EARNEST DUNFORD, et al.,

Grievants,

v. Docket No. 97-PEDTA-546

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

On April 21, 1997, Earnest Dunford filed a grievance against Respondent West Virginia Parkways Economic Development and Tourism Authority (Parkways) pursuant to W. Va. Code §§ 29-6A-1, et seq. Grievant Dunford alleged that he had been the victim of reprisal by Parkways' General Manager William H. Gavan, when a less experienced and less senior employee was selected for promotion to the position of Heavy Equipment Foreman in Parkways' Maintenance Department. Grievant Dunford's grievance was denied at Levels I and II, and he appealed to Level III where a hearing was conducted on November 21, 1997. The Level III Grievance Evaluator, D.L. Lake, denied the grievance in a decision dated December 2, 1997. Grievant Dunford appealed to Level IV on December 12, 1997, and this matter was set for hearing.

On April 21, 1997, Kenneth Kirk filed a grievance against Parkways that challenged his non-selection to the Heavy Equipment Foreman position on similar grounds as GrievantDunford. After his grievance was denied at Levels I and II, Grievant Kirk appealed to Level III, where a hearing was conducted on October 1-2, 1997. On October 9, 1997, Grievance Evaluator D.L. Lake denied the grievance at Level III. Grievant Kirk appealed to Level IV on November 6, 1997, and a Level IV hearing was duly scheduled before Administrative Law Judge Mary Jo Swartz.

Also on April 21, 1997, a grievance was filed against Parkways by Bobby Lafferty, John Harvey, Tommy L. Graley, Roger Furrow, Harvey Shrader, and Boyd Lilly, in which Grievants Kirk and Dunford joined, alleging that Parkways had violated Parkways' Personnel Policy I-1 when an employee with substantially less experience than required by the posting was chosen to fill a vacancy for Heavy Equipment Foreman. Without objection from Grievants, this matter was waived by Parkways to Level III where an evidentiary hearing was conducted on October 31, 1997. Grievance Evaluator D.L. Lake issued a decision denying the grievance on November 6, 1997, and Grievants appealed to Level IV on November 18, 1997.

After all three matters were set for separate hearings at Level IV, Parkways filed a Motion to Consolidate the grievances for hearing. Grievants did not oppose the motion. (See footnote 1) Grievant Kirk's grievance was administratively reassigned to the undersigned, and, on January 28, 1998, these three grievances were consolidated and set for hearing. On February 20, 1998, a Level IV hearing was conducted in this Grievance Board's office inBeckley, West Virginia. This matter became mature for decision upon receipt of the parties' written post-hearing arguments on May 13, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcripts of the Level III hearings, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Levels III and IV.

FINDINGS OF FACT

1. Grievants are employees of the West Virginia Parkways Economic Development and Tourism Authority (Parkways).

2. Parkways has adopted Personnel Policy I-1, effective May 17, 1993, governing "employment procedures." See G Ex 1 at L III (Lafferty). (See footnote 2)

3. Section B2 of Policy I-1 provides, in pertinent part, as follows:

> Once the Director of Human Resources has advertised, screened and selected qualified candidates for interviewing, the resumes and applications will be forwarded to the appropriate Department Head and Deputy General Manager for final screening. It shall then become the responsibility of a Selection Board to interview and select the candidate who is the most qualified for the position based upon merit, fitness and qualifications. If a choice is to be made between two or more applicants and all other factors are equal, consideration shall be given to the level of seniority of each of the respective applicants as a factor in determining which of the applicants will receive the boards recommendation. Selection board results will then be presented to the General Manager for final

approval.

G Ex 1 at L III (Lafferty). 4. Parkways' Personnel Policy I-1, Section A, delegates responsibility for recruiting "qualified applicants" to the Director of Human Resources. See G Ex 1 at L III (Lafferty).

5. A vacancy for Heavy Equipment Foreman was posted on March 12, 1997. The job announcement was accompanied by a cover letter from Parkways Director of Human Resources Carrie Roaché stating the following:

> The West Virginia Parkways Authority is currently accepting resumes for the position of Heavy Equipment Foreman in our Maintenance Department. A job description listing the skills and abilities required is attached. Interested and qualified employees should submit their resume to the Personnel Office by March 26, 1997.

G Ex C.

6. The letter quoted in Finding of Fact Number 5 was accompanied by a job description containing the following information pertinent to this grievance:

WEST VIRGINIA PARKWAY AUTHORITY

HEAVY EQUIPMENT FOREMAN

Description of Duties/Responsibilities

1. Shall be responsible for the supervision of the crew in the absence of the supervisor.

2. Shall be responsible for the completion of all time sheets, Foreman daily reports, gas/oil reports and work orders.

3. Shall be responsible for quality control, inspection, and coordination within the shops.

4. Shall be responsible for the training of all crew members in roadway maintenance and equipment use.

5. Shall assist the supervisor in annual and weekly work schedule planning.

6. Shall assist the supervisor in the evaluation of all sectional employees.

7. Heavy Equipment Foreman will also perform the duties of a Maintenance Technician when needed.

8. Shall assist the supervisor in maintaining an inventory of supplies, parts, and tools needed for day to day operation.

Skills and Abilities

1. Thorough knowledge of highway maintenance policies. (Knowledge of bridge policies within assigned sections.)

2. Thorough knowledge of sectional equipment operations.

3. Thorough knowledge of sectional crafts.

(Section 1: mowing) (Section 2: bridge work) (Section 3: drainage)

4. Ability to organize and direct large and diversified groups of skilled and unskilled labor, and/or an extensive fleet of heavy equipment.

5. Ability to meet and effectively deal with the public on occurring problems.

6. Skill in selecting, developing and retaining a highly skilled work force.

7. Skill in handling and preparing reports.

8. Ability to utilize all available man hours in a productive manner

9. Ability to recognize potential hazards in the workplace, and on the roadway.

10. Thorough knowledge of the policies and procedures of the WEST VIRGINIA PARKWAYS AUTHORITY.

Equipment

Should be an accomplished operator of all section equipment and technician equipment.

*** * ***

Education

Must possess High School Diploma or equivalent (GED).

Experience

5 years as a Heavy Equipment Maintenance and Technician (sic) or 5 years equal experience in a similar field of work and at least 2 years in a supervisory capacity.

Any formal training in sectional craft[.]

Special Requirements

Commercial Drivers License (CDL) class A or B[.]

Health

Good physical condition, and the ability to do excessive walking on/off the road in adverse weather. Good eyesight/hearing. Ability to lift weights up to 100 lbs.

WEST VIRGINIA PARKWAY AUTHORITY

EQUIPMENT LIST

Maintenance Technician

1. **Parkways radio**
2. **Pickup truck and crewcab**
3. **Tandem truck (automatic)**
4. **Endloader**
5. **Roller**
6. **Chainsaw**
7. **Plow/Spreader**
8. **Flashing arrow**
9. **Message board**
10. **Air compressor**
11. **Water pumps (volume/pressure)**
12. **Weedeater**
13. **Router**
14. **Concrete mixer**
15. **Tamper (wacker)**
16. **Sand blasters**
17. **Paint pumps**
18. **Scissor bed**
19. **Breaking hammer**
20. **Air drill**

21. Welder
22. Generator
23. Seeding equipment
24. Herbiciding equipment
25. Crack sealer
26. Brush chipper
27. Tractors (Mowers)
28. Asphalt paver
29. Concrete saw
30. Tandem truck (manual)
31. Grader (small/large)
32. Unimog (mowers/bridge snooper)
33. Green machine (culvert cleaner) 34. Vacall
35. UB-60 bridge inspection unit
36. Dozer
37. Track loader
38. Trailer (Tag a long)

Heavy Maintenance Technician (Includes Technician Equipment List)

1. Bobtail Tractor (manual)
2. Low-Boy Trailer and Dump Trailer
3. Vermeer
4. Track Excavator
5. Gradall or Equal

Thorough knowledge of the following sectional equipment:

Grad all

Dozer

Track loader

Vermeer

Tractor Trailer

Track back hoe

R Ex A at L III (Lafferty).

7. Grievants Kirk, Lafferty, and Dunford made timely application for the Heavy Equipment Foreman vacancy, along with Larry Farley, Ronald Workman, Shirley Johnson, Roger Albert, and Tommie Cochran.

8. Each applicant was interviewed by a Selection Board which asked the same questions of each applicant. See G Exs B, E, G, I & J. Six Parkways employees served on the Selection Board: Fred Combs, Chester M. "Butch" Dobbins, D. Richard Deeds, Lawrence Cousins, Bill Forrest and C. Jeanette Thomas. See J Ex 1.

9. Mr. Combs has been employed by Parkways for sixteen years and presently serves as Director of Operations. One of Mr. Combs' duties in that position is to conduct internal investigations. In that capacity he had previously conducted separate investigations into allegations regarding Grievants Dunford and Kirk. The investigation which he conducted relating to alleged racial slurs by Mr. Kirk did not substantiate the allegations. The investigation of Mr. Dunford resulted in his resignation from a supervisory position and transfer to another job. This previous reassignment of Grievant Dunford is common knowledge among Parkways employees.

10. Mr. Dobbins has been employed by Parkways for fourteen years and has served as Supervisor of Radio Control and Communications for over four years. Mr. Deeds has held supervisory positions with Parkways for twenty-three years and currently serves as Facilities Manager. Ms. Thomas has been employed by Parkways for sixteen years and presently serves as Deputy Director of Operations. Ms. Thomas also participated in conducting the prior investigation of Grievant Dunford. Mr. Forrest is Parkways' Maintenance Engineer. Mr. Cousins is Parkways' Deputy Director.

11. The Selection Board members independently rated the applicants on a scale from 1 to 10 in four categories comprising experience, leadership, communication, and knowledge of duties/Parkways policies, and a scale from 1 to 5 in two additional categories, administration and education. See G Exs N, O, & M.

12. Based upon total points awarded by the six members of the selection board, the applicants were ranked as follows:

First (tie) Mr. Farley and Mr. Workman (201.5)

Second Grievant Dunford (174.5)

Third (tie) Grievant Kirk and Mr. Cochran (164.5)

Fourth Mr. Albert (141)

Fifth Mr. Johnson (139.5) Sixth Grievant Lafferty (118.5)

G Ex L.

13. Consistent with Policy I-1, General Manager Gavan awarded the position to Mr. Farley, as he is senior to Mr. Workman.

14. Mr. Farley declined the position of Heavy Equipment Foreman. See G Ex K.

15. The Heavy Equipment Foreman position was then offered to Mr. Workman, who accepted.

16. Grievant Lafferty did not have a high school education or GED at the time he applied for the Heavy Equipment Foreman position.

17. On May 22, 1996, Pamela Ray with the West Virginia State Employees Union sent a letter to Transportation Secretary Fred VanKirk in his capacity as Parkways' Chairman, forwarding a complaint signed by Grievants Dunford and Kirk, which alleged that Parkways General Manager Gavan had addressed them in a vulgar and harassing manner at their work site on April 8, 1996. See G Ex 15 at L III (Dunford). This correspondence was forwarded to General Manager Gavan who provided a written response. That response, in turn, was transmitted to Ms. Ray by Secretary VanKirk. See G Ex 15 at L III (Dunford). Grievants Kirk and Dunford did not file a grievance relating to General Manager Gavan's conduct.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v.W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Because Parkways is a “classified-exempt” agency, it is not subject to the rules and procedures established by the West Virginia Division of Personnel for other state agencies.

Lilly v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-308 (May 14, 1998); Simmons v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 96- PEDTA-091 (July 31, 1996); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). See also Perry v. Miller, 181 W. Va. 192, 382 S.E.2d 29 (1989). Thus, Parkways has substantial discretion in determining the procedures it follows to select employees to fill vacant positions.

Parkways has adopted an administrative regulation governing selection procedures, Policy I-1. Because "[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)), Parkways is required to comply with the procedures contained in that policy. Lilly, supra; Edwards v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97-PEDTA-426 (May 7, 1998); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995). See Parsons v. W. Va. Dept. of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). Consistent with Parkways' Personnel Policy I-1, Grievants who applied for the Heavy Equipment Foreman vacancy met a Selection Board, and the General Manger offered the position to the applicants who received the highest ratings from that board, in order of seniority. Grievants Lafferty, Kirk, and Dunford, each of whom applied for the position, contend that the Selection Board's composition was flawed because it did not include members who were familiar with heavy equipment maintenance and operation, and the members did not properly or consistently enforce the minimum qualifications for the position set forth in the posting. The remaining Grievants, none of whom applied for the position, complain that the posting was misleading because it caused them to believe that certain qualifications they did not possess were required, while the selection board ultimately considered applicants with lower qualifications.

The first issue to be resolved in this grievance is whether the successful applicant, Mr. Workman, met the minimum qualifications for the position of Heavy Equipment Foreman. Policy I-1 does not contain specific requirements that minimum qualifications be set forth in any particular manner when a position vacancy is announced. See Graham, supra. Despite Ms. Roaché's use of the word "required" in her cover letter accompanying the job description

for Heavy Equipment Foreman, a fair reading of the accompanying documents indicates that not all skills and abilities listed were a necessary prerequisite to selection for the position. In an earlier grievance arising in Parkways, this Grievance Board observed that "[a] job description is normally considered a tool by which an employer identifies and defines a particular position, and does not, in and of itself, impose a legal obligation on the employer to abide by its terms." Simmons, supra.

Consistent with Simmons, the job description at issue here is not a "personnel policy" within the meaning of Powell. Indeed, the testimony of General Manager Gavan and Deputy General Manager Cousins indicated that Parkways intends to substantially retain the discretion it has as a classified-exempt entity. Thus, mandatory languageregarding minimum qualifications is deliberately avoided, except where necessitated by the nature of the job. In reviewing the job description at issue here, only the requirement for a high school diploma or GED is preceded by the word "must." See G Ex C. This minimum education requirement excludes only Grievant Lafferty from selection as Heavy Equipment Foreman. (See footnote 3)

Grievants assert that Mr. Workman did not have thorough knowledge of the equipment listed in the posting, and was not an "accomplished operator of all section equipment and technician equipment" at the time he was selected, and thereby failed to meet the minimum qualifications in the posting. Parkways submits that Grievants' interpretation of the posting is unrealistic in that no applicants, including Grievants, had thorough knowledge of each piece of listed equipment or was then an "accomplished operator" of each item listed. Parkways maintains that the posting only required the successful applicant to be capable of obtaining the requisite familiarity with all equipment in a reasonable period of time. This proposed interpretation is consistent with the approach taken by the Selection Board members who interviewed and rated the applicants. In the absence of clear mandatory language in the posting, it does not appear that Mr. Workman failed to meet the minimum qualifications for the position.

Because its employees are classified-exempt, Parkways may exercise considerable discretion in filling positions, so long as its actions are not arbitrary and capricious. See Wendling v. W. Va. Real Estate Comm'n, Docket No. 94-REC-514 (May 16, 1996); Drakev. Regional Jail & Correctional Auth., Docket No. 95-RJA-442 (Dec. 12, 1995). Indeed, in

adjudicating selection challenges for classified civil service positions, (See footnote 4) this Grievance Board has stated: "An agency's decision as to which candidate is most qualified will be upheld unless shown to be arbitrary and capricious or clearly wrong." Lilly v. W. Va. Dept. of Tax & Revenue, Docket No. 95-T&R-576 (Apr. 4, 1996). See Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). Further, the grievance procedure is not intended to serve as a "super interview" for unsuccessful job applicants, providing instead for a review of the legal sufficiency of the selection process. Ward v. Dept. of Transp., Docket No. 96-DOH-184 (July 24, 1997); Thibault, supra. See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989).

Grievants contend that Mr. Workman's experience and familiarity with the equipment operated in the Heavy Equipment Shop in a highway maintenance environment was so inferior, in comparison to their qualifications, that his selection was arbitrary and capricious under the circumstances. In applying an arbitrary and capricious standard of review to a selection determination, the scope of review is a narrow one, the issues being limited to whether the decision was based on a consideration of the relevant factors, and whether there has been a clear error of judgment. See generally Bowman Transp., Inc., v. Arkansas-Best Freight System, Inc., 419 U.S. 285 (1974). Although the arbitrary and capricious standard requires a searching and careful inquiry into the facts, the ultimate scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the employer. See Bedford County Memorial Hosp. v. Health &Human Serv., 769 F.2d 1017 (4th Cir. 1985); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990); Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997).

In Grievants' view, Parkways should have selected the most experienced and senior employee in the Heavy Equipment Shop to fill the vacancy in the Heavy Equipment Foreman position. Although failure to consider an applicant's experience in operating, maintaining, and directing heavy equipment would be arbitrary and capricious, the record indicates that Parkways did consider this factor, but did not give it controlling weight. Had Parkways emphasized experience with heavy equipment, particularly in a highway maintenance environment, the position would have been offered to Grievant Dunford ahead of Mr.

Workman.

However, Parkways considered other factors in selecting a new Foreman, including leadership, communication skills, and knowledge of Parkways' policies, where Mr. Workman had strengths in his resume and presentation during the interview that the Selection Board did not perceive in the other applicants. Grievants did not demonstrate that it was arbitrary and capricious for Parkways to consider these factors, or that the factors were unfairly weighted. Indeed, the record indicates that the Selection Board process was professionally conducted in a fair and impartial manner.

Grievants' complaint that the Selection Board did not include members who were familiar with heavy equipment operation simply represents another attempt to place controlling emphasis on experience and seniority in promotion decisions. The members who reviewed the applicants had extensive supervisory experience in a variety of positions sufficient to competently select a Foreman for any Parkways function. No Parkways policyor any other legal precedent limits service on a Selection Board to employees with experience in a particular trade or craft.

Grievants Dunford and Kirk also complain that certain employees on the Selection Board participated in investigations regarding their conduct in the past, and should have been disqualified from judging their qualifications for Heavy Equipment Foreman. However, the employees in question did not instigate the investigations in question, they simply conducted investigations involving Grievants' conduct in the course of their duties. It was not demonstrated that they came into possession of confidential information through an investigation, or that such information was improperly shared with other Selection Board members. Indeed, it appears that the results of those investigations, or lack thereof, was common knowledge in Parkways. Accordingly, there is no basis to conclude that participation in the Selection Board by such employees was improper.

Grievants Kirk and Dunford also allege that they were not chosen as Heavy Equipment Foreman in reprisal for a complaint they filed against the General Manager. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging unlawful

retaliation, in order to establish a prima facie case, (See footnote 5) must prove:

(1) that he engaged in activity protected by the statute; (2) that his employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken against him by the employer; and

(4) that the adverse action was the result of retaliatory motivation, or the action followed his protected activity within such a period of time that retaliatory motive can be inferred. Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, nonretaliatory reasons for its action. Conner v. Barbour County Bd. of Educ., 489 S.E.2d 787 (W. Va. 1997); Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 S.E.2d 461 (1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the employer succeeds in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for the adverse action were merely a pretext for unlawful retaliation. See Conner, supra; W. Va. Dept. of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994).

According to the record, Pamela Ray with the West Virginia State Employees Union sent a letter to Transportation Secretary Fred VanKirk in his capacity as Parkways' Chairman on May 22, 1996, forwarding a complaint by Grievants Dunford and Kirk thatParkways General Manager Gavan had addressed them in a vulgar and harassing manner on April 8, 1996. See G Ex 15 at L III (Dunford). This correspondence was forwarded to General Manager Gavan who provided a written response, which was transmitted to Ms. Ray by Secretary VanKirk. See G Ex 15 at L III (Dunford). This issue has not been the subject of any grievance prior to the instant grievances filed by Grievants Kirk and Dunford.

Grievants failed to establish a prima facie case of retaliation or reprisal under W. Va. Code

§ 29-6A-2(p), because they did not engage in the activity protected by that statute, (See footnote 6) participation in the grievance procedure for state employees. See Hoffer, supra. Moreover, even if Grievant's conduct is protected under § 29-6A-2(p), or some other statute, there was no probative evidence that General Manager Gavan, either directly or indirectly, influenced the outcome of the Selection Board to Grievants' detriment. Indeed, his only participation in the process was to approve Mr. Workman's selection following Mr. Farley's decision to decline the position. Because that action was consistent with Policy I-1, there is no inference that the decision was motivated by a desire to retaliate against Grievants Kirk and Dunford.

Grievants Harvey, Graley, Furrow, Shrader, and Lilly complain that the posting for Heavy Equipment Foreman was misleading, suggesting that they might have applied for the position had it been clearly stated that thorough proficiency in operating all listed equipment was not a prerequisite to competing for the vacancy. Contrary to Respondent's contention, Grievants have standing to complain that a posting is improper if it containserroneous or misleading information about the position, adversely affecting them, because they are led not to apply for the vacancy. See Thomas v. Kanawha County Bd. of Educ., Docket No. 94-20-1123 (May 17, 1995); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). Further, contrary to Parkways' contentions, it does not appear that this complaint involves a new issue that was not addressed at Level III, as the job description language was the focus of considerable discussion and testimony in the record below. See W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

In evaluating the merits of this claim, the undersigned administrative law judge is not limited to legal rules of interpretation as to whether the vacancy announcement contains language that is mandatory or merely suggestive. Grievants and other Parkways employees reasonably testified at Levels III and IV that they believed that they needed to be proficient in all of the equipment listed in the announcement to qualify for the position. Parkways did not point to any particular language in the notice, or its written employment policies, which would clarify the nature of such language for potential applicants who are not versed in the subtle distinctions in language employed by human resources professionals.

Parkways presented preponderant credible evidence that the restrictions perceived by

non-applicant Grievants were not intended, and the job description was generally written to retain the employer's discretion in selecting the applicant who, overall, is best qualified to fill the position vacancy. Nonetheless, the undersigned is persuaded that the job description in this particular matter is ambiguous and, therefore, subject to multiple interpretations, including Grievants' stated understanding that hands-on experience andthorough proficiency with the equipment used in the Heavy Equipment Shop represents a minimum qualification for Heavy Equipment Foreman. However, those Grievants who failed to apply for the posted position did not present persuasive evidence to establish that any one of them possessed such qualifications for the position that the outcome of the selection process would have changed, had any one of them applied for the position. For this reason, Grievants are entitled to no relief as the result of any misleading language in the vacancy announcement.

In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Parkways is a “classified-exempt” agency which is not subject to the rules and procedures established by the West Virginia Division of Personnel for other state agencies. Lilly v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 97- PEDTA-308 (May 14, 1998). See Simmons v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 96-PEDTA-225 (July 31, 1996); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

3. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723,238 S.E.2d 220 (1977). See Parsons v. W. Va. Dept. of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dept. of Transp., Div. of Highways, Docket No. 94-DOH-389 (Dec. 20, 1994).

4. Parkways' Policy I-1 does not require the minimum qualifications for a posted position vacancy to be listed in any particular manner. With the exception of a minimum education requirement, the posting at issue in this case did not include mandatory language in describing attributes sought in applicants for a Heavy Equipment Foreman vacancy.

5. Grievant Lafferty did not meet the minimum qualifications for the position of Heavy Equipment Foreman, because he did not have a high school education or equivalent.

6. Given that Grievant Lafferty was not minimally qualified for the position of Heavy Equipment Foreman, he lacks standing to contest the selection of another individual for the vacancy as he was not adversely affected by the employment decision being challenged. See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). See also Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994).

7. The grievance procedure in W. Va. Code §§ 29-6A-1, et seq., is not intended to be a"super interview" for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process. Ward v. Dept. of Transp., Docket No. 96-DOH-184 (July 24, 1997); Thibault v. Div. of Rehabilitation Serv.,Docket No. 93-HRS-489 (July 29, 1994). See also Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 16, 1989).

8. Unless proven arbitrary or capricious or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dept. of Health & Human Resources, Docket No. 97- HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dept. of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

9. Generally, an agency's action is arbitrary and capricious if the agency did not rely on the factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Shull, supra; Sheppard v. W. Va. Dept. of Health & Human Resources, Docket Nos. 97- HHR-186/187 (Dec. 29, 1997). See generally Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 285 (1974).

10. In this case, Parkways' failure to include personnel with significant experience in heavy equipment operation on a Selection Board which evaluated applicants for a Heavy

Equipment Foreman vacancy was neither clearly wrong nor arbitrary and capricious.

11. Although the successful applicant for a vacant Heavy Equipment Foreman position may have had considerably less experience and familiarity with the heavy equipment operated by Parkways than Grievants Kirk or Dunford, it was not demonstrated that Parkways' decision constituted an abuse of discretion in the circumstances presented by this grievance. 12. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

13. In order to establish a prima facie case of retaliation, a grievant must prove:

(1) that he engaged in activity protected by the statute;

(2) that his employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken against him by the employer; and

(4) that the adverse action was the result of retaliatory motivation or the action followed his protected activity within such a period of time that retaliatory motive can be inferred.

Hoffer v. State Fire Comm'n, Docket No. 95-SFC-441 (June 18, 1996). See Whatley v. Metro. Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Graley, supra.

14. Grievants failed to establish a prima facie case of retaliation or reprisal under W. Va. Code § 29-6A-2(p) because they did not engage in activity protected by that statute. See Hoffer, supra.

15. Although those Grievants who did not apply for the position at issue demonstrated that the vacancy announcement for Heavy Equipment Foreman was worded in such a manner that they were reasonably led to believe that they did not meet the minimum qualifications for the position, they are not entitled to any relief in this matter asthey failed to demonstrate that the outcome of the selection process would have changed had any one of them made a timely application.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 24, 1998

Footnote: 1

Grievants were represented by Boyd Lilly and Lynn Belcher of the West Virginia State Employees Union. Respondent was represented by its General Counsel, A. David Abrams, Jr.

Footnote: 2

Unless otherwise indicated, exhibits referenced are from Level IV. Exhibits from Level III and citations to Level III transcripts will be identified by the Grievant's last name to indicate in which of the three hearings a particular document was admitted.

Footnote: 3

Because Grievant Lafferty did not meet the minimum requirements for the position at issue, he does not have standing to contend that the successful applicant was not best qualified to fill the vacancy. See Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH- 287 (Jan. 22, 1996).

Footnote: 4

The West Virginia Division of Personnel's regulations permit agencies to hire any of the ten highest ranked applicants on a register for a particular position.

Footnote: 5

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 6

Similarly, the conduct in which Grievants Kirk and Dunford engaged, through their union representative, does not clearly fall within the scope of activity protected under W. Va. Code §§ 6C-1-1, et seq. See Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); Graley, supra.