THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LES BLAKE,
Grievant,

v. **Docket No. 2019-0439-DOT**

DIVISION OF HIGHWAYS,
Respondent,

and

DEXTER HARDMAN,
Intervenor.

DECISION

Grievant, Les Blake, is employed by Respondent, Division of Highways. On October 2, 2018, Grievant filed this grievance against Respondent protesting his non-selection for a Crew Chief position. For relief, Grievant seeks instatement into the position with back pay and interest.

On November 2, 2018, Dexter Hardman, the successful candidate for the disputed position, was granted intervenor status. On November 19, 2018, the level one grievance evaluator granted Respondent's Motion to Dismiss due to untimely filing of the grievance. Grievant appealed to level two on November 19, 2018. Following mediation, Grievant appealed to level three of the grievance process on April 8, 2019. On April 19, 2019, Respondent renewed its Motion to Dismiss. On April 26, 2019, Grievant submitted a response to the motion. A hearing was held on the motion at the Grievance Board's Charleston, West Virginia office on August 8, 2019. On August 15, 2019, an Order Denying Motion to Dismiss was issued.

A level three hearing was held before the undersigned at the Grievance Board's Westover, West Virginia office on June 15, 2020. Grievant appeared in person and was

represented by Gary DeLuke, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Gary Freeman and was represented by counsel, Jesseca Church. This matter became mature for decision on July 24, 2020,[1] after receipt of written Proposed Findings of Fact and Conclusions of Law (PFFCL) from Respondent and Grievant. Intervenor did not submit PFFCL.

Synopsis

Grievant protests his non-selection for a Crew Chief position by Respondent, Division of Highways. Respondent selected Intervenor after crediting his work on private roads towards the position's three-years of "highway" experience prerequisite. Grievant initially requested instatement into the position but now requests a reposting of the position. For the job to be reposted, Grievant must prove that the selection process was arbitrary and capricious. To be awarded the position, Grievant must prove the same for selection decision and that he was the most qualified candidate. While Grievant proved that Respondent's selection decision was arbitrary and capricious, he did not prove that he was either the most qualified candidate or that the selection process was arbitrary and capricious. 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, Les Blake, is employed in District 7 as a Transportation Worker 3, Equipment Operator, by Respondent, West Virginia Department of Transportation, Division of Highways (DOH).

[1]The original deadline of July 15, 2020, was extended.

2. Grievant began his employment with Respondent on November 3, 2008, as a Transportation Worker 1, before upgrading to Transportation Worker 2 on April 15, 2011, and to Transportation Worker 3 on November 30, 2014.

3. Intervenor, Dexter Hardman began his employment with Respondent on February 8, 2016, as a Transportation Worker 2 and upgraded to a Transportation Worker 3, Equipment Operator, on December 23, 2017.

4. Intervenor gained experience in constructing and maintaining private roads during his first stint with Energy Contractors from April of 2007 to March of 2009. (Grievant's Exhibit 3)

5. Respondent posted the supervisory position of Transportation Worker 3 Crew Chief (TW3CRCH) for District 7, Lewis County Headquarters, on July 2, 2018. (Grievant's Exhibit 1)

6. The Crew Chief posting stated, under the "CREW CHIEF ONLY" subsection of the "REQUIREMENTS" section, "THREE YEARS OF FULL-TIME OR EQUIVALENT PART-TIME PAID EXPERIENCE IN HIGHWAY CONSTRUCTION OR HIGHWAY MAINTENANCE, OR BRIDGE OR STRUCTURAL STEEL CONSTRUCTION." (Grievant's Exhibit 1)

7. The Crew Chief posting does not define "highway."

8. The term "highway" is defined in West Virginia State Code § 17-1-3 as follows:

> The words or terms "road", "public road" or "highway" shall be deemed to include, but shall not be limited to, the right-of-way, roadbed and all necessary culverts, sluices, drains, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts necessary for the maintenance of travel, dispatch of freight and communication between individuals

> and communities; and such public road or highway shall be taken to include any road to which the public has access and which it is not denied the right to use, or any road or way leading from any other public road over the land of another person, and which shall have been established pursuant to law. Any road shall be conclusively presumed to have been established when it has been used by the public for a period of ten years or more, and public moneys or labor have been expended thereon, whether there be any record of its conveyance, dedication or appropriation to public use or not. In the absence of any other mark or record, the center of the traveled way shall be taken as the center of the road and the right-of-way shall be designated therefrom an equal distance on each side, but a road may be constructed on any part of the located right-of-way when it is deemed advisable so to do.

9. There were seven applicants for the Crew Chief position, including Grievant and Intervenor.

10. An interview is granted only when the candidate meets the minimum requirements for the position.

11. At the time of his application and interview, Intervenor had been with DOH for about two and a half years.

12. Nevertheless, after reviewing all applications for the posted Crew Chief position, Human Resources for DOH District 7 determined that all seven candidates, including Intervenor, met the minimum qualifications for the position. (Mr. Murphy's testimony)

13. Consequently, on August 27, 2018, all seven candidates were interviewed by the selection panel. (Respondent's Exhibit 1)

14. The selection panel for the position included District 7 Maintenance Engineer Gary Freeman and District 7 Maintenance Assistant McKenzie Murphy, as well as Eric Belknap.

15. Grievant and Intervenor completed the same application form, were subjected to the same interview process, were asked the same questions, and evaluated on the same criteria covering qualifications, skills, and abilities. (*See* Grievant's Exhibits 2 & 3, Mr. Freeman's testimony, and Mr. Murphy's testimony)

16. In his written application, Intervenor described his job duties during his stint with Energy Contracts between April of 2007 to March of 2009, in relevant part, as "fixed lease roads" and "built new roads." (Grievant's Exhibit 3)

17. Both Grievant and Intervenor were rated by all the interviewers on an Application Evaluation Record (AER), the standard form used by Respondent in the selection process. (Grievant's Exhibits 2 & 3)

18. Grievant was rated by Mr. Murphy and Mr. Belknap as "Meets" in the categories of Overall Evaluation, Posses Knowledge, Skills, & Abilities, Interpersonal Skills, Flexibility/Adaptability, Presentability, and Optional Measures, and as "Exceeds" in the categories of Education and Relevant Experience. While Mr. Freeman failed to rate Grievant in the Overall Evaluation category, he awarded Grievant the same ratings as the other interviewers in the remaining categories.[2] (Grievant's Exhibit 2)

19. Intervenor was rated in Overall Evaluation and Flexibility/Adaptability as "Meets" by Mr. Freeman and Mr. Belknap, and "Exceeds" by Mr. Murphy. All three interviews unanimously rated Intervenor as "Meets" in Interpersonal Skills, Presentability, and Optional Measures, and as "Exceeds" in Education, Relevant Experience, and Posses Knowledge, Skills, & Abilities. (Grievant's Exhibit 3)

[2]Grievant did not take issue with or acknowledge Mr. Freeman's failure to rate Grievant in the Overall Evaluation category.

20. Respondent only considers the seniority of a candidate as a tie breaker but did not consider it in filling the Crew Chief posting because, as the leading candidate at the end of the evaluation process, Intervenor was not tied with any other candidate. (Mr. Murphy's testimony)

21. Neither Respondent nor Intervenor assert that Intervenor met the Crew Chief posting "Crew Chief Only" alternative requirement of "bridge or structural steel construction."

22. Respondent determined that Intervenor possessed the minimum experience in highway construction and maintenance to qualify as a candidate for the Crew Chief position as a result of his experience building and fixing private roads while employed in the private sector with Energy Contractors. (Mr. Freeman's testimony)

23. While Grievant initially requested as relief that he be awarded the Crew Chief position, his PFFCL simply requests that Intervenor be disqualified and the position refilled by Respondent after considering only those applicants qualified for the position.

24. Grievant argued at level three that Intervenor's selection was the result of favoritism but did not make a claim of favoritism in his PFFCL.[3]

25. In requesting through his grievance filling that he be awarded the Crew Chief position, Grievant implied that he was the most qualified candidate. In his PFFCL, Grievant did not claim he was the most qualified candidate but simply requested that

[3]The undersigned deems Grievant's claim of favoritism abandoned and will not address it further.

Intervenor be removed and that Respondent refill the Crew Chief position from the remaining qualified applicants.[4]

26. During the level three hearing, Grievant relied only on the definitions of "highway" found in West Virginia Code.[5]

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 erroneously selected Intervenor after counting Intervenor's work on private roads towards the posting's three-year "highway" experience requirement. Grievant argues that Respondent violated its own policy and acted unreasonably when it expanded the standard definition of "highway" from public roads to include private roads. Grievant contends that Respondent did so to cover for its failure to verify Intervenor's "highway" experience prior to awarding him the position. Grievant requests that Intervenor be disqualified and the position refilled from the remaining qualified candidates.

[4]The undersigned deems Grievant's claim of being the most qualified candidate abandoned.

[5]In its PFFCL, Grievant also provided definitions of "highway" used by courts in jurisdictions outside of West Virginia. The undersigned will not consider these other definitions of "highway" first raised by Grievant in his PFFCL.

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).

"'[T]he "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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant contends that once Respondent creates a job requirement, it is bound by the parameters it establishes. Respondent does not dispute that "[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). Rather, Respondent contends that it has broad leeway in interpreting its own policies and job requirements when they are ambiguous. In support thereof, Respondent cites the following:

> When the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own rules and regulations. *See Dyer v. Lincoln County Bd. of Educ*., Docket No. 95-22-494 (June 28, 1996). Where the language in a rule or regulation is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own regulations or classification specifications. *See Dyer, supra*; *Edwards v. W. Va. Parkways Dev. and Tourism Auth.,* Docket No. 97-PEDTA-426 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-

> MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993)." *Peacock/Stemple v. W. Va. Div. of Corrections*, Docket No. 01-CORR-542 (Jan. 15, 2002).

Peacock/Stemple misstates *Dyer*. *Dyer* does not cover "classification specifications," but simply states, "[m]oreover, LCBE's interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable." Thus, *Dyer* does not apply to the requirements set forth in a job posting.

Respondent's Crew Chief posting does not provide a definition of "highway." Nor does Respondent argue that it defined "highway" in its job posting to include "private roads" or that it had an informal working definition of "highway" prior to or at the time it posted or filled the position. The closest Respondent came to providing a definition was through the testimony of its primary witness and selection panel member, Mr. Freeman. When asked to define "highway," Mr. Freeman seemed uncertain and posited that it is a road traversed with motorized vehicles and concluded upon further questioning that it could include dirt-bike trails and driveways. Grievant juxtaposed Mr. Freeman's definition against the definition purportedly provided on Respondent's behalf by Cathy Weaver.

Grievant alleges that Ms. Weaver testified at level one that experience in highway construction and maintenance is only gained by working for the Division of Highways. Ms. Weaver did not testify at level three, which renders Grievant's restatement of her purported earlier testimony hearsay.[6] "Hearsay evidence is generally admissible in

[6]"Hearsay includes any statement made outside the present proceeding which is offered as evidence of the truth of the matter asserted." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings." *Gunnells v. Logan County Bd. of Educ*., Docket No. 97-23-055 (Dec. 9, 1997).

The Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Id*.; *Sinsel v. Harrison County Bd. of Educ*., Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-H-115 (June 8, 1990).

Ms. Weaver's purported statement was not made under oath or on the record, as level one was a conference. Grievants generally have the option at level one of either requesting a conference or hearing. While hearings are typically recorded and testimony is made therein under oath, a conference is not recorded and testimony not under oath. *See* W. VA. CODE § 6C-2-4. Grievant implies that Ms. Weaver was Respondent's witness. As such, Ms. Weaver would have lacked incentive to make a statement to Grievant's

advantage. While Grievant's rendition of Ms. Weaver's testimony would appear to be self-serving, Respondent did not cross exam Grievant thereon. Unfortunately, the level one dismissal order does not deal with the merits of the grievance and does not indicate whether there was level one testimony or whether Ms. Weaver was even present. Nevertheless, as the statement attributed by Grievant to Ms. Weaver goes to the heart of this case, Grievant should have subpoenaed Ms. Weaver to testify at level three. Grievant knew the importance of this attribution well before the level three hearing but did not provide any reason he did not call Ms. Weaver to testify. Therefore, the undersigned will not attribute any credence to Grievant's restatement thereof.

Grievant also contends that "highway" is clearly and unambiguously defined in the West Virginia Code. Throughout the level three hearing, Grievant relied on the definition of "highway" found in the West Virginia Code. For its part, Respondent failed to reference any authoritative source. The West Virginia Code defines "highway," in relevant part, as "any road to which the public has access and which it is not denied the right to use, or any road or way leading from any other public road over the land of another person, and which shall have been established pursuant to law." W. VA. CODE § 17-1-3.

Grievant argues that Respondent acted arbitrarily and capriciously in not providing its definition of "highway" or including "private roads" therein until after it selected Intervenor for the Crew Chief position and that it only included "private roads" upon realizing that Intervenor did not have the requisite three years of experience on public roads. Further, Grievant contends that Respondent did so to cover for its failure to verify Intervenor's "highway" experience prior to awarding him the position. Grievant presented no evidence for this proposition.

Grievant also claims that Intervenor did not mention his highway construction and maintenance experience with Energy Contractors in the written interview questionnaire. Nevertheless, Grievant submitted into evidence Intervenor's written application for the Crew Chief position wherein Intervenor describes his relevant job duties with Energy Contractors between April of 2007 to March of 2009 as "fixed lease roads" and "built new roads." Grievant did not state why it was significant that Intervenor provided this information on one form but not the other. Grievant argues that the Intervenor should have provided more detail regarding how the work he did qualified as highway construction and maintenance, implying that Respondent's failure to require this detail made its selection of Intervenor arbitrary. Any failure by Respondent to verify necessary experience could be evidence of the arbitrary and capricious nature of its selection procedure if Respondent's standard practice is to verify outside experience. However, Grievant did not provide any evidence regarding whether Respondent has ever verified a candidate's outside work experience or whether Respondent verified it on this occasion.

Nevertheless, Grievant proved that Respondent acted arbitrarily and capriciously when it made the decision to select Intervenor after counting his experience on private roads towards the requisite three years of "highway" experience for the position. However, proving the selection decision was flawed did not entitle Grievant to any relief. There was an extra hurdle that Grievant needed to cross to receive the position. In order to be instated into the position, Grievant must not only prove that the selection was arbitrary and capricious, but also that he 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 did not present any evidence to demonstrate he was the most qualified candidate for the

position and instead simply relied on his request that the position be reposted.

In order to successfully advocate for reposting the position, Grievant need only prove that the selection process was arbitrary and capricious. "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). The undersigned notes that caselaw clearly distinguishes between the selection decision and the selection process. The precise distinctions can be found in the dictionary. "Process" is "mode, method or operation whereby a result is produced… ."[7] "Decision" is "[a] determination arrived at after consideration of facts, and, in legal context, law."[8] Thus, a decision is the result of the selection process. A reasonable selection process could still end in a flawed decision. Conversely, Respondent's decision to select Intervenor could be flawed without tarnishing the process used to reach that decision.

As previously discussed, Grievant showed that Respondent's decision to give the position to Intervenor was flawed due to the unreasonableness of Respondent's decision to attribute to the three-year "highway" experience prerequisite Intervenor's experience on private roads. However, Grievant did not show that this was a flaw in the selection process but only in the determination of the requisite experience of one candidate, resulting in a flawed selection decision. While Grievant proved that Respondent's selection decision was arbitrary and capricious, he did not prove that he was either the

[7] BLACK'S LAW DICTIONARY 1205 (6th ed. 1990).
[8] BLACK'S LAW DICTIONARY 407(6th ed. 1990).

most qualified candidate or that the selection process was arbitrary and capricious. Thus, this grievance must be denied.

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 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. 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).

3. 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).

4. "'[T]he "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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. In order to be instated into the position, Grievant must not only prove that the selection was arbitrary and capricious, but also that he was, in fact, the most qualified

candidate. *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008).

6. While Grievant proved that the selection decision was arbitrary and capricious, Grievant failed to prove by a preponderance of evidence that he was the most qualified candidate.

7. "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).

8. Grievant did not prove by a preponderance of evidence that the selection process was arbitrary and capricious.

Accordingly, the 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: August 21, 2020

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Joshua S. Fraenkel
Administrative Law Judge