.

As to qualifications, again, this Board cannot disturb the selection decision of Respondent absent some showing that it was arbitrary and capricious or clearly wrong. Respondent stressed that the successful candidate should have “[s]trong supervisory and communication skills as well as knowledge related to custodian responsibilities” and set forth the particular qualifications for the position as such:

- Ability to schedule employee work assignment[s] in an efficient manner.
- Ability to interpret and dispense verbal and written instructions.

⁸ “Evaluations” only considered whether the candidates’ performance was previously “satisfactory” or “unsatisfactory”; it did not delve deeper. Each candidate was rated as “satisfactory” in that category.

- Must have excellent communication skills.
- Ability to work effectively with others.
- Ability to be an Asbestos Supervisor.
- Ability to design, set-up[,] and teach various training and in-service activities for custodial staff.
- Ability to solve problems and provide assistance to custodial staff.

Not having been present for the interviews, the undersigned is hard pressed to make a determination as to which candidate best demonstrated these characteristics, let alone that the interview scores were contrary to the performance of Grievant and Intervenor or were implausible. What the evidence does show is that Intervenor had the highest interview score at 84.667 while Grievant had the lowest score at 13.667.⁹ Grievant did not dispute—and even agreed—that the interview did not go well; so, it is safe to say that his score, at least, does not indicate any sort of arbitrary action on the part of Respondent. But it is simply impossible for the undersigned to determine whether the remaining scores accurately reflected their candidates' performances and demonstration of those candidates' qualifications.

What this Grievance Board can determine is that good, effective communication skills were clearly highlighted in the job posting and desired qualifications. The Board can further say with assurance that it is neither arbitrary and capricious nor clearly

⁹ The scores in between were 75.667 (a custodian with 11 years of seniority), 55.000 (a custodian with two years of seniority), 50.667 (a cook with six years of seniority), 38.667 (a custodian with 22 years of seniority), 36.333 (an electrician with three years of seniority), 33.000 (a custodian with two years of seniority), 28.333 (a carpenter with zero years of seniority), 23.667 (a custodian with 11 years of seniority), and 19.667 (a custodian with nine years of seniority). Again, one candidate did not appear for his interview.

wrong for Respondent to prioritize effective communication skills in a supervisory/management position. The Board can also say that the ten interview questions asked were appropriate to the qualifications listed in the job description.

Certainly, the undersigned sees that, on its face anyway, Grievant's several years of experience with KCS as a Custodian IV seem more directly related to the position of Supervisor of Maintenance – Custodial Services than Intervenor's recent experience as a roofer. The testimony at the hearing by Executive Director for Human Services Ron Pauley, however, indicated that Intervenor had worked as a custodian for KCS for a period of six years at some point. As far as supervisory experience, there was testimony that Grievant may have some level of supervisory duties over the other custodians in his school. Neither Respondent nor Intervenor offered any further evidence of Intervenor's particular custodial experience or any supervisory experience he had aside from his indication on his application that he had managed staff at a car dealership (which was apparently not independently verified by Respondent).¹⁰

Finally, regarding past performance, the evidence before the Grievance Board clearly shows that Grievant has been an exemplary employee and has done very good work throughout his career with KCS. However, there was no evidence that Intervenor had not performed to the same level. All the undersigned knows with any certainty is that both Grievant and Intervenor had satisfactory performance evaluations at the time they applied for the Supervisor of Maintenance position.

In the end, it was Grievant's burden to prove by a preponderance of the evidence that Respondent's selection of Intervenor over him was so contrary to the evidence

¹⁰ It is important to note that neither Respondent nor Intervenor bore any burden in this case.

and/or implausible as to be arbitrary and capricious or clearly wrong. While Grievant demonstrated that he was a competent and hardworking custodian with more years of seniority than Intervenor, he did not tip the scale to show that, overall, he was better qualified for the open position than Intervenor. Indeed, Mr. Pauley testified that Intervenor simply demonstrated a better grasp of the Supervisor of Maintenance position than Grievant. There just was no evidence that, in the grand scheme of things, Respondent abused its discretion in selecting Intervenor over Grievant.

Regarding Grievant's claim of favoritism, the claim simply never got off the ground. "Favoritism" means 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) (2003). Grievant asserted that he was told that the outgoing Supervisor of Maintenance, Matt Rollins, indicated to an Assistant Superintendent that he wanted Intervenor to replace him. Grievant also found it unfair—if not favoritism—that Intervenor's then-supervisor was on the interview panel. But Grievant offered no real evidence that Mr. Rollins ever made that statement or that, even assuming he did, Respondent gave the statement any weight in its selection decision, resulting in the preferential treatment of Intervenor. Likewise, regarding the makeup of the interview panel, there was no evidence that Intervenor's supervisor unduly influenced the outcome of the selection process. Moreover, there were only four or five existing Supervisors to draw from in the first place, and two served on the panel. With custodians, painters, roofers, electricians, carpenters, and cooks all represented in the field of candidates, any iteration of the

interview panel would include the supervisor of one candidate or another. Again, Grievant has failed to meet his burden of proof.

Grievant has failed to prove by a preponderance of the evidence that Respondent acted arbitrarily and capriciously or was clearly wrong in selecting Intervenor over Grievant for the position of Supervisor of Maintenance – Custodial Services. He also failed to prove by a preponderance of the evidence that Respondent acted with favoritism toward Intervenor. Accordingly, the grievance is 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 his 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 employer has not met its burden. *Id.*

2. The legislature has established seniority rights for service personnel, but seniority itself is not exclusive:

A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, *on the basis of seniority, qualifications and evaluation of past service.*

W. VA. CODE § 18A-4-8b(a) (2016)(emphasis added). Rather, seniority is considered in conjunction with qualifications and past performance.

3. Even if seniority was the deciding factor, Grievant was not the most senior candidate for the position.

4. “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).

5. 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)).

6. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

7. “[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].” *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); *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).

8. In a selection case, the grievance procedure is not intended to be a “super interview”; rather, it serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). To that end, the Grievance Board recognizes selection decisions are largely the prerogative of management, and, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, selection decisions will generally not be overturned. *Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

9. 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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

10. Respondent's process for selecting the successful candidate in this case was neither arbitrary and capricious nor clearly wrong.

11. Grievant failed to demonstrate by a preponderance of the evidence that Respondent's decision in selecting Intervenor over Grievant was arbitrary and capricious or clearly wrong.

12. "‘Favoritism’ means 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) (2003).

13. Grievant failed to demonstrate by a preponderance of the evidence that Respondent's decision in selecting Intervenor over Grievant demonstrated favoritism.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure. W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A54(b) (2024).

DATE: May 14, 2025

Lara K. Bissett
Administrative Law Judge