JAMES BEER, II,

Grievant,

v. **Docket No. 99-DOH-117**

DIVISION OF HIGHWAYS and

DIVISION OF PERSONNEL,

Respondents.

DECISION

James Beer, II, (Grievant) filed a grievance on November 23, 1998, alleging, in part:

> Personnel who do not meet the minimum qualifications or have the knowledge, skills or abilities as defined by the State Personnel Board have been placed in acting positions as Highway District Administrator and Highway District Assistant Administrator in violation of the Department of Transportation Temporary Classification Upgrade Policy. . . . In most cases statewide, personnel were assigned on a political basis which is in violation of both State and Federal patronage and nepotism laws.

Grievant seeks the following relief:

> The Division of Personnel should review the qualifications of personnel assigned to acting positions as Highway District Administrator and Highway District Assistant Administrator and ensure that unqualified personnel are removed and qualified personnel be placed in these positions until they can be properly posted for permanent hiring.
>
> The Division of Highways should be ordered to stop using a system of patronage in hiring, promotions, transfers, demotions and layoffs as required by State and Federal Laws.

Grievant's immediate supervisor advised him on December 2, 1998, that he was without authority to grant relief. Grievant appealed to level two on December 3, 1998, and a level two decision was rendered on December 10, 1998, denying the grievance. Upon appeal to level three, a hearing was held on January 22, 1999, before Brenda Craig Ellis. The grievance was denied in a written level three decision dated March 8, 1999. Grievantappealed to level four on March 16, 1999. The parties

agreed to submit this grievance for a decision based upon the record developed below, and it became mature for consideration on May 5, 1999, upon receipt of Respondent Division of Highways' (DOH) written argument. Neither Grievant nor the Division of Personnel (DOP) elected to file a level four submission. (See footnote 1)

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence submitted at level three.

Findings of Fact

1. Grievant is employed by DOH as a Maintenance Engineer in District Four.

2. In 1998, DOH underwent a statewide reorganization. The new classifications of District Administrator and Assistant District Administrator for each of the districts were created, resulting in 20 new positions statewide.

3. Because these new classifications had not previously existed, DOH, in conjunction with DOP, selected individuals to serve in the positions on a temporary basis, until they could be posted and filled, pursuant to DOP regulations. (See footnote 2)

4. Classification specifications for the positions of District Administrator and Assistant District Administrator were initially created on August 20, 1998, and they were revised on October 16, 1998.

5. Grievant was not selected to fill any of the temporary positions.

6. The individuals selected to fill the temporary positions were certified by DOP as meeting the minimum qualifications for the job specifications at issue.

Discussion

An agency's decision regarding selection of an applicant for a position will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant

positions. Thibault, supra.

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). If a grievant can demonstrate that the selection process was so significantly flawed that he might reasonably have been the successful applicant if the process had been conducted in a proper fashion, the employer will be required to compare the qualifications of the grievant to the successful applicant. Thibault, supra. The placement of individuals into the positions at issue was accomplished pursuant to the provisions of DOP's Administrative Rule Section 9.3 “Provisional Appointments,” which provides, in pertinent part:

> If, in the opinion of the appointing authority, there are urgent reasons for filling position and there is no appropriate preference register . . . the appointing authority may submit to the Division of Personnel the name of a person to fill the position pending examination and establishment of a register. If that person's qualifications have been certified by the Director as meeting the minimum qualifications as to training and experience for the position, that person may be provisionally appointed to fill the existing vacancy until an appropriate register is established and appointment made from the register. The position must be classified and minimum qualifications established for the position in accordance with this rule before provisional appointments may be made. No provisional appointment shall be continued for more than thirty days after an appropriate register has been established for the class of position and in no event for more than 6 months from the date of appointment, nor shall successive provisional appointments of the same person be permitted, nor shall a position be filled by repeated provisional appointments.

Grievant contends that none of the individuals temporarily appointed to these positions met the minimum qualifications, and also suggests that they received the appointments for purely political reasons. He also contends that more qualified individuals were available to serve in the positions, but were not selected. Although he did not request as relief to be placed in one of the positions, he testified at level three that he would have liked the opportunity to have applied for one or all of the temporary positions.

The only requirement of Section 9.3 is that the selected employee meet the minimum qualifications for the position. There is no requirement that provisional appointments be filled with the “most qualified” candidate. Therefore, the qualifications of other employees, including Grievant, are irrelevant, so long as all of the employeesselected to fill the appointments met the minimum

qualifications.

Grievant's focus during the level three hearing was on the experience and backgrounds of individuals selected for the positions. However, specific qualifications of only 12 of the 20 individuals were introduced as evidence. Nevertheless, a review of the information for the 12 individuals contained in the record does not indicate that they did not meet the minimum qualifications. The minimum experience requirement for the District Administrator position is “ten years of full-time or equivalent part-time paid professional managerial experience in business administration, public administration, transportation, construction, manufacturing, mining, or the armed services,” and the Assistant District Administrator position requires seven years of the same types of experience. Grievant objected to Respondents' granting of experience credit to these individuals which occurred outside the realm of DOH or highway construction in general. However, the classification specifications clearly allow for experience obtained outside the transportation industry, in areas such as business or public administration, construction, manufacturing, etc. Grievant has not established by a preponderance of the evidence that the individuals selected did not meet the minimum requirements, nor has he established that their selection was arbitrary and capricious.

Grievant's allegations regarding the political nature of these selections is unsupported by any evidence in the record. Even Grievant acknowledged this at level three, stating “even though I haven't shown real evidence, I think I can show circumstantial evidence by the records I've submitted, the applications I've submitted and some of the questions I've asked, there's quite a bit of political influence in this.” Level III Tr. at 28. The record lacks even “circumstantial” evidence that these appointments were politically motivated. The records of some of the individuals selected show that they have been politically active, but this alone does not prove by a preponderance of the evidence that they were provisionally appointed for political reasons.

It appears that Grievant's frustration has resulted because the provisional appointments were made without a wide field of applicants being allowed to apply. This frustration is somewhat understandable; however, the appointments were made in compliance with Section 9.3, which does not even require that “applications” be taken. It only states that the appointing agency may select an individual to fill the position on a temporary basis, who meets the minimum requirements of the position. From the evidence submitted, it can only be concluded that the requirements of the Administrative Rule were followed.

Finally, it is somewhat unclear whether Grievant believes he should have been placed in one of the temporary positions at issue. His only requested relief was that “unqualified individuals” be removed from the positions and that DOH be ordered to discontinue its allegedly unfair selection practices. However, even if Grievant wished to be placed in one of the positions, the evidence would not support such a decision. As discussed above, Section 9.3 does not require that the “most qualified applicant” be placed in these temporary appointments. Moreover, at level three, Grievant provided no evidence of his own qualifications, and, at level four, he merely attached his resume to his grievance form, without requesting that it be placed in evidence. Nevertheless, even if Grievant's qualifications were properly in evidence in this grievance, they would be irrelevant, in theabsence of any evidence that the individuals selected to fill the appointments were not minimally qualified. Since this has not been proven, a comparison or discussion of Grievant's qualifications is unnecessary.

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6; Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. An agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

3. Provisional appointments may be made until a position can be filled through posting and selection from a register, so long as the individual selected meets the minimum training and experience requirements of the position. West Virginia Division of Personnel Administrative Rule, Section 9.3 (1998).

4. Grievant has failed to prove by a preponderance of the evidence that the individuals selected to fill the provisional appointments for the newly created positions of District Administrator and Assistant District Administrator were not minimally qualified for the positions. 5. Grievant

has failed to establish that the selections at issue violated any statute, policy, rule, regulation, or written agreement applicable to his employment situation.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or 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 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 24, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented himself; DOH was represented by counsel, Krista L. Duncan; and the Division of Personnel was represented by Acting Director Joe E. Smith.

Footnote: 2

The positions at issue had been posted by the time the level three hearing was held, but they had not yet been filled. Therefore, if Grievant were to prevail, he could still potentially receive relief; i.e., placement in one of the temporary positions.