

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DOTTIE HATFIELD,
Grievant,

v.

Docket No. 2018-1393-CONS

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,**
Respondent

and

KIMBERLY VANCE,
Intervenor.

DECISION

Grievant, Dottie Hatfield, is employed by Respondent, Department of Health and Human Resources within the Bureau for Children and Families. On October 27, 2017, Grievant filed this grievance against Respondent protesting her non-selection for an Economic Service Supervisor position. For relief, Grievant seeks “[t]o be made whole in every way including back [pay] with interest.”

By notice dated February 20, 2018, the parties agreed to waive level one. Following mediation, Grievant appealed to level three of the grievance process on June 19, 2018. The grievance was consolidated with the grievance of Norma Elkins, docket number 2018-0646-DHHR, by order entered June 27, 2018. By order entered November 2018, Kimberly Vance was granted intervenor status. A level three hearing was held on November 19, 2018, before the undersigned at the Grievance Board’s Charleston, West Virginia office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Norma Elkins did not appear in person and by representative announced her intention to withdraw her

grievance. Respondent appeared by Jeffrey Dean, Community Services Manager, and was represented by counsel, Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on December 21, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as an Economic Service Worker. Grievant was not selected for an Economic Service Supervisor position that was awarded to Intervenor. Respondent failed to follow its policy regarding hiring decisions. Respondent could not explain why Intervenor was the most qualified candidate when Grievant had more experience. Grievant proved the selection process was arbitrary and capricious. Grievant failed to prove she was the most qualified applicant but, as the selection process was arbitrary and capricious, the position must be reposted. 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. Grievant is employed by Respondent as an Economic Service Worker within the Logan County office of the Bureau for Children and Families and has been so employed for more than sixteen years.

2. In May 2017, Respondent posted an Economic Service Supervisor position for which Grievant, Intervenor and an unknown number of others applied.

3. The posting contained the following job description:

Under general supervision, performs work at the full-performance level supervising and guiding economic service

workers in the performance of eligibility determination duties and record-keeping. Responsible for ensuring that all applications and redetermination for financial assistance in all programs are processed in accordance with established policy. Interprets, applies and explains to others the policies and procedures relevant to the assistance programs. Assigns and reviews the work of subordinate staff. Performs other related duties as assigned.

4. On July 27, 2017, an interview committee consisting of Cheryl Salamacha, Regional Director, Darlena Ables, Logan County Community Services Manager ("CSM"), and Tracy Angle, Cabell County CSM, interviewed Grievant, Intervenor, and three others.

5. Sometime in September or October 2017, with no explanation why a selection decision had not been made from the first interviews and without reposting the position, interviews were conducted again of the original five candidates plus a new sixth candidate.

6. The second set of interviews were conducted by CSM Ables and Lance Whaley, Regional Director. At the time of the level three hearing, Mr. Whaley was the Regional Director. Mr. Whaley was previously the CSM of Putnam County. It is not clear what position Director Whaley held at the time of the interview.

7. Of the people involved in the hiring decision, only Director Whaley was called to testify.

8. Respondent's hiring decisions are governed by a very thorough policy, the Department of Health and Human Resources Policy Memorandum 2106, Employee Selection.

9. The policy contains an appendix with forms including the Applicant Interview Rating and Candidate Comparison Chart. The policy states, "Interviewers are expected to familiarize themselves with the policy and utilize Appendix A." *Id.* at 6.

10. The policy further states in relevant part:

The chart in the OPS-13, Applicant Interview Rating . . . should be utilized as a tool in the process of selecting a candidate; but it is not necessarily the deciding factor. Where appropriate, different factors can be weighed on the needs the job entails. Such facts and weights must be determined prior to the interview and applied consistently to all applicants. An applicant's demonstrated skills and abilities might make them the best candidate for the job, despite the fact that they did not have the best interview or the most education. **Significant factors in the employment decision should be documented.** (*emphasis in original*).

. . . .
When selecting one employee from among several applicants, demonstrated ability, work history, references, education and the interview should be considered. The ultimate selection decision should be based upon the interviewer's judgment as to which candidate would best do the job. Hiring decisions should be based on an individual's qualification for the essential duties of the position. . . .

11. The first interview committee failed to use the Candidate Comparison Chart. Instead, the committee scored the candidates using what appears to be an official DHHR tool, DHHR Solutions, that is not mentioned in the policy.

12. A Weighted Applicant Scoring Worksheet was completed for all candidates that gave each candidate a numerical score on four categories for a total of 100 points: Education, 10 points; Experience, 15 points; Supervisory Experience, 15 points; and Interview, 60 points. This worksheet did not include the same factors to be considered as the Candidate Comparison Chart that the interview committee was required to use by policy.

13. A legend is attached to the Weighted Applicant Scoring Worksheet showing how points are calculated for each category.¹

14. The first interview committee scored the candidates as follows:

Candidate	Education	Experience	Supervisory Experience	Interview	Total
Grievant	0	11	15 [11] ²	30	56 [53]
Bailey	0	15	0	30	45
Intervenor	0	6	13 [11]	40	59 [57]
Bradford	0	7	10	30	47
Elkins	0	10	13	20	43

15. Although Intervenor was awarded 13 points for supervisory experience, which is the score for between 16 and 20 years of experience, Intervenor's application only reflected 14 years of supervisory experience, which should have earned her only 11 points.

16. Although Grievant was awarded 15 points for supervisory experience, which is the score for 20 plus years of experience, Grievant testified she had only 8 years of supervisory experience as a backup supervisor and 5 years of supervisory experience managing her own company's employees, which totals only 13 years of supervisory experience, which should have earned her only 11 points.

¹ Joint Ex. 2. This exhibit includes the Weighted Applicant Scoring Worksheet from the first interviews and the Candidate Comparison Chart from the second interviews. The exhibit appears to be out of order in that two pages of the legend for the Weighted Applicant Scoring Worksheet appear after the Candidate Comparison Chart.

² Brackets denote the corrected score as discussed in finding of fact 15 and 16.

17. For the interview scoring, the first committee rated the candidates on nine questions, indicating the candidate's responses, the interviewer's comments and a numerical score for each question of between 0 and 5.

18. The interview question form originally contained eleven questions. One question was crossed out and was not asked of the candidates. Another question was asked of the candidates, but then was crossed out and not scored.

19. The total score possible on the interview question form was 45 points.

20. Grievant was scored on the interview questions as follows: Ables, 34; Tangle, 31; and Salamacha, 28.

21. Intervenor was scored on the interview questions as follows: Ables, 34; Tangle, 36; and Salamacha, 34.

22. The first interview committee also completed the Applicant Interview Rating form, which rated each candidate with a score of 1 to 5 on each of seven factors: Oral Expression; Intelligence, Reasoning Process; Judgment, Objectivity; Tact, Sensitivity; Appearance; Poise, Confidence; and Leadership Potential.

23. The total score possible for on the Applicant Interview Rating form was 35 points.

24. Although Ms. Tangle's scores on the individual categories of the Applicant Interview Rating form added up to 29, Ms. Tangle put her total rating as 25 and Grievant's cumulative interview score was based on a score of 25. This appears deliberate as Ms. Tangle wrote 29 beside 25 and, at the bottom of the document, added her score of 31 from the interview questions sheet to both 29 and 25 separately to get scores of 60 and 56.

25. Thus, despite what Ms. Tangle put on her sheet, Grievant's actual Applicant Interview Rating form scores were as follows: Ables, 29; Tangle, 29; and Salamacha, 28.

26. Intervenor's scores on the Applicant Interview Rating form were as follows: Ables, 31; Tangle, 31; and Salamacha, 23.

27. The total score possible for the interview, combining the Applicant Interview Rating form and the interview questions form was 80 points.

28. Using the correct score for Grievant from Ms. Tangle, Grievant's total interview scores were as follows: Ables, 63; Tangle, 60; and Salamacha, 56. Her average score was 60.

29. Intervenor's total interview scores were as follows: Ables, 65; Tangle, 67; and Salamacha, 57. Her average score was 63.

30. However, the total score possible for the interview on the Weighted Applicant Scoring Worksheet was 60 points, not 80 points.

31. The legend of the Weighted Applicant Scoring Worksheet reveals that the 60-point score for the interview was calculated as follows:

Actual scoring	Number of points
31-40	10
41-50	20
51-60	30
61-70	40
71-80	50
81-90	60

32. The legend is incorrect in that it lists the total points possible as 90 when the total points possible were 80, but that mistake would not have changed the Grievant or Intervenor's position in the scoring.

33. The effect of this method of scoring was to turn a 3-point difference in the actual interview scores between Grievant and Intervenor into a 10-point difference in the final scoring.

34. If the question that was asked and not scored was included, Grievant and Intervenor would have scored the same on the interview per the legend and Grievant would have had the highest overall score on the Weighted Applicant Scoring Worksheet considering all factors and including the correct scores for supervisory experience.

35. If Grievant and Intervenor's interview scores were considered proportionally by a percentage, Grievant received 75% of the points possible and Intervenor received 79% of the points possible. By percentage, Grievant would have received 45 out of 60 points and Intervenor would have received 47 out of 60 points as a combined interview score. Again, Grievant would have had the highest total score on the Weighted Applicant Scoring Worksheet considering all factors.

36. The legend for scoring experience was altered in such a way that Intervenor received 6 points for her 2 years and 2 months of employment rather than the 5 points she would have been awarded under the original scale.

37. Given all of the above combined, it appears Grievant should have scored higher overall than Intervenor.

38. The second interview committee did not use the same methodology or forms as the first interview committee.

39. The second interview committee used the Candidate Comparison Chart provided in the policy but changed the categories on the form. They did not use the Applicant Interview Rating form.

40. The second interview committee scored the candidates as follows:

Name	Comments on Interview (scores) ³	Comments on Education	Comments on Past Experience & Demonstrated Ability	Comments on References (co-worker sup/em) (excellent, good, average)	Comments on Leadership or Growth Potential (sup. experience)	Comments Concerns with Limitations of Candidate (second interview)	Rate Candidates in Order of Preference
[Grievant]	57	Hsd	14.6	4 ex-cw 7 good-em 1 ave-em	31 yrs sup	25	2
Bailey	53	Hsd	20	4 ex cw 7 ex em 1 good em	0	23	4
[Intervenor]	63	Hsd	2 yr. 4 mo.	10 ex em 2 good em	19 yrs 10 mo.	28	1
Bradford	52	Assoc. Cert.	3 yr. 5 mo.	4 ex cw 3 ex em 4 good em 1 poor	10 yrs. 2 mo.	26	3
Elkins	47	Assoc. Degree	10 yr. 5 mo.	8 ex cw 3 ex em 1 poor em	18 yrs. 10 mo.	24	5
Britt	59	Hsd	7 yr. 1 mo.	8 ex cw 4 ex em	2 yrs. 5 mo.	23	withdrew

41. No explanation was offered regarding the scoring methodology. While it appears the first column represents a total score, no information was entered into evidence regarding how that score was calculated.

42. In the second interviews, only five questions were asked. This would be typical of a second round of interviews conducted to make a decision between two close candidates, but all five original candidates plus a new candidate were interviewed.

³ Information in parentheses are the hand-written notes that appear on the form categories.

While Grievant and Intervenor were within three points of each other as scored by the first hiring committee, the other candidates were well below them.

43. The second interview questions were scored differently than the first interview questions, worth only 1 to 4 points each, for a total of 20 points, rather than 0 to 5 points each in the first interview, and the interview scores were added together for a total rather than averaged as in the first interview.

44. Grievant's second interview scores were as follows: Ables, 12; Whaley, 13; total 25.

45. Intervenor's second interview scores were as follows: Ables, 14; Whaley, 14; total 28.

46. Jeffrey Dean is now the Community Services Manager of Logan County.

47. Mr. Dean has no personal knowledge of this selection decision and his explanation that a second round of interviews was conducted because the scores were close is not supported by the evidence.

48. Grievant's supervisor at the time of her application, Trish Mullins, who was not a part of the hiring decision, told Grievant she was required to include her current supervisors as a reference. As a result, Grievant included Supervisor E.S.⁴ as a reference. Grievant had been making complaints about E.S. to Supervisor Mullins and eventually filed an EEO complaint about E.S.

49. There was no evidence presented that anyone on the hiring committees told Grievant to use E.S. as a reference or that Grievant expressed her concern on that issue to anyone on the hiring committees.

⁴ The supervisor's initials are being used as the supervisor is not a party to this action and was not called to testify so has had no opportunity to dispute allegations.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

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)). "While a searching inquiry into the facts is required to determine if

an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant argues Respondent's selection decision was arbitrary and capricious in that it failed to follow its policy in numerous and considerable ways and gave inordinate weight to the interviews. Respondent asserts that the selection process was "well-reasoned, well-supported," and not arbitrary and capricious.

Respondent's decision was not supported by substantial evidence or by a rational basis. Everything about this hiring decision appears irregular. While there may be a good reason why a selection decision was not made after the first interviews, no credible explanation was offered in the level three testimony, which makes the convention of a second hiring committee to interview all the same candidates plus an additional candidate suspicious.

Further, significant and persistent errors were made in both committees. Neither hiring committee followed the requirements of the policy in that neither used all the required forms. Consequently, the first hiring committee did not consider all factors required by the policy and it is unclear from the documentation whether the second hiring committee considered all factors. The scoring used by the committees is not reliable. There were multiple errors in the scoring by the first committee. The scoring of the first committee appears to give inordinate weight to the interview. As discussed in the findings of fact, neither scoring methodology is transparent. After a thorough review

of the Candidate Comparison Chart and all the submitted information, the undersigned still cannot decipher how the total score was determined by the second interview committee. The first committee's use of a scoring methodology for the interview that inflated a three-point difference in score to a ten point difference in score is, again, suspicious.

"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). "[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); *See Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008)." *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

The only person who participated in the hiring decision who testified at level three was Director Whaley. Director Whaley appeared to have almost no memory of the hiring process in this case. Director Whaley's only explanation for why Intervenor was selected over Grievant was that Intervenor scored higher on one interview question than Grievant. Other than that Intervenor answered one question better than Grievant, no explanation was offered for why Intervenor was the best fit for the job given that

Intervenor had only two years of income maintenance experience to Grievant's fifteen years of experience and, at the time of the hiring decision, it appeared Grievant also had more years of supervisory experience. It is not unreasonable to expect the members of a hiring committee to be able to clearly explain the reasons for their decision, including the factors that must be considered by policy, and when a hiring committee cannot do that the hiring decision was obviously flawed.

"An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995). If the question that was asked and not scored in the first interview had been scored, Grievant would have had the highest score. Alternatively, if the interview scoring had not inflated the small point difference between Grievant and Intervenor, Grievant would have had the highest overall score. If the second hiring committee had considered all factors under the policy, rather than selecting Intervenor based on her better answer to one question⁵, Grievant would have prevailed. Grievant has proven she suffered significant harm.

⁵ To be clear, this is not to say that the interview, or even the answer to one question in the interview cannot be determinative. If Director Whaley had provided an explanation why that question was so determinative, relating the answer to the relevant factors the committee was required to consider, especially for a supervisor position for

In order to be instated into the position, not only must Grievant prove that the selection was arbitrary and capricious, but also that she was, in fact, the most qualified candidate. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008). Grievant has not proven that she was, in fact, the most qualified candidate. Grievant's seeming inflation of her supervisory experience on her application is a concern. Intervenor clearly had far superior references than Grievant⁶. While Director Whaley did not provide any real explanation about the determinative question, Grievant's answer was wholly inadequate. The hiring committee asked the candidates to discuss a situation in which they had experienced a conflict with a coworker or supervisor, with the obvious intention to allow the candidates to discuss how they would handle conflict resolution, a vitally important part of supervision. Grievant simply said she gets along with everyone while Intervenor provided a detailed answer providing insight into how she deals with conflict resolution that was even in the context of her previous supervisory experience.

"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)). Grievant has failed to prove

which it is appropriate to consider pertinent personality traits and abilities, it may have been proper to base the hiring decision on that answer.

⁶ Grievant's arguments regarding her references are not relevant as no evidence was presented that either hiring committee required her to submit E.S. as a reference or that Grievant even discussed her concerns about E.S.'s reference with either hiring committee.

she was the most qualified applicant, but the selection process was clearly arbitrary and capricious. The position must be reposted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. 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).

3. 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 her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. "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).

5. "[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp.*, Docket No. 06-DOH-121 (Aug. 2, 2006); See *Ball v. Dep't of Transp.*, Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep't of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008)." *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

6. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723,

238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995).

7. In order to be instated into the position, not only must Grievant prove that the selection was arbitrary and capricious, but also that she was, in fact, the most qualified candidate. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008).

8. "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)).

9. Grievant proved the selection process was arbitrary and capricious.

10. Grievant failed to prove she was the most qualified applicant but, as the selection process was arbitrary and capricious, the position must be reposted.

Accordingly, the grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent is **ORDERED** to repost the position of Economic Service Supervisor within thirty days of the receipt of this decision, and to select the most qualified applicant for the position in compliance with Respondent's policy.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: February 8, 2019

Billie Thacker Catlett
Chief Administrative Law Judge