

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

**ANTHONY BELCHER AND GLENDON WILLIAMS,**  
**Grievants,**

**v.**

**Docket No. 2019-1195-CONS**

**DIVISION OF WIGHWAYS**  
**Respondent.**

## **DECISION**

Grievant Anthony Belcher and Grievant Glendon Williams are employed by Respondent, Division of Highways (“DOH”) in the classification Transportation Worker 2, Equipment Operator (“TW2”). They are assigned to District 2 and are based in Mingo County. Mr. Williams and Mr. Belcher filed separate level one grievances dated March 1, 2019, alleging:

Grievant is currently employed by Respondent as a Transportation Worker 2 (TW2). Grievant applied for a Classification Position Vacancy – Transportation Worker 3 (TW3) (Posting DT1900205). Grievant was not selected, in violation of W. Va. Code 29-6-10 and CCR 143-1-111.<sup>1</sup>

As relief, Grievants seek, “to be promoted to the position of TW3, plus back pay with interest and seniority from the effective date of the promotion.”

A level one conference was held on March 28, 2019, and a decision denying the grievances was issued on April 24, 2019. The level one grievance evaluator consolidated the grievances for consideration and decision by order dated May 10, 2019. Grievants filed an appeal to level two dated May 7, 2019. A mediation was conducted on September 30, 2019, and Grievant’s appealed to level three by a form dated October 8, 2019.

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<sup>1</sup> The allegations and relief sought in both grievances are identical.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on September 21, 2020.<sup>2</sup> Grievants personally appeared and were represented by Sarah Hodges, Esquire, and Gordon Simmons, WVSSPA. Respondent was represented by Jesseca R. Church, Esquire, DOH Legal Division. This matter became mature for decision on November 5, 2020, upon receipt of the Proposed Findings of Fact and Conclusions of Law submitted by the parties.

### **Synopsis**

Respondent posted a total of five vacancies for Transportation Worker 3 positions in two separate postings. The vacancies were for Mingo County. Respondent held a job fair in September 2018, wherein many external applicants were given an expedited application and interview process. One of the TW3 vacancies was filled by an external applicant at the job fair. Two more of the positions were filled by internal applicants and two vacancies were not filled. Neither Grievant was recommended nor selected for any of the vacant TW3 positions.

Grievant argue that the hiring process was improper, and their non-selection was arbitrary and capricious because they were the most qualified candidates. Both Grievants are experienced and capable employees with good employment records. However, they did not prove that any flaws that occurred in the hiring process effected the outcome. They also did not prove that the reasons for selecting the successful applicants were not reasonably related to the position being filled and therefore arbitrary and capricious.

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<sup>2</sup> The case was continued for good cause shown. Additionally, Grievants' original counsel changed job, and had to withdraw from this case. Their new attorney needed time to prepare for the hearing, prior to it being held.

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

### **Findings of Fact**

1. Grievant, Anthony Belcher, and Grievant Glendon Williams are employed by Respondent, Division of Highways (“DOH”) in the classification Transportation Worker 2, Equipment Operator (“TW2”).

2. Grievant Belcher began working for DOH in 2014 and Grievant Williams began working for DOH in 2015. They have been continuously employed in District 2 at the Mingo County facility to the present date.

3. DOH District 2 is made up of five counties: Cabell, Lincoln, Wayne, Mingo, and Logan.

4. Respondent posted three vacancies for TW3 position in Mingo County as posting number DT1900205 (“205”), with an application period of August 6-12, 2018. (Grievants Exhibit 5).

5. Respondent posted two vacancies for TW3 position in Mingo County as posting number DT1900231 (“231”), with an application period of September 20-26, 2018. (Grievants Exhibit 6).

6. Both Grievants submitted timely applications for all five TW3 vacancies. One application for posting 205 and another for posting 231 were enough for Grievants to be considered for all five TW3 vacancies.

7. On September 21, 2018, DOH District 2 held a job fair with the objective of increasing the number of employees in support of the Governor’s Roads to Prosperity

initiative. One goal of the Governor's initiative was the hiring of 500 West Virginians to build and repair state roads.<sup>3</sup>

8. This was the first time that the DOH District 2 held a job fair in this manner and of this magnitude. The DOH job fair was modeled after similar events hosted by the West Virginia Division of Corrections.<sup>4</sup>

9. The job fair hiring event included approximately 100 posted vacancies<sup>5</sup> for TW1, TW2, TW3, and Crew Chief positions in the District 2 Maintenance and Branch organizations for all five District 2 counties. The five positions for TW3s in postings 205 and 231 were included in the vacant positions.

10. The stated goal of the September 21, 2018, job fair was to increase the head count of employees by hiring new applicants and avoid creating new vacancies by promoting or transferring existing employees into the posted positions. Moving existing employees into the posted positions would create new vacancies which would have to be filled at a later date.<sup>6</sup> Nevertheless, only one external applicant was selected for the five TW3 vacancies at issue herein.

11. The job fair began at 9 a.m. and concluded at approximately 9 p.m. The event was intended to be a "one-stop shop" for new applicants. Candidates were provided an opportunity to complete their applications, asked job-related questions, be placed on the register by the Division of Personnel ("DOP"), to ensure that they met the minimum qualifications for the position, be drug tested if they possessed a CDL, and be interviewed,

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<sup>3</sup> Testimony of Kathleen Dempsey, District 2 Human Resources Manager.

<sup>4</sup> Now the Division of Corrections and Rehabilitation.

<sup>5</sup> These vacancies were listed in 48 separate postings, many of which contained multiple vacant positions.

<sup>6</sup> Testimony of Kathleen Dempsey, District 2 Human Resources Manager.

all in the same day. The DOH Human Resources Division granted an exception to the policy requirement that all references had to be checked before a recommendation for employment could be made.

12. The number of applicants as well as the many positions to be filled necessitated the DOH personnel split into teams for conducting the interviews. This resulted in different DOH personnel conducting interviews for different applicants for the same position.

13. The interview team consisted of two managers each as follows:

- Edward Armbruster, District 2 Bridge Evaluation Engineer, and Joseph Webb;
- Kathleen Dempsey, District 2 Human Resources Manager, and Michael Spry, Highway Administrator 4;
- Stacey Johnson, District 2 Personal Specialist Associate, and Robert Mantzel;
- Michael Spry, and Nichole McKissick.

14. The interview teams all asked the same questions of all applicants for specific vacancies. For example, all applicants for TW3 positions were asked the same questions regardless DOH personnel conducting their interviews. Applicants for multiple positions were given one interview to be used for consideration in all the positions for which they applied.

15. All applicants were rated by the individual interview teams pursuant to a specific set of criteria. Each candidate was rated separately based upon the criteria and were not compared to other candidates for their initial rating.

16. The criteria and rating for each candidate were listed on an Applicant Evaluation Record form. The criteria were: 1) Education; 2) Relevant Experience; 3) Knowledge, Skills and Ability; 4) Interpersonal Skills; 5) Flexibility/Adaptability; and 6)

Presentability.<sup>7</sup> All the applicants received a rating of “Meets” or “Exceeds” for each criterion.

17. At the conclusion of the interview, each team would either recommend the candidate for consideration or not recommend them, by checking “yes” or “no” on the Application Evaluation Records form. (Grievants Exhibits 11, 12, 13, 14, 18, & 19)<sup>8</sup>

18. Attached to each Application Evaluation Record was a copy of the interview questions and the individual interviewer’s notes related to each candidate’s responses. (*Id.*)

19. A particularly important question asked for each candidate’s years of experience on “the following types of equipment or vehicle systems:”<sup>9</sup>

- Tandem or Dump Trucks;
- 8-speed transmission;
- 9-speed transmission;
- 10-speed transmission;
- Wheeled Loader;
- Grader;
- Excavator;
- Backhoe;

20. Among the external candidates interviewed for the vacant position was Jason Hager who was interviewed on September 21, 2018, and Kevin Parsley<sup>10</sup> who was interviewed on December 14, 2018. Both were recommended for one of the vacant positions. After Kevin Parsley was informed of his recommendation he withdrew from

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<sup>7</sup> There was an additional space for “Optional Measures.” However, there was nothing listed in that area for any of the candidate.

<sup>8</sup> The same documents were included among Respondent exhibits.

<sup>9</sup> (Grievants Exhibits 11, 12, 13, 14, 18, & 19).

<sup>10</sup> Since Mr. Parsley declined to take one of the TW3 vacancies in Mingo County his qualifications and application will not be further discussed herein.

consideration due to medical issues. Jason Hager was the only applicant interviewed at the job fair who was a successful applicant for one of the vacant TW3 positions in question. (Grievants Exhibits 11 & 14)

21. Among the internal applicants who interviewed for the position were; Grievant Belcher, Grievant Williams, Caleb Allen, and Bethel Vance. All the internal interviews were conducted on October 4 and 5, 2018. (Grievants Exhibits 12, 13, 18. & 19.) Caleb Allen and Bethel Vance were selected for two of the vacant TW3 positions in Mingo County. Two of the positions were not filled.

22. The applicants' ratings on the Application Evaluation Record are reflected in the following table:

<b>Qualification</b>	<b>Belcher</b>	<b>Williams<sup>11</sup></b>	<b>Hager</b>	<b>Allen</b>	<b>Vance</b>
Education	Meets	Meets	Meets	Meets	Meets
Experience	Meets	Meets	Exceeds	Exceeds	Meets
Knowledge, Abilities, Skills	Exceeds	Meets	Meets	Exceeds	Exceeds
Interpersonal Skills	Meets	Exceeds	Meets	Exceeds	Meets
Flexibility/Adaptability	Meets	Exceeds	Meets	Meets	Meets
Presentability	Meets	Exceeds	Meets	Exceeds	Meets
<b>Overall Evaluation</b>	Meets	Meets	Meets	Exceeds	Meets

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<sup>11</sup> Grievant Williams was given two sets of ratings on separate Applicant Evaluation Records. Manager Dempsey testified that she and Mr. Spry decided they had rated him too high in two categories and reduced his initial ratings after all the interviews were completed. Since the contemporaneous rating was reduced after the other interviews were completed, the initial ratings are used for Grievant Williams herein

23. The applicants' experience on the equipment listed in the interview is reflected in the following table:

<b>Equipment, Vehicle</b>	<b>Belcher</b>	<b>Williams</b>	<b>Hager</b>	<b>Allen</b>	<b>Vance</b>
Tandem or Dump trucks	10 years	10 years	10 years	4 years	10 years
8-speed	10 years	4.5 years	10 years	4 Years	10 years
9-speed	None	4.5 years	10 years	4 years	4 years
10-speed	2 years	4.5 years	10 years	4 years	4 years
Wheeled Loader	15 years	6 years	4 years	4 years	7 years
Grader	5 years	2 months	3 years	4 years	3 years
Excavator	2 years	none	1 year	10 years	8 years
Backhoe	2 years	2 months	1 year	13-14 years	3 years

24. All applicants possessed experience on all the equipment with the exception of Grievant Belcher who had not operated a truck with a 9-speed transmission, had no experience on an excavator, and limited experience on a grader and backhoe.

25. Grievant Belcher had been temporarily upgraded to a TW3 on several occasions when the regular TW3 crew leaders were absent. On those occasions he supervised a crew, filled in all the paperwork, and procured the appropriate equipment and material to perform the assignments for the day.

26. Bethel Vance was selected for one of the positions listed in posting 205.

27. Both Mr. Vance and Grievant Belcher were interviewed by the team of Stacey Johnson and Robert Mantzel on October 5, 2018. The interview team found that



Mr. Vance had a very detailed application and conducted himself very well in answering the interview question. He had significant experience on a wide variety of equipment. Additionally, Mr. Vance had been the owner/operator of a gas station/convenience store for five years. He had five employees and was responsible for all paperwork related to their employment including payroll, He also ordered supplies and products as well as performed the inventory for the business. (Grievants Exhibit 12)

28. Conversely, Grievant Belcher's application was less detailed, particularly related to his prior work experience. While Grievant Belcher had been temporarily upgraded to TW3 on days when the regular crew leaders were absent. This occasional supervisory experience was not found to be as compelling as that of Mr. Vance. Additionally, while Grievant Belcher is very experienced on a lot of equipment, Mr. Vance has more experience on a wider variety of equipment. Ultimately, the interviewers believed that Mr. Vance's experience made him a more versatile employee and a better fit for the TW3 position as a crew leader.<sup>12</sup>

29. Two of the TW3 positions listed in posting 231 were filled by an internal applicant, Caleb Allen, and an external applicant, Jason Hager. The remaining two TW3 positions in the two postings were not filled.

30. Once again, the interview teams were impressed by the detailed applications of Mr. Hager and Mr. Allen and their answers and demeanor during the interviews.

31. The interview team of Edward Armbruster, Dava Hearn, and Joe Webb, were also impressed by Mr. Hager's experience on a wide variety of equipment utilized

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<sup>12</sup> Testimony of Stacey Johnson and Robert Mantzel.

by the DOH. His experience was rated as “Exceeds” by his interviewers, while Grievants Belcher and Williams were rated “Meets” in this important criterion. Because of his successful interview as well as his extensive and varied experience, the interview team recommended Mr. Hager for a TW2 or TW3 position, and he was ultimately selected for a TW3 vacancy in Mingo County.

32. Caleb Allen was interviewed by Kathleen Dempsey and Michael Spry on October 4, 2018, with the other internal applicants for TW3 positions advertised in posting 205 and 231. The interview team was very impressed with Mr. Allen’s demeanor and acumen exhibited while answering the interview questions. Ms. Dempsey indicated that Mr. Allen’s responses showed a good grasp of the responsibilities of a TW3 and exhibited strong leadership potential. based upon his detailed application and his interview performance, he received a rating of “Exceeds” in the criteria of Knowledge, Ability, and Skills; Flexibility/Adaptability; and Presentability, as well as Experience, He was the only applicant to receive an overall rating of “Exceed” by an interview team.

33. Mr. Allen had comparable experience to the Grievants. Grievants Belcher and Williams had roughly twice the years of experience years with trucks. While Mr. Allen had more than five times the experience as both Grievants on the Excavator and Backhoe. Because Mr. Allen had significant experience with all the equipment and a great deal of experience with complex equipment, his “Experience” was rated as “Exceeds” and both Grievants received a rating of “Meets” in “Experience” from their interview teams.

34. Grievant Williams was also interviewed by Kathleen Dempsey and Michael Spry. Ms. Dempsey characterized his interview as good but nothing special. While he performed well enough to receive an initial rating of “Exceeds” in the criteria of

Flexibility/Accountability” and “Presentability,” he did not exhibit the same leadership qualities as Mr. Allen. Additionally, Grievant Williams had only a couple of months experience operating the Grader and Backhoe, and no experience operating an Excavator.

35. Based upon their interviews and applications, the interview committees did not recommend Grievant Belcher nor Grievant Williams for any of the TW3 vacancies.

### **Discussion**

This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants argue that Respondent failed to properly consider their seniority in the selection process in violation of W. VA. CODE § 29-6-10 and the Division of Personnel Administrative Rule which implements that statute.<sup>13</sup> The Grievance Board has noted that “As of 2017, the Division of Highways was removed from the oversight of the Division of Personnel. Respondent’s hiring procedures are now governed by West Virginia Code § 17-2A-24 and Respondent’s Legislative Rule, West Virginia Code of State Regulations §§ 157-12- 1, *et seq.* Neither the statute nor the rule require the consideration of seniority.” *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019). Furthermore,

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<sup>13</sup> W. VA. CODE ST. R. §§ 143-1-1 *et seq.*

if there is a policy requiring the consideration of seniority, Grievants must prove its existence which they did not. *Id.*

Grievants also argue that they were the most qualified candidates and their non-selection was arbitrary and capricious because it failed to follow proper procedures for filling vacancies. 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 Rehab. 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).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

First, Grievants note the use of four distinct interview teams to judge the applicants for the five vacant positions. Grievant argue that this process would make it very difficult to accurately compare the candidates against one another. Certainly, this is not the usual way, nor perhaps the best way, to conduct selection interviews. However, Respondent explains that this process was necessary in order to interview the large number of applicants for an unprecedented number of vacancies listed at the job fair. More importantly, the applicants were not initially rated against one another. The teams initially rated each candidate against a specific set of criteria to determine if they should be recommended to fill one of the positions. Then, Ms. Dempsey and her staff reviewed all the recommendations for compliance with policy and made recommendations for filling positions. Since all the applicants were rated individually based upon standard criteria, the process was not arbitrary or capricious. While the process is unusual, Grievant did not demonstrate that it was in violation of statute or policy. Grievant also failed to prove that had there been only one interview team the results would have been different.

Grievants also point to the fact that the posting for internal applicants must be for at least fourteen days. W. VA. CODE § 17-2A-24(2). Postings 205 and 231 were only posted for five days prior to the job fair. The only external applicant to be selected for any of the vacancies was Jason Hager. Neither he nor any other external applicant complained about the short posting period. Grievants were internal applicants and there is no dispute that the posting was sufficient for internal applicants. Grievants lack standing

to contest the posting because they were not affected by the short posting for external applicants.

Grievants also note that Jason Hager's name did not appear on the interview sheets prepared for the job fair. However, an Application Evaluation Record and interview record for Mr. Hager dated for the day of the job fair exists. Grievants were supplied these documents in discovery and placed them in the record as an exhibit. Clearly, Mr. Hager was interviewed that day, and Grievants were not harmed by his name being inadvertently left off the interview log.

Respondent admits that they did not verify the prior employment references for the external applicants before the interviews or selection. This issue also only applies to Mr. Hager since all other successful candidates were internal applicants. As Grievants point out, "[i]f a selection relies on previous employment, failure to verify experience claimed is found to be a relevant fact in determining that a selection was improper." *Blake v. West Virginia Division of Highways*, Docket No. 92-DOH-416 (May 1, 1998); *Hale v. West Virginia Division of Highways*, Docket No. 2010-1327-DOT (June 3, 2011). Respondent decided to waive the policy requirement for checking references during the job fair but failed to provide any legal basis for doing. Thus, the failure to check the prior employment references of Mr. Hager is relevant to his selection. However, Grievants did not present any evidence that Mr. Hager's prior employment and references listed in his application was inaccurate. Even though Respondent erred by not checking his prior employment record and references prior to his selection, Grievants did not demonstrate that this error affected the non-selection in any way.

Perhaps the most significant flaw in the hiring process was that Grievant Williams was given two distinct Application Evaluation Records with widely varying scores on two of the rated criteria. Ms. Dempsey explained that she and Mr. Spry reviewed Grievant Williams, interview and decided that they had scored him too highly on the criteria of "Flexibility/Adaptability" and "Presentability." They reduced his scores on those criteria from "Exceeds" to "Meets." Ms. Dempsey did not provide any specific reason why they thought they had erred on the initial scores and it seems the initial score would be the most reliable since they reflect the team's contemporaneous assessment of Grievant Williams' interview. The higher scored Application Evaluation Record was used in the comparisons above and it did not change the outcome. Grievant Williams' interview responses were not as strong as the successful applicants. He did not exhibit the same leadership qualities as Mr. Allen. He had only a couple of months experience operating the Grader and Backhoe, and no experience operating an Excavator while the successful applicants had greater and more varied experience.<sup>14</sup>

Normally, "[a]n 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). In addition to demonstrating that the error actually occurred, it must also

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<sup>14</sup> See FOFs 22, 23, 30 – 34, *supra*.

be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as “harmless error.” *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008); *Delauder v. Dep’t of Health & Human Ser.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

Grievants proved that the hiring process for the TW3 positions was irregular. However, most of the anomalies were not violations of rule or policy, and some were related solely to external applicants and had no relevance to Grievants. Most importantly, to prevail, Grievants must show that the errors influenced the outcome. If the same result would have inevitably been reached, the procedural violation will be treated as “harmless error.” *Delauder*, Docket No. 07-HHR-326, *supra*. Grievants did not demonstrate that any of these errors influences the outcome so they must be found to be harmless error.

Both Grievants are long term and reliable employees with significant experience. It is understandable that they are sorely disappointed with not being selected for the promotions in questions. Respondent provided credible evidence that the successful applicants had more varied experience than Grievants and Grievants demeanor and responses to the interview question were not as compelling. The interview teams found that the successful applicants’ responses were more specifically related to their experience and demonstrated more leadership potential. The agency relied on criteria intended to be considered for filling TW3 positions, so their decisions were not arbitrary



and capricious. *Burgess*, Docket No. 2019-0576-DOT *supra*. Accordingly, the consolidated grievances are **DENIED**.

### **Conclusions of Law**

1. This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Grievants did not prove by a preponderance of the evidence that Respondent violated W. VA. CODE § 29-6-10 and the Division of Personal Administrative Rule which implements that statute, (or any other law or policy), by not giving proper consideration to their seniority in the selection process. *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

3. 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 Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

4. 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).

5. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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), *aff’d Mercer Cnty. Cir. Ct.* Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

6. Normally, “[a]n 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).

7. 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). In addition to demonstrating that the error actually occurred, it must also be shown

that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as “harmless error.” *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008); *Delauder v. Dep’t of Health & Human Ser.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

8. If a selection relies on previous employment, failure to verify experience claimed is found to be a relevant fact in determining that a selection was improper. *Blake v. West Virginia Division of Highways*, Docket No. 92-DOH-416 (May 1, 1998); *Hale v. West Virginia Division of Highways*, Docket No. 2010-1327-DOT (June 3, 2011).

9. Grievants did not prove by a preponderance of the evidence that any flaws in the selection process influenced to outcome of the process. Any flaws that did occur were therefore harmless errors. *Delauder v. Dep’t of Health & Human Ser.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

10. Grievants did not prove by a preponderance of the evidence that the selection decision concerning the TW3 vacancies in question were arbitrary and capricious.

Accordingly, the consolidated grievances are **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See W. VA.*

CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2018).

**DATE: DECEMBER 18, 2020**

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**William B. McGinley**  
**Administrative Law Judge**