THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RAYMOND HARTMAN, et al.,
Grievant,

v. **Docket No. 2018-1141-CONS**

DIVISION of HIGHWAYS,
Respondent, and

STEVEN LEE FUNK
Intervenor.

D E C I S I O N

In April 2018, Brian Myers, Raymond Hartman, Gary Shockey, and David Conrad filed Level One Grievance Forms against their employer, Division of Highways, Respondent, protesting the selection of Intervenor Steven Funk. The grievances were consolidated by order on May 1, 2018. The grievance filed by Grievant Hartman on April 24, 2018, provides:

> I appled (sic) for TW3 posting no DT 1800531 that I was certified for. The job was given to a person that was not over at lest (sic) 4 others that are. (sic) this caused a hostile work environment. Our supervisor Donnie Coby told us he had nothing in who was hierd (sic). He said is up to Leslie Staggers.

The relief sought states, "I would like the job be re posted or what wages that I would lose over the next 13 years."

By letter dated May 29, 2018, the level one grievance evaluator mailed Intervenor Funk notice of the grievance and of his right to intervene. Intervenor Funk did not receive this notice until after the level one hearing and did not attend. A level one hearing was held on June 1, 2018. All four Grievants attended. A level one decision was issued on June 25, 2018, granting the grievance in part and denying it in part. The level one decision ordered Respondent to repost the position.

On July 10, 2018, after Intervenor Funk was removed from his position due to the level one decision, he filed a motion to intervene. An order dated November 9, 2018, granted Intervenor's request to intervene and he appealed the matter to level two. A mediation was conducted on December 18, 2018.

On January 9, 2019, Intervenor appealed to level three, requesting the undersigned to:

> address the issue of reinstating Steven L. Funk to the TW III Equipment Operator position, including any and all back pay associated with the upgraded position. Mr. Funk was awarded the upgraded position and pay increase on March 17, 2018; however, was removed from said aforementioned position on July 7, 2018, by virtue of the decision of Sandra Castillo, the Level One (1) Grievance Evaluator. Lastly, it is anticipated that the issues associated with the prior decision in this matter and upcoming hearing will address whether or not a qualified applicant had to be "certified" or "preferred" for the position along with Mr. Funk's overall attributed experience. It is also my intent to request attorney's fees on behalf of Mr. Funk.

A level three hearing was held before the undersigned Administrative Law Judge on April 16, 2019, at the Grievance Board's Westover office. The only remaining Grievant at level three was Mr. Hartman.[1] Grievant appeared *pro se.*[2] Respondent appeared by Jarod Wilson, Assistant Maintenance Engineer, and was represented by Jesseca Church, Esquire. Intervenor appeared in person and was represented by Nathan Walters, Esquire, Walters & Heishman, PLLC. Parties were provided an opportunity to submit written Proposed Findings of Fact and Conclusions of Law, which

[1]Referred to as Grievant hereafter.

[2]"*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. BLACK'S LAW DICTIONARY, 8th Edition, 2004 Thompson/West, page 1258.

Grievant chose not to submit. This matter became mature for consideration on or about June 18, 2019, after receipt of Respondent and Intervenor's proposed findings of fact and conclusions of law.

Synopsis

Grievant and Intervenor applied for a Transportation Worker 3 Equipment Operator position with Respondent, Division of Highways. Respondent selected Intervenor over four certified backhoe operators, due to his skill as an equipment operator. Grievant argues that Respondent should have selected a candidate who was certified as a backhoe operator. Grievant further contends that Intervenor should not have been credited with any equipment operating experience he gained as a minor. The level one evaluator granted the grievance in part, but directed Respondent to repost the position and select the most qualified candidate based on a fair comparison of experience in compliance with all procedures and policies. Intervenor appealed, arguing that Respondent did nothing improper in considering the expertise Intervenor gained while operating equipment as a child on his family farm and ranking him above certified candidates, because he was clearly the best equipment operator. Intervenor proved that Respondent did not act arbitrarily and capriciously in selecting him over certified candidates and crediting him with expertise gained as a minor. Accordingly, Intervenor's appeal is GRANTED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2 Equipment Operator in Respondent's District 5.

2. Intervenor is employed by Respondent as a Transportation Worker 2 Equipment Operator in Respondent's District 5.

3. Grievant has been employed by Respondent since December 23, 2010, and is certified on multiple pieces of equipment, including the backhoe.

4. Intervenor has been employed by Respondent since May 7, 2011, and is certified on one piece of equipment. (Intervenor's testimony)

5. Jarrod Wilson is the Assistant Maintenance Engineer in Respondent's District 5 and was one of the interviewers in the selection process for the position that is the subject of this grievance.

6. On or about December 18, 2017, Respondent posted a vacancy for a Transportation Worker 3 Equipment Operator (TW3EQOP) in District 5, Hardy County.

7. The posting in part described the job as "PRIMARILY OPERATES THE BACKHOE FOR CLEANING DITCH LINES, RESETTING DROP INLETS, AND REPAIRING SINK HOLES. OPERATES A VARIETY OF OTHER MOTORIZED EQUIPMENT INCLUDING, BUT NOT LIMITED TO, FRONT ENDLOADER, TANDEM AND SINGLE AXLE TRUCKS, ROLLER, SKID STEER, ASPHALT KETTLE/CRACK SEALING MACHINERY, AND OTHER HIGHWAY MAINTENCE EQUIPMENT. (Intervenor's Exhibit 3)

8. The posting further stated, “BACKHOE CERTIFICATION FROM THE INTERNATIONAL UNION OF OPERATING ENGINEERS IS PREFERRED.” (Intervenor’s Exhibit 3)

9. Intervenor, Grievant, and three other individuals (formerly grievants in this action) applied for the vacant TW3EQOP position.

10. Interviews were conducted on January 24, 2018. Jarrod Wilson and Donald Coby acted as interviewers on behalf of Respondent.

11. The interviewers gave equal consideration to candidates after subjecting them to the same interview process, asking them the same series of questions, and evaluating them on the same qualifications. (Mr. Coby & Mr. Wilson’s testimony and Respondent’s level one Exhibits 3, 4, 9, 11, 12, & 15)

12. The interviewers rated candidates using the same standard Application Evaluation Record (AER) form. (Mr. Coby & Mr. Wilson’s testimony)

13. Additionally, there is a comments section on the AER for the interviewers to note any pertinent information during the interview.

14. The panel uses the AER to rate whether the applicant “meets”, “does not meet”, or “exceeds” qualifications for the job posting. These qualifications include education; relevant experience; possess knowledge, skills & abilities; interpersonal skills; flexibility/adaptability; presentability; and overall evaluation. (Respondent’s level one Exhibit 5)

15. Mr. Coby rated Grievant as “meets” on five qualifications and “does not meet” on two qualifications. Mr. Coby noted on the AER comments section that Grievant

"has certification no experience." (Mr. Coby & Mr. Wilson's testimony and Intervenor's Exhibit 1)

16. Mr. Coby rated Intervenor as "meets" on one qualification and "exceeds" on six qualifications. Mr. Coby noted on the AER comments section that Intervenor "has gradall cert. (sic) and runs personal backhoe all year on farm and does side jobs, would make an excellent backhoe operator – not certified, but willing to get certified." (Mr. Coby & Mr. Wilson's testimony and Respondent's level one Exhibit 10)

17. Mr. Wilson rated Grievant as "meets" on all seven qualifications but noted on the AER comments section "[h]ave better qualified applicants." (Mr. Wilson's testimony and Respondent's Exhibit 1)

18. Mr. Wilson rated Intervenor as "meets" on five qualifications and "exceeds" on two qualifications. Mr. Wilson noted on the AER comments section that Intervenor "would make a great TW3 backhoe operator for org. 0582. Is not certified however runs a backhoe many hours a year. He is a natural operator of equipment." (Mr. Wilson's testimony and Respondent's Exhibit 2)

19. Each candidate was asked these same ten questions:

a. Why are you interested in this job?

b. Describe your work experience operating the backhoe. What type of work have you performed with that equipment? How many years of this type of experience do you have?

c. Tell us about the most challenging work you have done with the backhoe. In what ways was it most challenging?

d. Describe any other qualifications you have for this position.

e. Describe how you would install an 18 inch culvert crossing a county roadway using a backhoe.

f. Give an example of the last time you went above and beyond the call of duty to get the job done. How did you feel about it? What were the result?

g. Describe your experience working with people who are different than you. What are your thoughts on working in a diverse environment?

h. Is there any reason you could not perform the job duties of this position?

i. Why are you the best candidate for this position? What particular skills and qualities do you have that other candidates may not?

j. Is there anything else you want to tell us? Do you have any questions?

20. Each interviewer memorialized each candidate's answers.

21. Grievant acknowledges that Intervenor is a better backhoe operator and has more experience than he does in operating a backhoe. (Grievant's testimony)

22. Intervenor has stepped in to perform difficult maneuvers on equipment for certified operators.

23. Intervenor specializes in the backhoe, but also operates various other pieces of equipment.

24. Respondent looked at each applicant's experience in running equipment, regardless of the age at which they gained that experience. (Mr. Wilson's testimony)

25. Interviewers talked to supervisors for the candidates and they agreed that Intervenor was the best candidate in terms of his skills as an operator. (Mr. Wilson's testimony)

26. After reviewing the submitted applications, conducting interviews, evaluating the applicants, and giving equal consideration to all applicants, both

interviewers concluded that Intervenor was the most qualified applicant and the best fit for the vacation TW3EQOP position. They therefore recommended him for the position. (Mr. Coby & Mr. Wilson's testimony)

27. Leslie Staggers is the Administrative Services Manager in Respondent's District 5 and is responsible for processing all personnel transactions in District 5. She reviews applications before interviews to see if the candidate meets the minimum qualifications and helps prepare the interview questions. After the interview, she reviews the results to make sure that proper procedure is being followed. (Ms. Staggers' testimony)

28. Ms. Staggers reviewed all applications before the interviews and determined that the five candidates met the minimum qualifications. (Ms. Staggers' testimony)

29. Intervenor's application stated that he was 29 years old and that he had 17 years of experience running equipment on his family's farm. (Ms. Staggers' testimony)

30. Ms. Staggers determined that Intervenor had the requisite 4 years of experience needed to receive the job. (Ms. Staggers' testimony)

31. Ms. Staggers reviewed the interviews afterwards and determined that proper procedures were followed. (Ms. Staggers' testimony)

32. After the interview, Ms. Staggers received the interviewers' recommendations and made the final determination to award the position to Intervenor. (Ms. Staggers' testimony)

33. While Respondent's hiring policy prefers certification, it does not require it. Respondent's policies balance certification against hiring the best qualified candidate. (Ms. Staggers' testimony)

34. Respondent's practice is to hire the best operator and get him certified later if he lacks necessary certification. (Ms. Stagger's testimony)

35. The level one grievance evaluator found that Respondent had credited Intervenor with 17 years of work experience, even though he was in his late 20's.

36. The level one grievance evaluator found that "[t]he selection process does not appear to represent Respondent's routine hiring procedures. Although the interviewers may believe Mr. Funk was best suited for the vacancy, there appears to have been a flaw in the interview process since he was given credit for work performed as an adolescent."

37. The level one grievance evaluator ruled that, even though the multiple grievants did not prove they were the most qualified, they proved that the selection of Intervenor was arbitrary and capricious because they were not given equal consideration based on documented work history and experience and did not represent Respondent's routine hiring procedures.

38. The level one grievance evaluator found that "[v]ery often candidates are given credit for outside or previous work experience or credit for operating heavy equipment on a family farm …, but clearly work performed as a child should not be included or taken into consideration when there are several qualified applicants with tangible work experience."

39. The level one grievance evaluator therefore directed Respondent "to repost the position and commence with a new process selecting the most qualified candidate based on a fair comparison of experience in compliance with all procedures and policies."

Discussion

Normally, in a non-disciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). However, an intervenor appealing an adverse level one decision has the burden of proof at the hearing before the Grievance Board. *See Jackson v. Grant County Bd. of Educ*., Docket No. 97-12-224 (Oct. 16, 1997); *Holmes v. Berkeley County Bd. of Educ. and Dave Rogers*, Docket No. 96-02-070 (Jan. 13, 1998). "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*.

At level one, Grievant alleged that, in selecting Intervenor for the Transportation Worker 2 Equipment Operator position, Respondent acted in an arbitrary and capricious manner in both crediting Intervenor for equipment operating experience he gained as a minor and selecting a non-certified operator over four certified operators. The level one grievance evaluator determined that Respondent did not abide by its normal hiring practice when it credited Intervenor for experience he gained as an adolescent when there were candidates who had "tangible work experience" documented through

certifications, that “clearly work performed as a child should not be included or taken into consideration”, and that Intervenor’s selection was therefore arbitrary and capricious. Intervenor counters that Respondent is not obligated to choose a certified candidate over a non-certified one it deems more qualified to do the job, and that Respondent acted properly in deeming him the most qualified candidate based on expertise he gained over his lifetime.

Normally, in a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. However, when an Intervenor appeals the reversal of his selection, the Intervenor is only required to show that the decision to hire Intervenor over Grievant was not clearly wrong and that Respondent’s selection decision was not arbitrary and capricious. See *Holmes, Supra*; *Thibault v. Div. of Rehabilitation Serv*., Docket No. 93-RS-489 (July 29, 1994). The reason for this distinction is that an intervenor is, by definition, the successful applicant and great deference is afforded a selection decision. If the selection panel’s decision in selecting an intervenor is to be given deference, a party grieving their non-selection must be required to show that they were the most qualified candidate (in order to unseat the successful applicant) or that the selection process was flawed (in order to at least have a do over with the selection panel). Conversely, an intervenor, when appealing a level one decision reversing his selection, is justifiably only required to prove that his selection was not clearly wrong nor arbitrary and capricious in order to be reinstated. The Grievance Board has held that 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). 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 & Human Serv*., 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment

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

At level one, Grievant did not prove he was the most qualified candidate, but convinced the grievance evaluator that the hiring process was flawed, since Respondent considered the operating experience Intervenor gained as a minor. Even though the level one decision did not find that Grievant was more qualified than Intervenor, Grievant did not appeal the level one decision. As neither Grievant nor Respondent appealed the level one decision, the undersigned will examine only those issues appealed by Intervenor and the arguments made by Grievant at level three.

In considering arguments about whether the selection process was clearly wrong or arbitrary and capricious, the undersigned is mindful of the following facts. The interview panel had valid and reasonable explanations for their recommendation of Intervenor and were in complete agreement that Intervenor was the most qualified applicant. Ms. Staggers adopted their recommendation after reviewing the files. Respondent applied a uniform selection process for all applicants. Respondent used standardized procedures to evaluate the applicants and used the same AER form that DOH uses for all its interviews. All candidates were asked the same written questions and were rated on the same qualifications, including education, relevant experience, knowledge, skills and abilities, interpersonal skills, flexibility/adaptability, and presentability.

In accounting for Intervenor's experience, knowledge, skills, and abilities in operating equipment, Respondent's acted reasonably in not differentiating the experience Intervenor gained in operating equipment for DOH from experience he gained as a minor.

"Experience" can be synonymous with "knowledge" and has been defined as "practical knowledge, skill, or practice derived from direct observation of or participation in events or in a particular activity". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 437 (1983). It defies credulity to expect Intervenor to separate from his body of knowledge the equipment operating experience he gained as a minor. Nor is there any regulation that mandates that Respondent ask Intervenor to do so. It is a given that employees gain at least some relevant knowledge during their childhood. Some employees may acquire a useful amount of knowledge in childhood that is disproportionate to that gained by their coworkers. While some of that knowledge may be ill gotten, there was no evidence either that Intervenor gained his knowledge and experience through improper means or that the use of improper means should nullify Intervenor's ability to use that knowledge to benefit DOH. Even to the extent that Respondent credited Intervenor with years of experience rather than actual skill, there was no evidence that this was improper, particularly in light of the fact that Intervenor had gained the four-year minimum requisite with DOH.

The undersigned is mindful that, where a selection panel places an inordinate amount of weight on experience as a time factor, rather than actual skill and knowledge, an unintended consequence could be that an applicant gains an edge by claiming experience that is difficult to verify and easy to falsify. While this could be a factor in a grievance resulting over such a selection, it was not in this matter. Respondent did not put Intervenor ahead of Grievant based on a comparison of Intervenor's time operating equipment as a child against Grievant's time operating equipment as an adult. Ultimately, the selection process was based upon a range of specific criteria and was

uniform. The evidence showed that Respondent would have credited any applicant with relevant knowledge gained during childhood and that all applicants were treated equally.

Grievant concedes that he probably has less experience than Intervenor on the backhoe and that Intervenor was a better backhoe operator. However, Grievant contends that his backhoe certification trumps Intervenor's experience, especially since Intervenor gained much of that expertise as a minor. Respondent's hiring practices attempt to balance the competing protocols of hiring someone who is certified versus hiring someone who has experience operating a piece of equipment. Respondent attempts to balance these by deferring to experience, as it is more efficient to have someone with experience get certified than it is giving experience to someone who is already certified. It is less efficient for Respondent to enable an employee to learn how to operate equipment on the job than it is to assist him in obtaining certification for that equipment. It is undisputed that Intervenor had more experience than Grievant on the backhoe and various other pieces of equipment, and that Intervenor was a better overall equipment operator. A collateral benefit of hiring the best equipment operator is that, in addition to being more efficient with its resources, Respondent would have less workplace accidents. Evidence showed that coworkers are comfortable working around equipment being operated by Intervenor due to his skill in controlling the equipment.

There was no evidence that, in crediting Intervenor with outside knowledge and experience, Respondent acted inconsistently with protocol or past practices. The level one grievance evaluator implied as much when she found that "[v]ery often candidates are given credit for outside or previous work experience or credit for operating heavy equipment on a family farm …, but clearly work performed as a child should not be

included or taken into consideration when there are several qualified applicants with tangible work experience." In so finding, the evaluator did not say why experience and knowledge gained as a child should not count, but implied that, while expertise may normally be weighed against certification, certification trumps expertise gained as a child. While parties disagree with the manner in which experience should be attributed to candidates, they do not dispute that Intervenor was the more experienced candidate.

As for certification, the evaluator treated certification as being similar to seniority. In many ways they are alike. The Grievance Board has, however, routinely held that seniority is merely a factor to be considered and is not required by statute to be the determinative factor. An 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). Further, the job posting said that certification was "preferred", implying that it was not required and would be weighed against other factors, such as expertise. Intervenor had more relevant knowledge and expertise than Grievant. While each interviewer rated Grievant's "relevant experience" and "knowledge, skills, & abilities" as "does not meet" and "meets", they each rated Intervenor's "relevant experience" and "knowledge, skills, & abilities" as "exceeds". Even though Intervenor was a better equipment operator than Grievant, ability to handle equipment and certification are not the only factors that Respondent can consider. Interviewers rated Intervenor higher in other AER categories unrelated to operating equipment, demonstrating that Grievant and Intervenor were not equal candidates. While Grievant received an "overall evaluation"

of "meets" from each interviewer, Intervenor received one "meets" and an "exceeds". Thus, Intervenor proved that there was no flaw in the process and that Respondent's selection decision was not arbitrary and capricious.

Regarding Intervenor's request for attorney's fees, it is well established that "an ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ*., Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp*., Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. Va. Code § 6C-2-6." *Stuart v. Div. of Juvenile Serv*., Docket No. 2011-0171-MAPS (Sept. 23, 2011). Intervenor's request for attorney's fees is therefore denied.

The following conclusions support the decision reached

Conclusions of Law

1. Normally, in a non-disciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). However, an intervenor appealing an adverse level one decision has the burden of proof at the hearing before the Grievance Board. *See Jackson v. Grant County Bd. of Educ*., Docket No. 97-12-224 (Oct. 16, 1997); *Holmes v. Berkeley County Bd. of Educ. and Dave Rogers,* Docket No. 96-02-070 (Jan. 13, 1998).

2. Normally, in a selection case, a grievant must prove, by a preponderance

of the evidence, that he was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra.* However, when an Intervenor appeals the reversal of his selection, the Intervenor is only required to show that the decision to hire Intervenor over Grievant was not clearly wrong and that Respondent's selection decision was not arbitrary and capricious. *See Holmes, Supra; Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994). This is because 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).

3. 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).

4. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of [the employer]. *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

5. Seniority is merely a factor to be considered, it is not required by the statute

to be the determinative factor. An 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).

6. It is well established that "an ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ*., Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); C*hafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp*., Docket No. 2008-0633-DOT (Dec. 23, 2008).

7. Intervenor proved that there was no flaw in the selection process and that it was not arbitrary and capricious.

Accordingly, Intervenor's appeal is GRANTED in part and DENIED in part. Respondent is ORDERED to immediately reinstate Intervenor to his position of Transportation Worker 3 Equipment Operator and issue him back pay from the date he was removed from this position through the date of his reinstatement.

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 (2018).

Date: July 30, 2019

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Joshua S. Fraenkel
Administrative Law Judge