

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LARRY WILLIAMS,  
Grievant,**

**v.**

**Docket No. 2017-1643-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

## **DECISION**

Grievant, Larry Williams, is a Transportation Worker 3, ("TW3"), Equipment Operator employed by Respondent, Division of Highways ("DOH"). Mr. Williams filed a Level One grievance form dated February 8, 2017, contesting his non-selection for a crew supervisor position which was posted as DT1601042. As relief, he seeks to be placed in that position with back pay with interest and back pay.

A conference was held on March 16, 2017, and a Level One decision was issued on April 6, 2017, denying the grievance. Grievant filed a timely appeal to Level Two and a mediation was conducted on July 17, 2017. Grievant filed a Level Three appeal on the same day.

A Level Three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on July 13, 2018. Grievant appeared and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Jesseca R. Church, Esquire, with Respondent's Legal Division. This matter became mature for decision on August 14, 2018, upon receipt of both Proposed Findings of Fact and Conclusions of Law.

## **Synopsis**

Grievant is contesting his non-selection for a Transportation Worker Crew Chief position. He alleges the Respondent failed to consider his seniority with the agency in violation of a statutory mandate to do so. He also alleges that the selection process was flawed and arbitrary and capricious because the interviews for the committee could not articulate any real differences between the candidates to support their decision. Finally, Grievant alleges that the selection of the successful applicant was the result of favoritism.

Respondent counters that it followed an organized and impartial selection procedure where the applicants were compared based upon predetermined criteria and an interview. Respondent points out that the applicants were all asked the same questions during the interviews and avers that this process was not arbitrary or capricious and was not based upon favoritism. Grievant proved his allegations by a preponderance of the evidence.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## **Findings of Fact**

1. Grievant, Larry Williams, is employed by DOH at the Mercer County facility in Princeton, West Virginia. Mercer County is in DOH District Ten. He has been employed by Respondent since January 11, 2011. He had been employed by the DOH for five and a half years at the time he applied for the Crew Chief position. (Grievant Exhibit 1).<sup>1</sup>

2. Grievant's position is in the TW3 classification, as an Equipment Operator and he is certified by the DOH to operate all the agency's heavy equipment with the

---

<sup>1</sup> Grievant's application for the Crew Chief position dated June 8, 2016.

exception of a backhoe and an excavator. He also holds a Class A commercial driver's license.

3. For roughly seven years prior to coming to work for the DOH, Grievant worked for a company which ran a large rock quarry. Grievant operated heavy equipment on the quarry job to help build roads and rail lines in and out of the quarry. Grievant occasionally acted in a supervisory capacity on the that job.

4. Respondent posted a position for a TW3 Crew Chief<sup>2</sup> at the Mercer County Headquarters dated May 31, 2016. (Grievant Exhibit 3).

5. Grievant and five other internal applicants<sup>3</sup> were interviewed for the Crew Chief position, along with one external candidate. Grievant and the five other internal applicants were interviewed on August 18, 2016. The sole external applicant, Thomas Lance, was interviewed on November 28, 2016. (Grievant Exhibit 5)<sup>4</sup>

6. The interviews were conducted by Joe Pack and Mike McMillion. Joe Pack is the Roadway Design Engineer for DOH District Ten and previously served as the District Ten Assistant Maintenance Engineer. Mike McMillion was a Highway Administrator 2 and was in charge of the Mercer County facility when the selection process for the Crew Chief positions took place.<sup>5</sup>

7. DOH District Ten Human Resources Director, Kristen Shrewsbury, attended all the interviews, took notes and filled out forms. Her role was to monitor the

---

<sup>2</sup> The job posting stated that, "This position functions as a working Crew Supervisor." The position is commonly referred to by either of the two titles: "Crew Chief" or "Crew Supervisor."

<sup>3</sup> The seven applicants were Larry Williams, Calvin Poff, Tamara Williams, Kevin Belcher, Dennis Davidson, Danny Wolford, and Thomas Lance.

<sup>4</sup> Internal and External Application and Interview Logs.

<sup>5</sup> Mr. McMillion retired from the DOH effective February 28, 2017.

process and provide procedural advice. She did not otherwise participate in the interview and selection process.

8. The interviewers utilized a chart entitled *Department of Transportation Application Evaluation Record* which rated each applicant based upon six factors:

1. EDUCATION
2. RELEVANT EXPERIENCE
3. POSSESS KNOWLEDGE, SKILLS & ABILITIES
4. INTERPERSONAL SKILLS
5. FLEXIBILITY/ADAPTABILITY
6. PRESENTABLE

The form then held a rating column for "OVERALL EVALUATION." Each applicant had a separate form and the applicant received a rating of "DOES NOT MEET," "MEETS," or "EXCCEDS" for each criterion. Every applicant received a rating of "MEETS" for every criterion and for the "OVERALL EVALUTION." The "COMMENTS" section was left blank on all the applicants' forms. (Grievant Exhibits 1, 2, & 7-11).

9. Each applicant was asked the same set of questions and Director Shrewsbury recorded the answers on answer sheets. *Id.* At the conclusion of the interviews, the interviewers conferred and selected Calvin Poff as the successful applicant.

10. The first question asked at the interview was, "Why are you interested in this job." Grievant answered that he wanted to earn more money. Mr. Poff responded that he wanted to make a difference. While the remaining responses were not exactly the same, the notes indicated that they were generally similar. *Id.*

11. Calvin Poff was employed by DOH as a TW2 Equipment Operator since December 2013. He had been employed by the DOH for approximately two and a half years on June 8, 2016, when he applied for the Crew Chief position. He has received

DOH training for operating heavy equipment including a backhoe, roller, end loader, bucket truck and skid steer loader. (Grievant Exhibit 2).<sup>6</sup>

12. Prior to Mr. Poff's employment with DOH, he worked for eight months as a Fireman/Oiler for the Norfolk and Southern Railroad and ten years as a lead carpenter for a general contractor. *Id.*

13. After Mr. Poff was selected, Mr. Pack sent a memorandum dated December 1, 2016, to Leslie Adkins, AH stating:

Calvin Lee Poff was selected for the position of TW3CRCH over Tamara Williams due to his dependability and willingness to lead a crew. Mr. Poff is reliable when needed and has an attendance that is trustworthy for a management position.<sup>7</sup>

Mr. Pack testified that these reasons applied to all the applicants. He provided this memorandum for the non-selection of Tamara Williams, as a woman she was considered a minority candidate.

14. Under cross examination, Mr. Pack indicated that there were no problems with Grievant's attendance or reliability, Grievant did not turn down opportunities to lead a crew and that he did not refuse or decline overtime.<sup>8</sup> When asked what put Mr. Poff ahead of the other candidates Mr. Pack stated that the most important factors were "leadership," "loyalty" and "professionalism." When asked why Grievant was not recommended for the position he testified, "We felt as though there was another applicant who could perform the job duties better, for lack of a different term."<sup>9</sup> Aside from these

---

<sup>6</sup> Crew Chief application of Calvin Poff.

<sup>7</sup> Grievant's Exhibit 6.

<sup>8</sup> Mr. Pack testified that some employees volunteer for overtime but did not specifically identify Mr. Poff as one of those employees.

<sup>9</sup> Level Three testimony of Joe Pack.

general statements, Mr. Pack provided no testimony examples or responses which demonstrated the difference between Grievant and Mr. Poff.

15. The undersigned asked Mr. Pack specifically, “What was different about [these applicants] that demonstrated that one had more leadership than the other.” Mr. Pack replied:

I want to hire a person that’s going to put the organization first in their mind. I want a person who when they go out with crew of seven or eight that are their buddies and look at their friends and say it’s 95 degrees out here and we’ve to do a hard job and I know we’d all rather be in an air-conditioned truck, but it’s my job to make you all get out to do this work. And we’re going to do it safely and we’re going to meet the production levels that the district asks of us.” . . . “He is the boss out there and I have to believe that the man or woman we select is going to be the kind of person who make their crew out meet those production levels. . . and do the job right.”

16. Administrator McMillion had a construction crew who did side jobs for homeowners on weekends and evenings. These jobs consisted of general construction and repair including carpentry, and electrical work. Mr. Poff and other employees Mr. McMillion supervised at the Mercer County facility worked on Mr. McMillion’s crew.<sup>10</sup>

17. Mr. Poff and two other employees who worked on Mr. McMillion’s side jobs with him were advanced to supervisory positions in the Mercer County facility.<sup>11</sup>

18. Mr. McMillion did some roof leak repair work on Mr. Pack’s house.

19. Mr. Pack characterized the difference between the applicants as “millimeters.”

---

<sup>10</sup> Testimony of Grievant and Mr. Pack.

<sup>11</sup> Testimony of Mr. Pack.

20. Grievant testified that he was more qualified for the posted position, but he believed that Kevin Belcher or Tamara Williams were the most qualified candidates.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See, W. VA. CODE R §156-1-3. Burden of Proof.* "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant argues that the selection process was significantly flawed and arbitrary and capricious for three significant reasons. First, Grievant argues that Respondent violated W. VA. CODE § 29-6-10 (4) by failing to give any consideration to the seniority of the applicants even though they had "substantially equal or similar qualifications." Second, Grievant avers the decision was arbitrary and capricious because the interviewer could not articulate any specific differences between Grievant and the successful applicant on the factors allegedly used to make the decision. (i.e. leadership, loyalty and professionalism). The fact that there was no difference among the factors to be considered on the Applicant Evaluation Forms, indicates that the decision was based upon factors which may not be considered. Finally, Grievant argues that the selection of the successful application was derived through favoritism.

Respondent argues that it followed all the appropriate procedures for interviewing applicants and selected the applicant who was best suited to fulfill the duties of the Crew

Chief position. All the candidates were given interviews in which they all were asked the same questions. All the applicants met the minimum qualifications for the position and the interviewers exercised their discretion in recommending the applicant who demonstrated in the interview that he was the most qualified candidate. Respondent also notes that Grievant testified that he was not the most qualified applicant for the position and therefore could not be placed in the position even if the selection position was arbitrary and capricious.

In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *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). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem,



explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "

WEST VIRGINIA CODE § 29-6-10(4)<sup>12</sup> requires that when two or more classified employees are seeking a promotion and their qualifications are "substantially equal or similar," the relative seniority of the applicants shall be given consideration as a factor in determining which employee receives the promotion. *Id.* There are generally two ways this statute has been addressed in Grievance Board decisions. One set of decisions are resolved where there was insufficient evidence to demonstrate that the applicants' qualifications were "substantially equal or similar" See *Tanner v. Div. of Highways*, Docket No. 2015-1303-DOT (Feb. 16, 2016). Another set of decisions hold that, seniority is a factor to be considered, it is not required by the statute to be the determinative factor. An

---

<sup>12</sup> W. VA. CODE § 29-6-10 (4) states: "When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be."

employer certainly retains the discretion to select a less-senior applicant with greater qualifications. *Lewis v. W. Va. Dep't of Admin.*, Docket No. 96-DOA-027 (June 7, 1996); *See Blake v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 97-DOH-416 (May 1, 1998); *McCloy v. Div. of Rehabilitation Ser.*, Docket No. 2014-1499-DEA (Oct. 22, 2015). *McGhee v. Div. of Homeland Sec. & Emergency Mgmt.*, Docket No. 2016-0559-MAPS (Jun. 22, 2016).

The first set of cases are not applicable here. The candidates were given the same rating for the six criteria set out on the Application Evaluation Record. Grievant exceeds Mr. Poff in the area of experience with the agency and he holds a higher classification of TW3 as opposed to Mr. Poff who held a TW2 classification. Mr. Pack said that Mr. Poff lead in the area of leadership, but he testified that the difference between the candidates were “millimeters.” The qualifications of the applicants do not have to be identical for the statute to apply, they need only be “substantially equal or similar.” In this matter the documents and testimony show that they were and the levels of seniority of the applicants were required to be considered by the interviewers. There is no evidence to prove that it was considered. Seniority certainly did not have to be the deciding factor, but it had to be considered. Grievant proved by a preponderance of the evidence that Respondent violated WEST VIRGINIA CODE § 29-6-10(4) by giving no consideration to the relative seniority of the applicants for the posted position.

Failure to follow the statute applicable to granting a promotion is one indication that the selection decision was arbitrary and capricious. Grievant also points to the testimony of Roadway Design Engineer Pack as well. Mr. Pack agreed that all the applicants were equal on the set of six criteria initially examined. He testified that Mr. Poff

exceeded the other applicants in the areas of leadership, loyalty, and professionalism. Yet he did not offer a single example where Grievant showed a lack of any of these traits or that Mr. Poff excelled. Even when he was given the specific opportunity to identify the differences that “demonstrated that one had more leadership than the other,” he spoke only about what he was seeking in an applicant but did not identify those characteristics in either candidate or give any relevant examples. He simply stated that the interviewers decided that Mr. Poff was the best suited to fill the position,

The Grievance Board has consistently held: “There is no doubt that it is permissible to base a selection decision on a determination that a particular applicant would be the ‘best fit’ for the position in question. However, the individuals making such a determination should be able to explain how they came to the conclusion that the successful applicant was, indeed, the best fit. *Spears v. Dep’t of Health & Human Res.*, Docket No. 04-HHR-284 (July 27, 2005).” *Underwood v. Div. of Health & Humans Ser.*, Docket No. 2012-0237-DHHR (Dec. 6, 2017). In this case, Mr. Pack did not explain why the interviewers reached their “best fit” decision.<sup>13</sup> While he stated that Mr. Poff had better leadership he did not give a single example to demonstrate how that conclusion was reached. Because the interviewers did not demonstrate how one applicant exceeded the other in the areas which they said were pivotal. Grievant proved by a preponderance of the evidence that the selection process was arbitrary and capricious.

---

<sup>13</sup> It is worth noting that Mr. Pack was passionate about the importance of the Crew Chief positions and what he believed were the necessary attributes it takes to successfully perform in that position. He simply did not articulate how those attributes manifested in the individual applicants.

Finally, Grievant argues that the selection process was flawed because favoritism was shown to the successful applicant due to his outside working relationship with Administrator McMillion. For the purposes of the grievance “‘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). In the case of *Frymier v. Higher Educ. Policy Comm’n*, 655 S.E.2d 52, 221 W. Va. 306 (2007), the West Virginia Supreme Court of Appeals wrote:

While our case law is replete with examples of discrimination cases, the issue of favoritism is not well distinguished. The analysis for the two types of cases has been commingled in many circumstances. Thus, we find it appropriate to look to the analysis available in discrimination cases for the guidance on the favoritism issue that is now before us.

*Id.* 655 S.E.2d 52 at 59. Accordingly, in order to establish a favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm’n*, 655 S.E.2d 52, 221 W. Va. 306 (2007);

*Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In this case, Grievant and Mr. Poff, are both Transportation Workers employed by Respondent in the Mercer County facility. They both applied for the position of Crew Chief,

and both were interviewed. For purposes of this matter they were similarly-situated employees.

The difference in treatment is that Mr. Poff was given the job and Grievant was not. Grievant argues that the difference in treatment resulted from Mr. Poff being given preferential treatment because he worked on evenings and weekends with Administrator McMillion on construction jobs. As evidence, Grievant demonstrated that Mr. Poff worked on side jobs with Mr. McMillion and one of those side jobs included roofing work for Mr. Pack. The evidence also shows that at least two other workers in the Mercer facility who worked on McMillion's side job crews also received promotions to supervisory positions. Grievant had the higher classification of TW3 compared to Mr. Poff's classification of TW2. Additionally, Grievant had five and a half years of experience with the DOH as a Transportation Worker which is more than twice that held by Mr. Poff. Grievant's prior experience was also related to construction of road and railways with heavy equipment. The majority of Mr. Poff's prior work was as a lead carpenter.<sup>14</sup> Mr. Poff did use a backhoe while working for the general contractor.

Based upon an examination of the objective factors, Grievant appears to be more qualified for the promotion. As stated above, Respondent provided no examples of how Grievant and Mr. Poff differed on the more subjective criteria which was cited for promoting Mr. Poff. Given the evidence in this case Grievant proved that it is more likely than not that Mr. Poff was given the favorable treatment of getting the promotion for reasons which were not related to the actual job responsibilities of their positions.

---

<sup>14</sup> Ironically, this experience appears to be more closely related to the side work on the jobs with Mr. McMillion than work as a heavy equipment operator for the DOH.

Grievant proved by a preponderance of the evidence that he was subjected to favoritism as defined by W. VA. CODE § 6C-2-2(h).

The issue that remains to be addressed is if there is an appropriate remedy for Grievant. He stated that he was not the most qualified applicant for the job. Further, insufficient evidence was presented about the other applicants to conclude that Grievant was the most qualified candidate. Where Grievant has not proven that he was the most qualified applicant, the relief of reinstatement into the posted position is inappropriate. *Forsythe v Dep't of Admin/Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009). However, "[w]here 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. *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)." *Forsythe v. Dep't of Admin/Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009). Accordingly, the grievance is **GRANTED in part and DENIED in part**.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process.

*Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

3. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "

4. WEST VIRGINIA CODE § 29-6-10(4) requires that when two or more classified employees are seeking a promotion and their qualifications are "substantially equal or similar," the relative seniority of the applicants shall be given consideration as a factor in determining which employee receives the promotion. *Id.*

5. Grievant proved by a preponderance of the evidence that Respondent violated WEST VIRGINIA CODE § 29-6-10(4) by giving no consideration to the relative seniority of the applicants for the posted position even though the qualifications of the applicants were substantially equal or similar.

6. “There is no doubt that it is permissible to base a selection decision on a determination that a particular applicant would be the ‘best fit’ for the position in question. However, the individuals making such a determination should be able to explain how they came to the conclusion that the successful applicant was, indeed, the best fit. *Spears v. Dep’t of Health & Human Res.*, Docket No. 04-HHR-284 (July 27, 2005).” *Underwood v. Div. of Health & Humans Ser.*, Docket No. 2012-0237-DHHR (Dec. 6, 2017).

7. Because the interviewers did not demonstrate how one applicant exceeded the other in the areas which they said were pivotal, Grievant proved by a preponderance of the evidence that the selection process was arbitrary and capricious.

8. For the purposes of the grievance “‘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).

9. In order to establish a favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm’n*, 655 S.E.2d 52, 221 W. Va. 306 (2007);  
*Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).



10. Grievant proved by a preponderance of the evidence that he was subjected to favoritism as defined by W. VA. CODE § 6C-2-2(h).

11. “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. *Neely v. Dep’t of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).” *Forsythe v. Dep’t of Admin/Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009).

Accordingly, the grievance is **GRANTED in part and DENIED in part**.

Respondent is **Ordered** to repost the Transportation Crew Chief position which is the subject of this grievance within thirty calendar days of receipt of this decision. Further, Respondent cannot take into account the successful applicant's service in the contested position in the new selection process.

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 (2008).

**DATE: October 1, 2018.**

---

**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**

