THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LESLIE WAYNE HARPER,

Grievant,

v. **Docket No. 2018-0457-MAPS**

DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent.

DECISION

Grievant, Leslie Wayne Harper, filed a grievance directly to level three against his employer, Respondent, Division of Corrections, Mount Olive Correctional Complex ("DOC"), on September 25, 2017, stating as follows: "[o]n Wednesday the 31 May 2017 at 2:57PM I applied for CORRECTIONS PROGRAM SPECIALIST SENIOR CSV 1700031 by email to Karen E. Smith as the Post had for a contact. I had not heard anything about interviews and when I contacted Central Office HR Dept Karen Smith [I] was told they apologize I was not given an interview for the position and do not know what happened. Apparently, my application was misplaced during this. She stated [I] know its (sic) no excuse and do apologize." As relief sought, Grievant requests, "a 7% Pay increase that is back paided (sic) from the hiring date because [I] was not given the same opportunity as all other current state employees."

By Order entered October 6, 2017, this matter was transferred to the level one docket because Grievant did not allege any of the circumstances that would allow proceeding directly to level three. A level one hearing was conducted on October 25, 2017. During the level one hearing, the level one hearing examiner telephoned the

individual he knew to have been hired for the position at issue herein. While there was no written order to this effect, the level one hearing examiner verbally made that individual, Spencer Hill, a party to this grievance as Intervenor. The level one hearing examiner did not amend the style of the case, and Mr. Hill is not otherwise listed in the level one decision as a party. The grievance was denied by decision issued on November 29, 2017. However, there being no entered order making Mr. Hill a party, he was not added to the case. Neither party informed the Grievance Board of Mr. Hill being a party, and neither moved to amend the style of the case.

Grievant perfected his appeal to level two on December 6, 2017. A level two mediation was conducted on February 9, 2018. Grievant appealed to level three on February 12, 2018. A level three hearing was held on May 1, 2018, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, *pro se*.[1] Respondent appeared by counsel, John H. Boothroyd, Esquire, Assistant Attorney General. Spencer Hill did not appear for the level three hearing. At the commencement of the hearing, the ALJ asked the parties about Mr. Hill, if they had any contact with him, or if they knew whether he wanted to participate in this grievance. It is noted that Mr. Hill did not appear, or otherwise participate, at the level two mediation. Counsel for Respondent informed the ALJ that he had been in contact with Mr. Hill, had informed him of the level two mediation and the level three hearing, had explained the possible outcomes of the level three hearing, and that Mr. Hill could participate if he wished. Counsel further informed the ALJ that he informed Mr. Hill that

[1] For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

DOC/Respondent's counsel does not represent him. Lastly, Respondent's counsel stated that it was his understanding that Mr. Hill did not want to take an active role in this grievance. Based upon the statements of counsel, and there otherwise being no indication that Mr. Hill wanted to participate in this grievance, the ALJ proceeded with the level three hearing. Counsel for Respondent then orally moved to dismiss the grievance. As Respondent orally moved for dismissal, Grievant had no notice of the same and no opportunity to fully prepare his response. As such, the ALJ held the motion to dismiss in abeyance to be addressed in the grievance decision. The ALJ directed the parties to address the motion to dismiss and any response thereto in their post-hearing submissions and proceeded with the presentation of evidence.

This matter became mature for decision on June 8, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

At the times relevant herein, Grievant is employed by Respondent as a Case Manager. Grievant properly applied for a Corrections Program Specialist Senior position that had been posted. Respondent lost Grievant's application, resulting in its failure to consider him for the position and he was not granted an interview. Respondent argues that this matter was untimely filed and is barred by the doctrine of laches. Grievant denies these claims. Grievant argues that Respondent violated provisions of the Administrative Rule and policies by failing to consider his application for the position. Respondent denied Grievant's claims. This grievance was timely filed and is not barred by the doctrine of laches. Grievant proved his claims by a preponderance of the evidence. Grievant did not prove that he was the most qualified candidate for the position, or that he was entitled

to a pay increase. Accordingly, the grievance is GRANTED IN PART and DENIED IN PART.

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

Findings of Fact

1. At the times relevant herein, Grievant is employed by Respondent at the Mt. Olive Correctional Complex as a Case Manager, which is a pay grade 12. Grievant is currently employed by Respondent as a Unit Manager. Grievant has been employed by Respondent since 2001.

2. On May 22, 2017, DOC posted a vacancy for a Corrections Program Specialist, Senior which is a pay grade 13. The deadline to apply for the position was May 31, 2017. The posting indicated that applications were to be sent to Karen Smith, Respondent's Assistant Director of Human Resources, at an address provided.[2]

3. Grievant telephoned Karen Smith on May 31, 2017, and asked if he could apply for the Corrections Program Specialist, Senior by email that day. Ms. Smith informed Grievant that he could apply for the position by email.[3]

4. Grievant emailed his application for the Corrections Program Specialist, Senior to Karen Smith on May 31, 2017, at 2:57 p.m.[4]

[2] *See*, Respondent's Exhibit 1, Posting dated May 22, 2017.
[3] *See*, testimony of Grievant, level three and level one; testimony of Karen Smith, level three.
[4] *See*, Grievant's Exhibit 1, May 31, 2017, email.

5. Karen Smith received Grievant's application for the position. However, Grievant's application was promptly lost. As a result, Grievant's application was not considered during the selection process, and he was not granted an interview.

6. A total of two people applied for the position, excluding Grievant. Spencer Hill was one of those interviewed. The identity of the other person is unknown.

7. The two applicants were interviewed on June 9, 2017, by a selection panel made of Kevin Casto, Terri J. Arthur, and Jennifer Ballard. At the times relevant herein, Ms. Ballard was the Director of Programs.[5] The titles of Kevin Casto and Terri J. Arthur are unknown. It is noted that Ms. Arthur served as the Level One Hearing Examiner in this grievance.[6]

8. On or about June 27, 2017, Spencer Hill was offered the position of Corrections Programs Specialist Senior. Mr. Hill began working in this position on or about July 10, 2017.[7]

9. On September 18, 2017, as he had not been contacted for an interview or received anything from Respondent stating that he had not been selected for the position, Grievant telephoned Tonya Harrison, Respondent's Director of Human Resources, and inquired about the Corrections Programs Specialist Senior position. Ms. Harrison informed Grievant that she would research the issue and call him back.

[5] *See*, Respondent's Exhibit 5, June 27, 2017, letter.
[6] *See*, Level One Decision.
[7] *See*, Respondent's Exhibit 5, June 27, 2017, letter.

10. On September 19, 2017, Ms. Harrison emailed Grievant and asked whether he submitted his application for the position by email or regular mail. Grievant responded that he submitted his application by email to Karen Smith on May 31, 2017, at 2:57 p.m.[8]

11. When he had not heard back from Ms. Harrison by the afternoon of September 20, 2017, Grievant sent her an email asking if she had found out anything about the Corrections Program Specialist Senior position. He immediately received a automatic reply from Ms. Harrison's email account stating that she was out of the office and had limited email access.[9]

12. On September 20, 2017, at 8:45 p.m., Grievant received an email from Karen Smith, which stated as follows:

> Hello Mr. Harper,
>
> Per your inquiry with HR Director, Tonya Harrison, I do have your application for the CPS, Sr. that was posted on CSV1700031. I had filed your email along with other applicants for this position and apologize that you were not given an interview for this position and do not know what happened. Your email came the following week after out office moved out of Central Office and into the Correctional Industries building and we did not have onsite printing capabilities at that time. We were working out of boxes and printing things to Central Office that were then either mailed or hand-delivered to us for about 3-4 weeks after our move. Apparently, your application was misplaced during this time. I know it's no excuse and I do apologize, as I have not other explanation of what happened to your application for this position.
>
> Please contact me or Tonya with any other questions that you may have.
>
> Again, please accept my apologies.

[8] *See*, Grievant's Exhibit 1, emails dated September 19, 2017.
[9] *See*, Grievant's Exhibit 1, emails dated September 20, 2017.

Thank you,
Karen.[10]

13. Grievant did not learn that Respondent had already conducted interviews and selected someone for the position until he received the September 20, 2017, email from Karen Smith.

14. Grievant filed this grievance on September 25, 2017, days after receiving the email from Karen Smith.

15. Grievant did not know the identity of the person selected for the position until the day of the level one hearing. At the level one hearing, Terri J. Arthur, who was serving as the hearing examiner, simply telephoned the person she knew to have been selected for the job, Spencer Hill, and put him on speakerphone. Mr. Hill had not asked to intervene in the grievance. Based upon the level one transcript, it appears that it was this call that first notified Mr. Hill of the grievance.

16. At level one, the hearing examiner denied this grievance as untimely stating that "Grievant did not file within the 15-day timeframe of Mr. Hill being placed in the position in question."[11]

17. Grievant learned that only two people applied for the position and were interviewed while attending the level two mediation in February 2018.

18. The application of the successful candidate was submitted as evidence in this matter, as was a duplicate of Grievant's lost application, but no evidence was presented about the qualifications of the second person interviewed.

[10] *See*, Grievant's Exhibit 1, September 20, 2017, email.
[11] *See*, Level One Decision, dated November 29, 2017.

19. Grievant was promoted to Unit Manager on or about March 31, 2018, which is a paygrade 14.

Discussion

Motion to Dismiss

Respondent, by counsel, orally moved to dismiss this grievance at the commencement of the level three hearing asserting that this grievance was untimely filed and it is barred by the doctrine of laches. Grievant denies Respondent's claim and argues that he timely filed this grievance.

"[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

An employee is required to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a

> continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). "'Days' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." W. VA. CODE § 6C-2-2(c).

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), ***aff'd***, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016).

It is undisputed that Grievant properly applied for the Corrections Program Senior position before the deadline listed in the posting, but that Respondent lost Grievant's application. It is further undisputed that Respondent never considered Grievant's application for the position during the selection process, and Grievant was not granted an interview or notified that he did not receive the position. Grievant learned of the interviews and that Respondent had filled the position on September 20, 2017. As such, that was the date that Grievant was unequivocally notified of the decision he is challenging. As Grievant filed this grievance on September 25, 2017, it was, therefore, timely filed.

Respondent's claim that this matter is barred by the doctrine of laches also fails. "Laches is a delay which operates prejudicially to another person's rights. [*See*] *Bank of Marlinton v. McLaughlin*, 121 W. Va. 41, 1 S.E.2d 251 (1939). The equitable doctrine of

laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. [*See*] *Maynard v. Bd. of Educ*., 178 W. Va. 53, 59, 357 S.E.2d 246, 259 (1987), *citing Black's Law Dictionary*. A party seeking to assert the defense of laches must show '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.' *State ex rel. Smith v. Abbot*, 187 W. Va. 261, 264, 418 S.E.2d 575, 578 (1992). *See Mogavero v. McLucas*, 543 F.2d 1081 (4th Cir. 1976); *Buchanan v. Bd. of Directors*, Docket No. 94-BOD-078 (Nov. 30, 1994); *Dollison v. W. Va. Dep't of Employment Sec*., Docket No. 89-ES-101 (Nov. 3, 1989)." *Frost v. Bluefield State College, et al.,* Docket No. 2012-0055-BSC (Sept. 22, 2014), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-104 (July 22, 2015).

Respondent argues that Grievant's failure to contact Ms. Smith or Ms. Harrison to inquire about the status of his application until September 18, 2017, was a lack of diligence because Grievant should have known to check the status earlier, which could have alerted Human Resources to its mistake before the selection process began. Respondent further asserts that it has been prejudiced by Grievant's failure to check the status of his application because it has already hired someone for the job and this grievance could potentially result in the selected person being left with no job. Respondent argues that it never takes two and a half months to set up interviews and that Grievant knows this. However, while it may not normally take that long, there is nothing to suggest that such cannot ever happen. No rule setting a timeline for the filling of positions was mentioned or presented at the level three hearing. It does not appear that any such rule exists. It is noted that Grievant testified that he is aware that sometimes positions are "frozen" by management or personnel and cannot be filled immediately.

Such is certainly plausible. Respondent's argument that Grievant should have known to call and check his application status earlier simply lacks merit. Grievant applied for the position and Respondent never contacted him because it lost his application.

Respondent had the responsibility of receiving the applications, scheduling interviews, and selecting someone to fill the position. Respondent failed to fulfill its responsibilities when it lost Grievant's application. Respondent asserts that Human Resources' move to another location caused this mistake. That may be so, but Grievant had no reason to believe that his application was lost. He had not heard about interviews and did not know the position had been filled. Karen Smith expressly allowed Grievant to apply for the job by email. Grievant did so, and Human Resources promptly lost his application which resulted in his never being considered for the position. Mistakes do happen, but Respondent made the mistake which resulted in Grievant losing the opportunity to be considered for the position. If anyone lacked due diligence in this matter, it is Respondent. Respondent is simply trying to shift the blame for its mistake to Grievant. Accordingly, the Respondent's Motion to Dismiss is denied.

Merits

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 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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*.

It is undisputed that Respondent lost Grievant's application for the Corrections Programs Specialist Senior position. Respondent filled the position without considering Grievant at all. There were only two other applicants and they were both interviewed. One of those applicants was selected for the position at issue. The parties agree that while Division of Personnel ("DOP") is the agency that ultimately determines whether applicants meet the minimum qualifications for a position, Grievant appears to have met the minimum qualifications for the position at issue. Therefore, the issue in this grievance is whether the selection process was flawed as Grievant was given no consideration even though he correctly applied for the position.

The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *See Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *See Mihaliak v. Div. of Rehabilitation 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. *See Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994).

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473

S.E.2d 483 (1996)). "Generally, an 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 & Human Serv.,* 789 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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

The stated purpose of Division of Personnel Policy DOP-P11, "Posting of Job Openings," "is to establish the procedures and requirements for posting job openings to ensure that merit principles are upheld when filling job openings for classified positions."[12] This policy further defines "position" as "[a]n authorized and identified group of duties and responsibilities assigned by the proper authority requiring the full-time or part-time

[12] *See*, Grievant's Exhibit 2, DOP-11, "Posting of Job Openings."

employment of at least one person."[13] "The term job posting refers to any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer, except any vacancy filled as a result of an employee exercising his or her bumping rights, and to any position to be filled by reallocation. . . ."[14] "The appointing authority shall give due consideration to those employees who apply and are eligible for the posted vacancy." *See* W.VA. CODE ST. R. § 143-1-9.5.d (2016). DOP Policy DOP-P11, "Posting of Job Openings," states this verbatim at Section III, paragraph J. Further, the Administrative Rule states that "[t]he vacancy posting requirements in this subdivision shall apply to all classified position vacancies except vacancies filled as a result of employees exercising bumping or recall rights, demotions with prejudice and/or disciplinary transfers for cause." W.VA. CODE ST. R. § 143-1-9.5.f.

The evidence presented in this matter demonstrates that the selection process used to fill the Corrections Programs Specialist Senior was flawed as Respondent failed to consider Grievant for the position. It is undisputed that Grievant properly applied for the position, and that Respondent's human resources office lost this application. Such resulted in his never being considered for the position. It is noted that while this grievance was denied at level one as untimely, the hearing examiner wrote in her decision, "[t]here is no provision that says all applicants must be interviewed, although all applicants will be given due consideration as stated in the WV Division of Personnel Administrative Rule. Considering Grievant's application was misplaced until well after the interviews took place, it seems plausible that his application was never reviewed nor given due

[13] *See*, Grievant's Exhibit 2, DOP-11, "Posting of Job Openings," Section II, paragraph D.
[14] *See*, Grievant's Exhibit 2, DOP-11, "Posting of Job Openings," Section III "Policy." paragraph C.

consideration."[15] The failure to consider Grievant for the position violates the stated provisions of the Administrative Rule and DOP Policy DOP-P11, and renders the decision of the selection panel arbitrary and capricious.

Grievant proved that the hiring process was arbitrary and capricious. However, Grievant has requested an increase in pay as relief in his matter. Grievant did not prove he was entitled to the position. In order to be instated into the position, Grievant must not only prove that the selection was arbitrary and capricious, but also that he was, in fact, the most qualified candidate. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008). To award back pay without requiring proof that the grievant was actually entitled to the disputed position would be to grant speculative relief. It is well settled law that the Grievance Board will not grant relief sought that is "speculative or premature, or otherwise legally insufficient." *See Dooley v. Dept. of Trans./Div. of Highways,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991). It is clear that a grievant must sustain an actual injury by being passed over for a position to which he/she was actually entitled, otherwise any award of back pay would be a windfall. *See Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003). "Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken." *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

[15] *See*, Grievant's Exhibit 3, Level One Decision dated November 29, 2017.

Therefore, this grievance is GRANTED IN PART and DENIED IN PART.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. "[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

2. "Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . ." W. VA. CODE § 6C-2-4(a)(1).

3. The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of*

Educ., Docket No. 2017-0314-PutED (July 28, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), ***aff'd***, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016).

4. "Laches is a delay which operates prejudicially to another person's rights. [*See*] *Bank of Marlinton v. McLaughlin*, 121 W. Va. 41, 1 S.E.2d 251 (1939). The equitable doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. [*See*] *Maynard v. Bd. of Educ*., 178 W. Va. 53, 59, 357 S.E.2d 246, 259 (1987), *citing Black's Law Dictionary*. A party seeking to assert the defense of laches must show '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.' *State ex rel. Smith v. Abbot*, 187 W. Va. 261, 264, 418 S.E.2d 575, 578 (1992). *See Mogavero v. McLucas*, 543 F.2d 1081 (4th Cir. 1976); *Buchanan v. Bd. of Directors*, Docket No. 94-BOD-078 (Nov. 30, 1994); *Dollison v. W. Va. Dep't of Employment Sec*., Docket No. 89-ES-101 (Nov. 3, 1989)." *Frost v. Bluefield State College, et al.,* Docket No. 2012-0055-BSC (Sept. 22, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-104 (July 22, 2015).

5. This grievance was timely filed and it is not barred by the doctrine of laches.

6. 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 (2008). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. 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*.

7. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *See Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *See Mihaliak v. Div. of Rehabilitation 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. *See Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994).

8. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *See Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

9. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id. (citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

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

11. "The appointing authority shall give due consideration to those employees who apply and are eligible for the posted vacancy." *See* W.VA. CODE ST. R. § 143-1-9.5.d (2016). "The vacancy posting requirements in this subdivision shall apply to all classified position vacancies except vacancies filled as a result of employees exercising bumping or recall rights, demotions with prejudice and/or disciplinary transfers for cause." W.VA. CODE ST. R. § 143-1-9.5.f. (2016).

12. Grievant proved by a preponderance of the evidence that he properly applied for the position of Corrections Programs Specialist Senior and that Respondent failed to give him due consideration for the same. The Respondent's failure to give Grievant due consideration renders the selection panel's decision arbitrary and capricious.

13. In order to be instated into the position, Grievant must not only prove that the selection was arbitrary and capricious, but also that he was, in fact, the most qualified candidate. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008). To award back pay without requiring proof that the grievant was actually entitled to the disputed position would be to grant speculative relief. It is well settled law that the Grievance Board will not grant relief sought that is "speculative or premature, or otherwise legally insufficient." *See Dooley v. Dept. of Trans./Div. of Highways,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991).

14. A grievant must sustain an actual injury by being passed over for a position to which he/she was actually entitled, otherwise any award of back pay would be a windfall. *See Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003).

15. "Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken." *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

16. Grievant failed to prove by a preponderance of the evidence that he should have been selected for the position because he was the most qualified candidate.

Accordingly, this grievance is **GRANTED IN PART and DENIED IN PART**. Respondent is **ORDERED** to repost the position of Corrections Programs Specialist Senior within 30 days of the receipt of this decision, and undertake a new selection process selecting the most qualified candidate in compliance with applicable law and policies. All other relief sought by Grievant in his statement of grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of

the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: July 24, 2018.

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Carrie H. LeFevre
Administrative Law Judge