

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RICKY D. RIFE,

Grievant,

v.

Docket No. 2018-1441-RaIED

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Ricky D. Rife, filed this grievance against his employer, Raleigh County Board of Education, dated June 26, 2018, stating as follows:

[j]job was posted as Mechanic/Welder/Crew Leader. This job description was changed without being reposted as a Welder/Heavy Equipment Crew Leader and then was awarded as a Mechanic/Welder/Welder Crew Leader.

When the Personal (sic) recommendations were posted as who was awarded the job, it was posted as Welder/Heavy Equipment Operator/Welder Crew Leader. When presented to the Raleigh County Board Members it was verbally changed to Welder/Mechanic/Welder Crew Leader. According to the job descriptions for Mechanic (RCJD SP625) and Heavy Equipment Operator (RCJD SP657) both of these jobs require a CDL license. This qualification was not checked by the Personnel Office.

Because the job posting was changed and not reposted and also because the job description when the job was awarded was not changed by amendment to the Board, the job needs to be reposted and all qualifications meet (sic) before awarding the job.

As relief sought, “[r]epost Crew Leader job with correct classifications listed & qualifications checked.”

A level one conference was held on July 11, 2018, and the grievance was denied by decision dated July 25, 2018. Grievant appealed to level two on August 7, 2018, at

which time he amended his statement of grievance to allege violations of West Virginia Code § 18A-4-8(l). A level two mediation was conducted on October 22, 2018. Grievant perfected his level three appeal on November 5, 2018.

This matter was scheduled for a level three hearing to be held on January 22, 2019. However, this hearing was continued due to inclement weather. The level three hearing was next scheduled to be conducted on April 15, 2019. By email dated April 12, 2019, Grievant, by counsel, moved to continue the hearing as he had only recently received documents he had requested in January and earlier in the month and did not have adequate time to prepare for the April 15 hearing. Respondent had no objection to Grievant's motion to continue. For good cause shown, and there being no objection, this ALJ granted Grievant's motion. The level three hearing was again rescheduled to be held on September 13, 2019.

A level three hearing was conducted on September 13, 2019, before the undersigned administrative law judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person and by counsel, George B. Morrone, III, Esquire, General Counsel, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Jason S. Long, Esquire, Dinsmore & Shohl, LLP. However, the parties were unable to complete the presentation of evidence on this date, and the matter was continued until September 23, 2019. The parties and counsel again appeared before this ALJ on September 23, 2019, and concluded their cases in chief. This matter became mature for decision on November 18, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was regularly employed by Respondent as a Heavy Equipment Operator. Grievant argues that Respondent failed to perform yearly reviews of his classification and duties as required by W. Va. Code § 18A-4-8(l), and that as a result, he was denied a Welder Crew Leader in June 2018 to which he would have otherwise been entitled. Respondent denies Grievant's claims, and argues that while it failed to perform the annual classification reviews, Grievant was not entitled to the Welder Crew Leader position, and that it properly selected another applicant for the position. Grievant failed to prove by a preponderance of the evidence that he was entitled to the Welder Crew Leader position as a result of Respondent's violation of W. Va. Code § 18A-4-8(l), or otherwise. Therefore, 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. At the commencement of this grievance, Grievant was employed by Respondent as a Heavy Equipment Operator and had been employed in that classification since December 18, 2013.

2. Before becoming a Heavy Equipment Operator, Grievant was employed by Respondent as a substitute truck driver for approximately two years. He then became regularly employed as a custodian. Sometime, in late 2013, Respondent had four maintenance jobs posted. Grievant took and passed competency tests for all four positions. The job titles for two of these positions are unknown. However, two were Heavy Equipment Operator and Welder. Respondent offered Grievant a Heavy

Equipment Operator position in December 2013. He accepted the same and began employment in that classification on December 18, 2013.

3. Since the beginning of his employment as a Heavy Equipment Operator, Grievant regularly performed welding duties even though he did not hold the welder classification title.

4. Respondent failed to perform any annual review of Grievant's job classification from December 18, 2013, up through the filing of this grievance on June 26, 2018.

5. Samuel J. Cox is regularly employed by Respondent and he holds the multiclassified title of Welder/Mechanic, with the seniority date of March 26, 2014, in both classifications.

6. Walter Donaldson was employed by Respondent as a Welder/Crew Leader. Mr. Donaldson informed Respondent of his intent to retire on or about March 13, 2018, to become effective on June 30, 2018.

7. At the times relevant herein, Anthony Jones was employed by Respondent as its Personnel Director.

8. Upon information and belief, at the times relevant herein, Tina Lynch was employed by Respondent working with Anthony Jones on personnel matters. Her title is unknown.

9. At all times relevant herein, C. David Price was the Superintendent of Raleigh County Schools.

10. Randy Adkins is the Assistant Superintendent of Raleigh County Schools. He has been in this position since 2015. Before taking this position, Assistant

Superintendent Adkins worked with personnel matters, including the posting of positions and filling the same.

11. At the time of the level three hearing, Mr. Jones was unavailable to testify as he was deployed for military service. When Mr. Jones was unavailable to perform the duties of his job because of such service, Assistant Superintendent Adkins would step in and perform such functions as he had done the job in the past. Mr. Adkins testified at the level three hearing in this matter, but he had not worked on the personnel matters at issue in this grievance; Mr. Jones had.

12. Ms. Lynch was not called as a witness by either party at the level three hearing. Neither party represented that she was unavailable to testify.

13. Mr. Donaldson's retirement from his Welder/Crew Leader created a vacancy for the 2018-2019 school year that Respondent needed to fill.

14. Instead of posting one vacancy to fill Mr. Donaldson's position as Welder/Welder Crew Leader for the coming school year, Respondent posted two job vacancies on April 2, 2018, as posting numbers SV1926 and SV1927. These postings indicated that they would close on April 16, 2018. Initially, the posting for SV1926 identified the position as a Welder/Mechanic. The initial posting for SV1927 was a "Welder/Mechanic Crew Leader."

15. While postings SV1926 and SV1927 were open, Respondent changed the position titles for each posting several times without reposting, announcing the changes, or informing the people who had already applied for the vacancies.¹

16. On April 5, 2018, Respondent rescinded the position in posting SV1926.

¹ See, Joint Exhibit 16, printed SV1926 computer system audit trail.

Then on April 6, 2018, the position was changed from Welder/Mechanic to Welder/Heavy Equipment Operator.

17. On April 5, 2018, Respondent changed the position in posting SV1927 from Welder/Mechanic Crew Leader to Welder/Heavy Equipment Crew Leader. Then, on April 6, 2019, Respondent again changed the position from Welder/Heavy Equipment Crew Leader to Welder/Crew Leader.²

18. Grievant applied for both SV1926 and SV1927. Grievant applied for SV1927 on April 5, 2018. Given the confirmation email he received from Respondent's computer system after submitting his application, Grievant applied for the Welder/Heavy Equipment Crew Leader position on that date.³ Grievant also applied for SV1926 vacancy posted on April 8, 2018. At that time, it appears that position was Welder/Mechanic.

19. Mr. Jones and Ms. Lynch made changes to the job titles in the two postings after Grievant made application on April 5, 2018. Further, at one point, Mr. Jones even rescinded SV1927 briefly during the posting period. As a result of the changes they made, the position titles on the two postings at the close of the posting period were entirely different from the position titles that were originally posted on April 2, 2018.

20. It is unknown why there were such substantial changes to the postings after April 2, 2019. No explanations for Mr. Jones and Ms. Lynch's actions in making the changes were provided during the level three hearing.

21. Even though Mr. Jones and Ms. Lynch changed the position titles in the postings during the posting period, the regular computer system records reflect that all

² See, Joint Exhibit 17, printed SV1927 computer system audit trail.

³ See, Joint Exhibit 13, April 5, 2018, application confirmation email.

the applicants bid on the position titles listed on the final versions of the postings, even though they did not. In other words, the regular records do not show that changes that were made to the titles during the posting period. It is as if the postings were pulled up in the computer system, the position titles changed, and saved over the existing record, but the applicants were unaffected, or just carried over to the newly changed postings.

22. Respondent had to view the “audit trail” in its computer system to find record of the changes Mr. Jones and Ms. Lynch made to the two postings. The audit trails for each posting were presented as evidence at the level three hearing.⁴

23. By the close of the postings on April 16, 2018, the position title in posting SV1926 was ultimately Welder/Heavy Equipment Operator, and the position title in posting SV1927, Welder Crew Leader.

24. At Respondent’s June 12, 2018 regular meeting, Respondent filled the two positions; however, it is unclear how that happened. There are two versions of the “Recommendations of the Superintendent to the Board” document for this meeting, one marked as draft, but neither mentions the filling of the two specified position numbers. The only differences in the documents applicable herein appear to be the classification titles listed for Mr. Cox.

25. The version of the Superintendent’s recommendations marked “draft” states as follows with respect to Grievant and Mr. Cox:

MAINTENANCE

- A. Reclassify—eff. 07/01/18
Samuel J. Cox—from **Welder/Heavy Equipment Operator** (261-day employment term)—Maintenance to **Welder/Heavy Equipment Operator/Welder Crew**

⁴ See, Joint Exhibits 16 and 17, audit trail records.

Leader (261-day employment term)—Maintenance

B. Recommended for Transfer—eff. 07/01/18

...

Ricky Rife—from **Heavy Equipment Operator (261-day employment term)**—Maintenance to **Welder/Heavy Equipment Operator (261-day employment term)**—Maintenance.⁵

26. The final version of the Superintendent's recommendations states as follows with respect to Grievant and Mr. Cox:

MAINTENANCE

C. Reclassify—eff. 07/01/18

Samuel J. Cox—from **Welder/Mechanic (261-day employment term)**—Maintenance to **Welder/Mechanic/Welder Crew Leader (261-day employment term)**—Maintenance

D. Recommended for Transfer—eff. 07/01/18

...

Ricky Rife—from **Heavy Equipment Operator (261-day employment term)**—Maintenance to **Welder/Heavy Equipment Operator (261-day employment term)**—Maintenance.⁶

27. It is unknown who drafted the "Recommendations of the Superintendent" documents. Also, it is unclear from the record whether the changes to the recommendation documents were made prior to the board meeting, like a mistake being fixed, or whether the changes were made verbally during the board meeting and the document corrected afterward.⁷

28. No board members were called to testify at the level three hearing.

⁵ See, Joint Exhibit 21, "Recommendations of the Superintendent to the Raleigh County Board of Education (For the 2018-2019 School Year)," dated Tuesday, June 12, 2018.

⁶ See, Joint Exhibit 22, "Recommendations of the Superintendent to the Raleigh County Board of Education (For the 2018-2019 School Year)," dated Tuesday, June 12, 2018.

⁷ See, statement of grievance; Joint Exhibits 21 and 22.

29. The “Recommendations of the Superintendent to the Board” documents do not indicate that vacancies were being filled by the personnel actions regarding Grievant and Mr. Cox. It is unclear why Mr. Cox’s change of employment is referenced as a reclassification and not a transfer.

30. The minutes from the June 12, 2018, meeting of the Respondent Board do not mention postings SV1926 and SV1927, or the filling of the positions. Neither Grievant nor Mr. Cox are mentioned by name. With respect to the filling of service personnel positions for the 2018-2019 school year, only the follow notations appear:

CONSIDERATION OF PERSONNEL

...

- Approve Superintendent’s recommendations for personnel 2018-19

With two corrections noted by Human Resources Director Anthony Jones and approval of Superintendent Price, Mr. Roop made the motion to approve. Ms. Smith seconded it. Motion passed 3-0. . . .⁸

31. The reference to “two corrections” in the meeting minutes suggests that Mr. Jones made the changes to Mr. Cox’s position titles in his Recommendations to the Board verbally at the June 12, 2018, board meeting.

32. In the end, the record suggests that through the Board action on June 12, 2018, Samuel Cox was awarded the position advertised in SV1927, and his classification title changed from Welder/Mechanic to Welder/Mechanic/Welder Crew Leader effective July 1, 2018. Further, on that same day Grievant was awarded the position advertised in

⁸ See, Joint Exhibit 20, Minutes of the Board of Education Meeting, Raleigh County Schools, Tuesday, June 12, 2018.

SV1926, and his classification was changed from Heavy Equipment Operator to Welder/Heavy Equipment Operator effective July 1, 2018. Again, it is noted that Grievant bid on a Welder/Heavy Equipment Crew Leader position.

33. Grievant filed this grievance challenging Respondent's selection of Mr. Cox for the position on June 26, 2018.

34. Grievant became employed in the multiclassified title of Welder/Heavy Equipment Operator effective July 1, 2018. Grievant had not been employed by Respondent in the welder classification until this date.

35. A level one conference on this grievance was held on July 11, 2018. In attendance were Grievant, Mr. Jones, and Superintendent Price.⁹ During this conference, Grievant discussed the fact that he had been performing welding duties since December 18, 2013, even though he did not hold the welder classification.

36. During the level one conference, Superintendent Price told Grievant that they would change his welder seniority date to December 18, 2013, if Grievant would make the request in writing. While the level one decision is silent on this issue, Grievant testified that at the level one conference Superintendent Price stated that posting was not handled correctly, but had no explanation for why the changes were made. Further, Grievant testified that Mr. Jones had stated that even if the positions were reposted, Mr. Cox would get the job, but that Superintendent Price disagreed. Grievant testified that Superintendent Price then said that Grievant would have been at the top of the seniority list (for the welder crew leader), and would have received the position.

37. By letter dated July 23, 2018, Grievant requested that Superintendent Price

⁹ See, Level One Decision dated July 25, 2018.

change his welder seniority date “from 7/1/18 to 12/18/13.”¹⁰

38. Grievant’s welder seniority date was set as July 1, 2018, based upon his receipt of the Welder/Heavy Equipment Operator position at the June 12, 2018, board meeting, which was to be effective July 1, 2018.

39. Grievant had not requested or sought reclassification from Respondent to include welder in his title prior to the level one conference in this grievance.

40. The level one decision issued by Superintendent Price dated July 25, 2018, contained one finding of fact and one conclusion of law. The finding of fact states, “[p]osting was corrected/edited within the timeframe. The most senior person was hired for the position.” The conclusion of law states, “[b]ased on the facts provided at our conference, the most senior candidate was hired. However, your request (submitted on July 23, 2018) to consider changing your welder seniority date to December 18, 2013[,] has been verified and approved.”

41. After the filing of this grievance, Respondent corrected Grievant’s welder seniority date, but did not reverse its decision to award Mr. Cox the Welder Crew Leader position. Respondent has asserted that Welder Crew Leader is not a job classification title in and of itself, but that it is a “supplemental” title to be added to the most senior welder’s job title, like that of a foreman.

42. Effective July 1, 2018, Grievant began working for Respondent as a Welder/Heavy Equipment Operator, and has a seniority date of December 18, 2013, in each classification category. Therefore, Grievant now has an earlier welder seniority date than Mr. Cox has.

¹⁰ See, Joint Exhibit 25, July 23, 2018, letter to Superintendent Price.

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.*

At the outset, this ALJ notes that this case poses a set of circumstances that is both confusing and entirely avoidable. Add to that the unavailability of a key witness, the failure to call the superintendent who was involved at level one and at the board meeting in question, and the failure to call the only other eyewitness to the changing of the postings, ascertaining the basic facts of this matter has been a daunting task. That being said, Grievant argues that Respondent failed to review his classification annually as required by statute which caused him to not be classified as a welder, resulting in a mistake in his welder seniority date. Grievant also asserts that Respondent should have selected him for the Welder Crew Leader position in June 2018, and not Mr. Cox, because he actually had more seniority in the welder classification than Mr. Cox. Therefore, Grievant contends, Respondent's failure to review Grievant's classification annually caused the improper selection of Mr. Cox. Respondent has since corrected Grievant's welder seniority date following the level one conference in this grievance, but argues that at the time the position was filled on June 12, 2018, Mr. Cox held the welder classification title and had more welder seniority than Grievant. Therefore, Respondent asserts, it

correctly selected Mr. Cox for the position.

“County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best of the schools, and in a manner which is not arbitrary and capricious.’ Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). 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).

West Virginia Code § 18A-4-8b(g) states, in part, as follows:

County boards shall post and date notices of all job vacancies of existing or newly created position in conspicuous places for all school service personnel to observe for at least five working days. . .

(2) Notice of a job vacancy shall include the job description, the period of employment, the work site, the starting and ending time of the daily shift, the amount of pay and any benefits and other information that is helpful to prospective applicants to understand the particulars of the job. . . Job postings for vacancies made pursuant to this section shall be written to ensure that the largest possible pool of qualified applicants may apply. Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant.

(3) All vacancies in existing or newly created positions shall be filled within twenty working days from the closing date of the job posting for the position. . . .

Id. These notice requirements are designed to ensure that prospective applicants have all the necessary information to allow them to decide whether to apply for a position.

In this case, Respondent repeatedly changed the most elementary of all the information contained in the postings, the job titles, without rescinding and reposting the

positions, or even providing notice of the changes to those who had already applied. Such is not disputed. Position SV1926 was first posted as a “welder/mechanic.” When the posting closed and when the position was filled, SV1926 was a “welder/heavy equipment operator.” Position SV1927 was first posted as a “welder/mechanic crew leader” and was changed twice. It was first changed to a “welder/heavy equipment crew leader.” At the time it closed and was filled, SV1927 was a “welder crew leader” position. Respondent has provided no explanation as to why the changes were made. These changes were not corrections of typographical errors; they were substantial changes. Respondent’s actions were arbitrary and capricious, and caused needless confusion and complications in this case. Nonetheless, given the unique circumstances of this grievance, Respondent’s error is harmless because it does not invalidate the selections made in filling the two positions, or impact the outcome of this case.

The parties do not dispute that Grievant has performed welding duties since he began working as a Heavy Equipment Operator on December 18, 2013. Grievant was awarded the Welder/Heavy Equipment Operator position on June 12, 2018, to be effective July 1, 2018. Respondent then updated its seniority records to show July 1, 2018, as Grievant’s welder seniority date. Following the level one conference, Respondent granted Grievant’s request to change his welder seniority date to December 18, 2013, as that was the date he began performing welding duties in his job. Respondent’s current seniority list shows that Grievant’s welder seniority date and his heavy equipment operator seniority date are both December 18, 2013.¹¹

West Virginia Code § 18A-4-8(l) states as follows:

¹¹ See, Joint Exhibit 23, seniority lists dated September 13, 2019.

Each county board shall review each service person's job classification annually and shall reclassify all service persons as required by the job classifications. The state superintendent may withhold state funds appropriated pursuant to this article for salaries for service personnel who are improperly classified by the county boards. Further, the state superintendent shall order a county board to correct immediately any improper classification matter and, with the assistance of the Attorney General, shall take any legal action necessary against any county board to enforce the order.

Id. Respondent violated W. Va. Code § 18A-4-8(l) as it never conducted a reclassification review for Grievant in five years he worked there. Grievant had not held the welder classification title before July 1, 2018, the date he started in the welder/heavy equipment operator position at issue herein. While the burden is not on the Grievant to seek the reclassification, there has been no evidence presented to suggest that Grievant sought reclassification at any time prior to July 11, 2018, or raised the issue with Respondent before the level one conference in this grievance. Nonetheless, the problems with Grievant's classification and seniority date have since been rectified. Grievant began holding the welder classification title as a result of his selection for the Welder/Heavy Equipment Operator position on June 12, 2018. Then, on July 25, 2018, Respondent corrected Grievant's seniority date to December 18, 2013, when he first started performing the welder duties. While the problems with Grievant's classification and seniority date are now resolved, Respondent is not relieved of its statutory duties to annual review its employees classifications and to reclassify as needed, and Respondent is expected to follow the statutory requirements in the future.

The issue now is whether Grievant is entitled to the Welder Crew Leader position, SV1927, that Mr. Cox received because of Respondent's violation of W. Va. Code § 18A-4-8(l). West Virginia Code § 18A-4-8b, "Seniority rights for school service personnel,"

states, in 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 eight [§ 18A-4-8] 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 . . . 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. . . .

Id. (Emphasis added). “‘Class title’ means the name of the position or job held by a service person. . . .” W. Va. Code § 18A-4-8(i)(3). “Once an employee passes a 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). “Competency tests are used to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute

employee.” W. Va. Code § 18A-4-8e(g). “Notwithstanding any provisions in this code to the contrary, once an employee holds or has held a classification title in a category of employment, that employee is considered qualified for the classification title even though that employee no longer holds that classification.” W. Va. Code § 18A-4-8e(h). “Multiclassification” means a person employed to perform tasks that involve the combination of two or more class titles in this section. In these instances the minimum salary scale is the higher pay grade of the class titles involved W. Va. Code § 18A-4-8(i)(67). “For the purposes of determining seniority under this section a service persons seniority begins on the date that he or she enters into the assigned duties.” W. Va. Code § 18A-4-8b(e). “The seniority of a service person is determined on the basis of the length of time the employee has been employed by the county board within a particular job classification. . . .” W. Va. Code § 18A-4-8b(i). A “crew leader” is “a person employed to organize the work for a crew of maintenance employees to carry out assigned projects.” W. Va. Code § 18A-4-8(i)(29).

At the time the jobs were posted and filled, Grievant held only the heavy equipment operator classification despite having performed welding duties since December 2013. However, Grievant was *qualified* to fill a welder position because he had passed the competency test in 2013. Grievant had no welder seniority because he did not, and had not, held the welder classification. Conversely, Mr. Cox was a multiclassified employee holding the Welder/Mechanic classification. Mr. Cox had held the welder classification title since March 26, 2014. He was second only to Mr. Donaldson in welder seniority.¹² While there is no “welder crew leader” classification defined by statute, it is only logical

¹² See, Joint Exhibit 1, Welder Seniority List.

that to be a welder crew leader, one would have to hold the welder classification. See *Myers v. Monongalia County Bd. of Educ.*, Docket No. 2012-0981-MonED (Aug. 14, 2013.) Therefore, pursuant to the requirements of West Virginia Code § 18A-4-8b, Respondent correctly selected Mr. Cox for the Welder Crew Leader position, SV1926, over Grievant. It is noted that since being placed in this position effective July 1, 2018, Mr. Cox has accrued crew leader seniority in addition to his welder seniority.

As for SV1926, the Welder/Heavy Equipment Operator position, based upon the evidence presented, Grievant was correctly selected for the same. Grievant was qualified to hold the welder classification, and he was the most senior heavy equipment operator in Raleigh County. There was no evidence to suggest that any of the other applicants for the position held the Welder/Heavy Equipment Operator classification. Grievant now holds this multiclassified title and has since July 1, 2018. Accordingly, July 1, 2018, was set as his welder seniority date. He had not held a welder seniority date until then. It was only after the filing of this grievance that Grievant raised the issue of his welder seniority date.

After Grievant raised the issue of his welder seniority date and the performance of welding duties since 2013 with Superintendent Price at the level one conference in this grievance, Superintendent Price took action to change Grievant's welder seniority date. On July 25, 2018, in the level one decision, Superintendent Price granted Grievant's request to change his welder seniority date to December 18, 2013. Respondent's welder seniority list now reflects that Grievant's seniority date is December 18, 2013, and Mr. Cox's, is March 26, 2014. As Mr. Donaldson has retired, he no longer appears on this list. As a result of the changes Superintendent Price made on July 25, 2018, Grievant

became the most senior welder, and Mr. Cox became the second most senior welder.

Grievant argues that as Respondent has now corrected the mistake in his classification (corrected by being selected for the Welder/Heavy Equipment Operator position herein) and his seniority date, and should be required to change the outcome of the Welder Crew Leader selection. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. See *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008). Based on the evidence presented, it appears that Superintendent corrected the seniority date, after verifying the same, soon after it was brought to his attention. The issue becomes whether Grievant should retroactively be awarded the Welder Crew Leader position.

This grievance is similar to that of another recent Raleigh County grievance, *Bishop v. Raleigh County Bd. of Educ., and Dotson*, Docket No. 2017-2272-RalED (Aug. 28, 2018), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 18-AA-241 (Mar. 29, 2019). In that case, the grievant, classified as a Secretary III applied for a Secretary III/Accountant III position, as had the intervenor. At the time of application, intervenor also held the Secretary III classification. After she had applied, but before the position was filled, the intervenor questioned her supervisor about whether her classification was correct given her accounting duties. She asked whether she should be multiclassified as a Secretary III/Accountant III. The intervenor had raised this issue with her supervisor a few years earlier, but the supervisor had not followed through on it. Her supervisor agreed to look at the issue and determined that she should be reclassified as a Secretary III/Accountant III. At the close of the position, only one applicant held the classification Secretary

III/Accountant III. That applicant was offered the position, but she declined.

At the next board meeting on May 23, 2017, the superintendent, the same Superintendent Price as in this instant matter, recommended that intervenor be reclassified to reflect her current accounting duties, effective on the first day of her employment in her position, which was August 7, 2013, and the board granted the same. Similar to what occurred to the Grievant herein, the intervenor was reclassified at that May 2017 board meeting as a Secretary III/Accountant III with the seniority date of *August 7, 2013*. Then, at that same meeting, Superintendent Price recommended intervenor for the still-vacant Secretary III/Accountant III position because once she was reclassified, she was the only remaining applicant who was held the Secretary III/Accountant III multiclassified title. The Grievance Board held that because intervenor was the only applicant holding the Secretary III/Accountant III title, she was entitled to first preference pursuant to W. Va. Code § 18A-4-8b(b)(1).

In *Bishop*, the position at issue was *vacant* when the intervenor was reclassified. Therefore, upon her reclassification, intervenor became the only applicant who held the multiclassified title while the position was still vacant, even though both personnel actions occurred at the same board meeting. As such, intervenor was entitled to the position. In the instant matter, the Welder Crew Leader position was no longer vacant when the changes were made to Grievant's classification and seniority date. At the time the position was posted and filled, Mr. Cox was classified as a welder and Grievant was not. Accordingly, Respondent properly filled the Welder Crew Leader position with Mr. Cox.

For the reasons set forth herein, while Grievant proved that Respondent violated W. Va. Code § 18A-4-8(l), Grievant failed to prove by a preponderance of the evidence

that he was entitled to the Welder Crew Leader position as a result of Respondent's violation of W. Va. Code § 18A-4-8(l), or otherwise. Further, Grievant has failed to prove that Respondent's decision to fill the vacancy with Mr. Cox was arbitrary and capricious. Therefore, this grievance is 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. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). 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)).

3. “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. “Each county board shall review each service person’s job classification annually and shall reclassify all service persons as required by the job classifications. The state superintendent may withhold state funds appropriated pursuant to this article

for salaries for service personnel who are improperly classified by the county boards. Further, the state superintendent shall order a county board to correct immediately any improper classification matter and, with the assistance of the Attorney General, shall take any legal action necessary against any county board to enforce the order.” W. Va. Code § 18A-4-8(l).

6. Grievant proved by a preponderance of the evidence that Respondent violated W. Va. Code § 18A-4-8(l) as it never conducted reclassification reviews for Grievant in five years he worked there prior to June 12, 2018.

7. “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 eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.” W. Va. Code § 18A-4-8b(a).

8. “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 . . . 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” W. Va. Code § 18A-4-8b(b).

9. “Once an employee passes a 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). “Competency tests are used to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee.” W. Va. Code § 18A-4-8e(g).

10. “Notwithstanding any provisions in this code to the contrary, once an employee holds or has held a classification title in a category of employment, that employee is considered qualified for the classification title even though that employee no longer holds that classification.” W. Va. Code § 18A-4-8e(h).

11. “For the purposes of determining seniority under this section a service persons seniority begins on the date that he or she enters into the assigned duties.” W. Va. Code § 18A-4-8b(e). “The seniority of a service person is determined on the basis of the length of time the employee has been employed by the county board within a particular job classification. . . .” W. Va. Code § 18A-4-8b(i).

12. While Grievant proved that Respondent violated W. Va. Code § 18A-4-8(l), Grievant failed to prove by a preponderance of the evidence that he was entitled to the Welder Crew Leader position as a result of Respondent’s violation of W. Va. Code § 18A-4-8(l), or otherwise. Further, Grievant has failed to prove that Respondent’s decision to fill the vacancy with Mr. Cox was arbitrary and capricious.

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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2018).

DATE: January 27, 2020.

Carrie H. LeFevre
Administrative Law Judge