

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SHERRY SLUSHER,

Grievant,

v.

Docket No. 2018-1480-CONS

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

CANDIDA L. WILLS, Intervenor.

DECISION

Grievant, Sherry Slusher, is employed by Respondent, Jefferson County Board of Education. On September 12, 2018, Grievant filed this grievance against Respondent stating, "Grievant applied for a position posted by Respondent with the multi-classification title of clerk/aide. Respondent hired a regular service person holding less seniority than Grievant, and who did not hold the multi-classification title at the end of the posting period. No competency test was administered by Respondent for the clerk/aide position." For relief, "Grievant request that position be filled in accordance with W.Va. Code §§18A-4-8b and 18A-4-8e."

By agreement of the parties, the grievance proceeded directly to level three. A Motion to Consolidate Grievances was filed by Respondent on November 28, 2018, requesting that Ms. Slusher's grievance be consolidated with a grievance over the same hiring decision filed by Charlene Mauck in the matter of *Charlene Mauck v. Jefferson County Board of Education*, Docket No. 2018-1325-JefEd. Further, Candida L. Willis, Intervenor, had filed an Intervention Form in the *Mauck* action on September 26, 2018, and an Order Granting Intervenor Status to Intervenor Willis was entered on December

4, 2018. An Order of Consolidation merging the Mauck and Slusher grievances into the current action was entered on December 4, 2018. Prior to the level three hearing, Ms. Mauck withdrew her grievance.

A level three hearing was held on April 30, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and by counsel George B. "Trey" Morrone III, West Virginia School Service Personnel Association. Respondent appeared by Bryan Cooley and counsel, Tracey Eberling, Steptoe & Johnson, PLLC. Intervenor failed to appear. This matter became mature for decision on June 10, 2019, after Grievant and Respondent submitted written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is regularly employed by Respondent under the Secretary classification title as regular service personnel. Respondent posted a vacancy under the Clerk/Clerk-Aide multi-classification title. Grievant applied but was not considered. In order to be considered, applicants were required to hold or have held the multi-classification title or be qualified for each of the component classification titles. None of the regular service personnel ever held the multi-classification title. Respondent therefore only considered regular service personnel applicants who were qualified for both the Clerk classification and the Aide classification, allowing applicants to be qualified if they either held the title or met the definition of the job title via a competency test. Grievant had previously held the Aide classification title as a regular service personnel but was not qualified for the Clerk classification, having never held the clerk classification or passed the Clerk competency test.

Only 10 of the 37 applicants were regular service personnel. None of the 10 ever held the Clerk classification title. Six of the ten held the Aide classification title. Five of those had previously passed the Clerk competency test. Respondent only considered these five applicants for the vacancy. Respondent did not offer the competency test to Grievant or any of the remaining applicants prior to closing the job posting. Respondent prioritized seniority for the five candidates using their Aide classification. Intervenor Wills was the second most senior of these five. When the senior-most declined the position, it was awarded to Intervenor Wills.

Grievant contends that Respondent was obligated to offer a Clerk competency test to all ten regular service personnel applicants, because none of them ever held the Clerk or multi-classification titles, and only five had passed the Clerk competency test, some as substitute service personnel. Grievant argues that no one with less seniority should have been ranked higher than her for the job posting. Respondent counters that it had no obligation to offer the Clerk competency test, as five regular service personnel applicants had already taken and passed the same and were, therefore, qualified. Respondent further contends that, since Grievant was not qualified for the multi-classification position, her seniority did not matter. Grievant did not prove that applicants could only qualify as Clerk by first holding the title, that Respondent was required to offer the remaining applicants the Clerk competency test just because some passed it as substitute service personnel, or that Respondent acted arbitrarily and capriciously in ranking multi-classification position applicants using only Aide seniority. Accordingly, the grievance is DENIED.

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

Findings of Fact

1. Grievant is employed by Respondent as a regular service personnel and has held the Secretary classification title since August 15, 2014.
2. Grievant previously held the Aide classification title as regular service personnel from January 22, 2003 to August 14, 2014.
3. Grievant's overall seniority date is January 22, 2003.
4. On May 9, 2018, Respondent posted a vacancy for the multi-classification title of Clerk/Clerk-Aide. (Grievant's Exhibit 1)
5. The posting contained job descriptions of both Clerk II and Aide, and both required that the successful applicant meet the definition of "qualifications" in WV Code § 18A-4-8b and demonstrate competency pursuant to WV Code § 18A-4-8e (state-approved competency test). (Grievant's Exhibit 1)
6. Thirty-seven applicants, including Grievant, applied for the vacancy.
7. Fifteen applicants were new service personnel, none of whom were considered to fill the vacancy.
8. Twelve applicants were substitute service personnel, none of whom were considered to fill the vacancy.
9. The twelve substitute service personnel applicants fell within three groups: (a) two held a Clerk classification title; seven held an Aide classification title; and three held a Clerk/Clerk-Aide multi-classification title.

10. Ten applicants, including Grievant and Intervenor, were regular service personnel.

11. Five¹ of the regular service personnel applicants were qualified for both the Clerk and Aide classifications because they had qualified for the Clerk title by passing the Clerk competency test and either held or had held the Aide title.

12. Respondent only considered these five applicants for the Clerk/Clerk-Aide multi-classification job posting because they were the only regular service personnel applicants who were also qualified for both the Clerk and Aide classifications.

13. All ten regular service personnel applicants, including Grievant and Intervenor, held or have held a position under the Aide classification title as regular service personnel.

14. Six of the ten regular service personnel applicants, including Intervenor, held an Aide classification title.

15. Three of the remaining four regular service personnel applicants who did not currently hold an Aide classification title held a position under the Cook classification title, and one, Grievant, held the Secretary classification title.

16. None of the ten regular service personnel applicants held or have held a Clerk classification title or the Clerk/Clerk-Aide multi-classification title as regular service personnel.

17. Five of the regular service personnel applicants had previously passed the clerk competency test. Respondent therefore did not make the Clerk competency test available to any applicant.

¹Etta Stultz, Candida Wills, Lori Quimet, Jennifer Park, and Marlene Popkins.

18. Because she was not qualified for the Clerk title, Grievant was not one of the five applicants Respondent considered.

19. None of the five applicants that were considered for the job posting ever held the Clerk classification title as regular service personnel but had simply qualified for the Clerk classification by passing the competency test, some as substitute service personnel. (Respondent's Exhibit 2)

20. Respondent's seniority list has next to each employee's name a seniority date for their currently held classification title. The list does not necessarily include an overall seniority date based on prior classification titles held.² An employee's listed seniority date is therefore not necessarily that employee's overall seniority date. (Grievant's Exhibit 2 and Brian Cooley's testimony)

21. Three of the five candidates under consideration passed³ the clerk competency test prior to the seniority date⁴ listed for them, which could, but does not necessarily, indicate they were substitute service personnel when they passed the Clerk competency test. (Respondent's Exhibit 2 & Grievant's Exhibit 2)

22. Two of the five candidates under consideration passed⁵ the Clerk competency test after the seniority date⁶ listed for them, indicating they were regular

²For instance, the seniority list sets forth Grievant's seniority date as 8/15/14 (which is her seniority date for her currently held Secretary classification title), but it does not list her overall seniority date of 1/22/03.

³Dates each passed: Etta Stultz - 3/1/11, Candida Wills - 10/1/13, and Lori Quimet - 12/22/10.

⁴Etta Stultz (4/1/11), Candida Wills (2/29/16), and Lori Quimet (8/15/16) (seniority dates were taken from Grievant's Exhibit 2 since some dates were not correctly copied onto Respondent's Exhibit 2).

⁵Dates each passed: Jennifer Park (3/20/13) and Marlene Popkins (3/20/13).

⁶Jennifer Park (8/20/02) and Marlene Popkins (01/25/08).

personnel when they passed the Clerk competency test. (Respondent's Exhibit 2 & Grievant's Exhibit 2)

23. Respondent ranked these five candidates using their Aide seniority dates⁷ because none of them had any Clerk seniority, having never held a Clerk classification title. (They were still qualified for the Clerk title because they had passed the Clerk competency test.) (Respondent's Exhibit 2)

24. The job vacancy was initially offered to Etta Stultz since she had the most Aide seniority of the five. When she refused, Intervenor Wills was selected because she had the second most Aide seniority of the five. (Respondent's Exhibit 2 & 3)

25. Applicant Jennifer Park had the most overall seniority of any regular service personnel, with a seniority date of August 20, 2002. Ms. Park held the Cook classification but was qualified for the posting through passing the competency tests for the Clerk and the Aide classifications. Since she had only six months of Aide seniority for past work in that classification, she was ranked fourth. (Grievant's Exhibit 2)

26. Intervenor was a regular employee and was qualified for the Clerk classification title and the Aide classification title because she held an Aide position and qualified under the definition of the Clerk classification title by passing the Clerk classification competency test in 2013, well prior to the close of the job posting.

27. Respondent made the Clerk competency test available to Grievant after it closed the vacancy posting, and she passed it.

⁷Etta Stultz (4/1/2011), Candida Wills (2/29/16), Lori Quimet (8/15/16), Jennifer Park (six months), Marlene Popkins (none).

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 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.*

Grievant contends that Respondent was obligated to offer the Clerk competency test to all ten regular service personnel applicants, because none of them held or had ever held the Clerk classification or Clerk/Clerk-Aide multi-classification titles as regular service personnel. Grievant further contends that, because the five applicants who were considered were only qualified for the Clerk classification title through passing the Clerk competency test (some as substitute service personnel), Respondent was obligated to offer the Clerk competency test to all ten regular service personnel applicants. Grievant asserts that she has more overall seniority and more Aide seniority than Intervenor Wills, thereby implying that Respondent should have provided her the position before Intervenor Wills, after allowing her to take the Clerk competency test. Grievant contends that passing a competency test while one is a substitute service personnel is not the same as qualifying for a classification title as a regular service personnel. While Grievant concedes that Intervenor Wills was a regular service personnel, Grievant argues that Intervenor was a half-time Aide, which should not count as holding the Aide classification title as regular service personnel. Grievant further asserts that had she been allowed to

take the Clerk competency test, and passed, she would have received the position because of her seniority.

Respondent counters that it had no obligation to offer any applicant the Clerk competency test, because five regular service personnel applicants had already taken and passed the same and were, therefore, qualified. Respondent argues that, as the position is a multi-classified position, it complied with West Virginia law by selecting a candidate qualified for both classifications, pursuant to West Virginia law. Further, Respondent asserts that Grievant was not qualified for the position because she held only one of the classifications and had not passed the test for the other classification. The other five applicants were qualified for both titles. Respondent asserts that it had no obligation to offer the Clerk competency test for the Clerk/Clerk-Aide posting, as there were qualified applicants for the position, and that its selection of Intervenor Wills was proper. Respondent asserts that there is not much guidance on hiring for multi-classification positions and that it therefore has leeway in hiring for those positions as long as it does not do so in an arbitrary and capricious manner. Respondent further contends that even if Grievant's argument regarding deferring to her overall seniority has merit, Grievant had less overall seniority than Jennifer Park, one of the five applicants who was considered for the position. Ms. Parks had a year more overall seniority than Grievant and was qualified for the posting, having passed both the Aide and Clerk competency tests as a regular service personnel.

West Virginia Code § 18A-4-8b establishes the statutory framework for county boards in making hiring decisions. West Virginia Code § 18A-4-8b provides, in pertinent part, as follows:

(a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section either of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

(5) Substitute service personnel who hold a classification title within the classification category of the vacancy;

(6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and

(7) New service personnel.

(Emphasis added)

Grievant argues that Respondent failed to consider any qualified candidate because neither Intervenor Wills nor any other applicant under consideration held the Clerk or Clerk/Clerk-Aide classification titles. In so arguing, Grievant misinterprets West

Virginia Code § 18A-4-8b as equating “qualified” applicant with an applicant holding the requisite classification title. While “holds a classification title” is one way a candidate can be deemed “qualified”, it is not the only way. If no candidate holds the job title, candidates can still be considered qualified “by meeting the definition of the job title”. None of the regular service personnel applicants held the Clerk/Clerk-Aide classification title, or, in the alternative, both the Aide the Clerk classification titles. While some held the Aide title, this was not enough to qualify them for the Clerk/Clerk-Aide position, because they needed to hold both the Aide and Clerk titles to meet the “holds” requirement. Respondent was then justified in looking to the second qualification standard, “meeting the definition of the job title”.

The code provides multiple ways of “meeting the definition of the job title”. One way is through competency tests. Competency tests provide county boards “a uniform means of determining whether school service personnel who do not hold a classification title in a particular category of employment meet the definition of the classification title in another category of employment as defined in section eight of this article. . . .” W. VA. CODE § 18A-4-8e(b). Further, “[a]chieving a passing score [on a competency test] conclusively demonstrates the qualification of an applicant for a classification title.” W. VA. CODE § 18A-4-8e(c)(3). “Once an employee passes the competency test of a classification title, the applicant is fully qualified to fill vacancies in that classification category of employment as provided in section eight-b [§ 18A-4-8b] of this article and may not be required to take the competency test again.” W. VA. CODE § 18A-4-8e(c)(4).

Grievant asserts that Respondent was obligated to give the competency test to all regular service employee applicants so that Grievant could have a chance to become

qualified for the position. However, Respondent had no obligation to offer the competency test to Grievant. At the time of the Clerk/Clerk-Aide job posting, ten regular service personnel applicants held or had held the classification of Aide, but none of the applicants ever held the classification of Clerk or Clerk/Clerk-Aide. Five of the applicants had taken and passed the Clerk competency test. Intervenor Wills and two of the remaining five may have done so as substitute service personnel. All five were regular service personnel at the time they were considered and were the only qualified applicants for the positions.

“The Grievance Board has determined that ‘only if no qualified individuals apply, i.e., no applicant holds the class titles in question or have successfully completed the competency test, is the board obligated to offer competency testing in order for other employees to be deemed qualified through successful completion of the examination.’ *Nelson v. Boone County Bd. of Educ.*, Docket No. 2008-1190-BooED (Feb. 24, 2009) *aff’d*, Kan. Co. Cir. Ct. Civil Action No. 09-AA-49 (Jan. 14, 2011), *aff’d*, W. Va. Sup Ct. App. Docket No. 11-0278 (Feb. 14, 2012).” *Ward, et al., v. Nicholas County Bd. of Educ.*, Docket No. 2013-2224-CONS (Apr. 1, 2014). In this case, the five applicants who were considered for the Clerk/Clerk-Aide vacancy were already qualified when they applied for the positions because they had taken and passed the Clerk competency test and held or had held the Aide classification title. As there were five qualified applicants for the position, Respondent was not obligated to offer the competency test to the other applicants. Grievant does not cite any authority obligating Respondent to offer the competency test in this situation. Respondent could have offered the competency test, but was not obligated to do so since there were qualified candidates. Intervenor Wills

was qualified because she held the Aide title and met the definition of Clerk through passing the Clerk competency test. Respondent is only required to offer competency testing if no applicant qualifies, *i.e.*, if no applicant either holds the title or has passed a competency test for the title.

The vacancy at issue was a multi-classified position. “‘Multiclassification’ means a person employed to perform tasks that involve the combination of two or more class titles in this section [W. VA. CODE § 18A-4-8(i)].” W. VA. CODE § 18A-4-8(i)(67). “A school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title.” W. VA. CODE § 18A-4-8g(l).

Grievant argues that it was unreasonable for Respondent to ignore her overall seniority and to base the selection on Aide seniority. Respondent acted within its discretion in choosing to use only Aide seniority in ranking candidates. “Although seniority rights for school personnel are well defined in W. VA. CODE § 18A-4-8b, which requires an employer to make decisions affecting the filling of service personnel positions ‘on the basis of seniority, qualifications and evaluation of past service,’ there is a lack of definition with regard to seniority rights of multiclassified personnel.” *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003), *aff’d* Cir. Ct. of Kanawha County, Civil Action No. 03-AA-107 (June 23, 2004). The Supreme Court of Appeals of West Virginia has attempted to clarify these rights, stating:

Pursuant to W. Va. Code § 18A-4-8g(i) (2000), multiclassified school service personnel do not belong to a separate or unique classification category, but rather are employees of each classification category contained within their respective multi-classification titles. Under the

statute, a multiclassified employee accrues seniority in each of the several classification categories composing his or her multiclassification title, and correspondingly, is subject to a reduction in force in these individual job categories on the basis of the respective seniority accumulated in each. In all instances where an employee has seniority in a particular job category - - whether that employee is multiclassified or holds only a single job classification - - such employee will be entitled to preference during a reduction in force in that category. In the event a multiclassified employee is subject to a reduction in force in one or more, but less than all, of the categories composing his or her multiclassification title, such employee remains in the employ of the county board of education with those categories that are subject to the reduction in force being deleted from the employee's multiclassification title.

Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d

702 (2001), Syl. Pt. 5.

The Grievance Board has addressed the issue of which seniority date should be used in making a selection for a multi-classified position, each time concluding that Respondent had not acted in an arbitrary and capricious manner. In *Miller v. Preston County Board of Education*, Docket No. 2011-0107-PreED (August 9, 2011), the county board of education used the most overall seniority in any of the posted classifications to select the successful applicant, even though the grievant was the most senior employee. The Administrative Law Judge found this was not an abuse of discretion, and stated that "multiclassification seniority can be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question." In *Bowyer v. Fayette County Board of Education*, Docket No. 2012-1352-FayED, (August 22, 2013), the posted position was an Itinerant Special Education Supervisory Aide/Autism Mentor. Respondent filled the position based on seniority in the Aide classification, after concluding that the majority of the responsibility would involve supervisory Aide duties, and experience as an Aide was the most important consideration. The Administrative

Law Judge concluded that “[t]his determination was reasonable and not arbitrary and capricious.” In *Cornell, supra*, the respondent posted a Secretary/Accountant position, and awarded the position to the applicant with the most overall seniority in one of the classification titles in the posting, even though the successful applicant and the grievant were both multi-classified as Accountant/Secretary, and the grievant held the multi-classified title longer than the successful applicant. The Administrative Law Judge upheld the respondent’s hiring decision and found it was not arbitrary and capricious.

“Personnel actions of a county board of education which are not encompassed by statute are reviewed against the ‘arbitrary and capricious’ standard’ *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03 40 111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95 27 327 (Nov. 30, 1995).” *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). 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)).

The legal conclusion which can be reached from these decisions is that, when a multi-classified position is posted, it is a county board of education's choice as to which of the classifications in the posting it looks to in assessing the statutory requirement that seniority of the applicants be a determining factor in filling the position, so long as the decision is not unreasonable or an abuse of discretion. In this case, none of the regular service personnel applicants held the Clerk/Clerk-Aide title. Nor did they hold the Clerk title. Some held the Aide title. Respondent therefore based applicant seniority on their the Aide classification. This was not unreasonable. Grievant has not shown that Respondent's interpretation of the code is unreasonable or an abuse of discretion.

Grievant does not cite any authority for the proposition that Intervenor's experience as a half-time Aide should not count as holding the Aide classification title as regular service personnel. Further, Grievant meritlessly argues that passing the clerk competency test as a substitute should not have qualified some of the five finalists for the position through regular seniority. Nevertheless, as previously stated, the Grievance Board has held that in instances of multi-classification position vacancies a board of education can use seniority in any one of the classifications. Two of the five candidates that were considered had clearly passed the clerk competency test as regular service personnel and were also qualified for the Aide classification as regular service personnel. Even if Grievant's argument had merit, Respondent would then have to choose from one of the two candidates that qualified for each classification as regular service personnel, which would have excluded Grievant since she did not then qualify for the Clerk title. The

fact that Grievant had the highest Aide seniority did not matter because, unlike the five candidates that were considered, she was not qualified for both positions.

Therefore, the grievance is denied.

Conclusions of Law

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

2. County boards of education in West Virginia must fill school service personnel positions “on the basis of seniority, qualifications and evaluation of past service.” W. VA. CODE § 18A-4-8b(a).

3. Competency tests provide county boards “a uniform means of determining whether school service personnel who do not hold a classification title in a particular category of employment meet the definition of the classification title in another category of employment as defined in section eight of this article. . . .” W. VA. CODE § 18A-4-8e(b).

4. “Achieving a passing score [on a competency test] conclusively demonstrates the qualification of an applicant for a classification title.” W. VA. CODE § 18A-4-8e(c)(3). “Once an employee passes the competency test of a classification title, the applicant is fully qualified to fill vacancies in that classification category of employment

as provided in section eight-b [§ 18A-4-8b] of this article and may not be required to take the competency test again.” W. VA. CODE § 18A-4-8e(c)(4).

5. “The Grievance Board has determined that ‘only if no qualified individuals apply, i.e., no applicant holds the class titles in question or have successfully completed the competency test, is the board obligated to offer competency testing in order for other employees to be deemed qualified through successful completion of the examination.’ *Nelson v. Boone County Bd. of Educ.*, Docket No. 2008-1190-BooED (Feb. 24, 2009) *aff’d*, Kan. Co. Cir. Ct. Civil Action No. 09-AA-49 (Jan. 14, 2011), *aff’d*, W. Va. Sup Ct. App. Docket No. 11-0278 (Feb. 14, 2012).” *Ward, et al., v. Nicholas County Bd. of Educ.*, Docket No. 2013-2224-CONS (Apr. 1, 2014).

6. “Multiclassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction of force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles.” *Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005), *citing Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003) and *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 (2001).

7. Seniority may only be acquired within the separate classification titles within a multi-classified position. Multi-classification is not a separate title within W. VA. CODE § 18A-4-8, and each category within the multi-classification should be viewed separately. *Taylor-Hurley, supra*; *Cornell, supra*.

8. It was not arbitrary and capricious for Respondent to award multi-classified positions by considering the candidate with the greatest seniority in any one of the classification titles of a multi-classified position.

9. "A school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title." W. VA. CODE § 18A-4-8g(l).

10. "[M]ulticlassification seniority can be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question. . . . Multiclassification is not a separate title within W. VA. CODE § 18A-4-8, and each category within the multiclassification should be viewed separately. *Taylor-Hurley, supra; Cornell, supra.*" *Miller v. Preston County Bd. of Educ.*, Docket No. 2011-0107-PreED (Aug. 9, 2011).

11. "Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard'" *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03 40 111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95 27 327 (Nov. 30, 1995)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007).

12. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for*

the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). 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)).

13. Respondent's decision to look to seniority in only one of the two classification titles was not arbitrary and capricious or an abuse of discretion.

14. Grievant failed to prove by a preponderance of the evidence that Respondent was obligated to offer her the Clerk competency test for the Clerk/Clerk-Aide vacancy, and that its selection of Intervenor Wills was otherwise improper.

Accordingly, this Grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. See also W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: July 16, 2019

Joshua S. Fraenkel
Administrative Law Judge