RON CORBIN,

Grievant,

v. **Docket No. 00-HHR-241**

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES/BUREAU OF CHILD

SUPPORT ENFORCEMENT,

Respondents.

DECISION

Grievant, Ron Corbin, is employed as a Legal Assistant in the Bureau of Child Support Enforcement ("BCSE") in the Department of Health and Human Resources ("HHR" or "Agency"). His Statement of Grievance reads:

> I believe I have been discriminated against and treated unfairly by being passed over for the position of Central Registry/Locate Supervisor for a person less qualified in violation of State law.
>
> Relief Sought: I want the position.

After the Level III hearing, Grievant added the following to his Statement of Grievance, after the phrase "in violation of State law":

> and regulation. Specifically, the selecting official violated Department of Health and Human Resources' Policy Memorandum 2160. This is particularly egregious as the person to whom the position was given was found by the Level III Hearing Examiner to be unqualified for the position. I further believe this non-selection was in retaliation for grievances I have filed in the past.

Apparently, the relief sought, placement into the position, was unchanged.

This grievance was filed on January 7, 2000, and it was denied at all lower levels. Grievant appealed to Level IV on July 26, 2000. The Level IV hearing was held onSeptember 26, 2000, and

this grievance became mature for decision on November 6, 2000, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

First, it should be noted that the grievance filed at Level IV was significantly different than the initial grievance. A copy of this changed grievance was not sent to Respondent, but the new Statement of Grievance was read into the record at Level IV without objection from Respondent. Thus, all the issues raised in the new Statement of Grievance will be addressed in this Decision. (See footnote 2)

Grievant asserts several arguments. One, he was the most qualified candidate for the position. Two, the successful applicant was not minimally qualified for the position; thus, that selection must be rescinded, and HHR is required to place him in the position. Third, Grievant argues, the decision not to select him for the position was reprisal for filing a "smoking" grievance in the early 1980's. (See footnote 3)

Respondent notes the decision whether the successful applicant, Connie White, was minimally qualified for the position was made by the Division of Personnel ("DOP"), and HHR was informed by DOP that Ms. White met the minimum qualifications for the position prior to the selection interviews. Following the interviews, Ms. White was selected. Respondent also maintained Grievant has not proven he was the most qualifiedcandidate as he did not demonstrate he was more qualified than the third in-house candidate interviewed for the position. Respondent notes that while the successful applicant's qualifications were discussed in detail, almost no data was given on the third candidate. Respondent also explained that although Grievant met the basic requirements for the position, he was not an appropriate candidate for this supervisory position, as he has had repeated difficulty relating to and interacting with co-workers and supervisors for many years. Respondent noted the "smoking" grievance was so long ago in time as to not be applicable to the current non-selection, Grievant did not prove retaliation, and Respondent had valid reasons for the non-selection of Grievant.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by HHR for approximately 30 years. He has worked with BSCE since 1976, and is currently classified as a Legal Assistant.

2. In September 1999, HHR posted the Child Advocate Administrative Assistant position, with a closing date of September 10, 1999.

3. Many employees and non-employees applied. Ms. Sue Grimes, BSCE Director of Central Operations, decided to interview the in-house candidates first, as she believed in promoting from within.

4. Ms. Grimes sent the in-house candidates' applications to DOP for an assessment of whether they met the minimum qualifications for the position. 5. Initially, the successful applicant, Connie White, was found to not meet the minimum qualifications. She was notified of this result by Ms. Grimes, and as is typically done, Ms. White submitted further information to DOP.

6. The amended application was reviewed by two DOP Personnel Specialists, one a Senior Specialist, and by letter dated November 3, 1999, Ms. White was found "to meet the requirements for the classification at any rate of pay." Grt. Ex. No. 11, at Level III.

7. Two other in-house applicants were found to meet the minimum qualifications, Grievant and David Whittingham.

8. Respondent relied on this assessment of DOP in making its selection.

9. DOP is the agency with the authority, expertise, and duty to assess if candidates or successful applicants meet the minimum qualifications for a position, and, if in-house, what the rate of pay can be.

10. Interviews were conducted by Ms. Grimes and Mr. Frank Lewis, the then BCSE Central Registry Supervisor, on December 2, 1999.

11. The same questions were asked of each candidate, and all candidates performed well during the interview. Both Mr. Lewis and Ms. Grimes took notes during the interview. After she made the decision, Ms. Grimes threw her notes away; the applications, etc., were retained. (See footnote 4)

12. Because of her long tenure with BCSE in a supervisory positions, Ms. Grimes was familiar with all the candidates and their work performance.

13. After the interviews, Ms. Grimes talked to numerous supervisors and co- workers of the applicants to obtain their input into the selection. She also reviewed the candidates' personnel files.

14. In Grievant's personnel file she found the following documents:

a) An undated petition for Grievant's transfer signed by 67 of his co-workers with the rationale of invasion of staff's privacy and disregard of policies (this petition was believed to be from approximately 1985 or 1986).

Resp. Ex. No. 7, at Level III.

b) A June 24,1985 written reprimand for:

1) entering his supervisor's office unannounced and without an appointment while the supervisor was in a meeting; and

2) utilizing the Absent Parent Data System to obtain information on "the former husband and present fiancé of an Area employee". It was noted that the second action violated numerous Agency Policies.

Resp. Ex. No. 3, at Level III.

c) A June 7, 1990 written reprimand for establishing a business relationship with a client of the Agency. Grievant went to the client's home and paid her to cut his and his son's hair on two separate occasions. The client complained and believed Grievant would not provide her services if she refused to perform this service. These actions of Grievant were against Agency policy.

Resp. Ex. No. 4, at Level III.

d) A May 16, 1991 memo from a female Child Advocate Attorney to her supervisor complaining Grievant engaged in the following acts:

1) April 22, 1991 - Failure to report to work;

2) April 23, 1991 - Taking annual leave without proper prior permission;

3) May 6,1991 - Inappropriate touching of the Child Advocate Attorney;

4) April 29, 1991 - Grievant asked the Child Advocate Attorney to let him go against routine and make a home visit on the day when he was the worker of the day. He became upset when the Child Advocate Attorney would not permit this deviation. During this conversation he permitted the client to listen to the exchange, and then complained to the client about the Child Advocate Attorney's behavior.

5) Date uncertain - Child Advocate Attorney told Grievant he could not make a home visit to verify a pleading, the client must come to the office. Grievant allowed the client to listen to the conversation between the Child Advocate Attorney and himself and then complained to the client.

6) At the end of this memo, the Child Advocate Attorney questioned whether Grievant had been abusing his sick leave.

Resp. Ex. No. 5, at Level III.

e) A July 26, 1999 four page letter from Grievant to his supervisor Mr. Lewis complaining about having to attend workshop on domestic violence. Grievant stated the workshop was offensive, sexist, worthless, and inaccurate. He compared one of the leaders to a Nazi, and believed the atmosphere was one of "male-bashing". He stated "many domestic violence complaints were nothing more than unilateral accusations by the wife to gain advantage in a divorce, property or custody battle." He noted many of the complaints are later dropped after the wife gains an advantage, and that domestic violence warrants are "a serious waste of Judicial time." He also compared domestic violence to sexual harassment in the work place as portrayed by Michael Crichton in his novel Disclosure.

Additionally, Grievant reported how ashamed, angry, and embarrassed his colleagues were by his behavior, and how they requested and demanded that he be quiet instead of continuing to argue with the workshop leaders. He further called the person who set up the workshop a "dingy".

Resp. Ex. No. 6, at Level III.

15. No disciplinary actions were found in the successful applicant's personnel file. No information was provided about any disciplinary action against the third candidate.

16. In making her selection for the best person for the position, Ms. Grimes took into consideration the following factors: education; experience with the agency; interactions with

supervisors, former supervisors and co-workers; information in the personnel file, including disciplinary actions; and interview performance. The key factor Ms. Grimes identified for this supervisory position was the ability to interact well with co- workers and supervisors. Test. Ms. Grimes at Level III Hearing.

17. HHR Policy Memorandum 2106 dated February 28, 1992, discusses guidelines and regulations for Employee Selection. Section VII explains that the records of the selection process are to be maintained for one year following completion of the selection process. The exact records that are to be retained are not specified.

18. Section IX of Policy Memorandum 2106, at B5, states that the Chart OPS - 13 (See footnote 5) , Applicant Interview Rating, should be used as a tool in selecting a candidate, but "it is not necessarily the deciding factor." This Section's different factors are to be utilized depending of the needs and duties of the position, and notes the best candidate for the position might not be the one with the best interview or the most education. Section IX of Policy Memorandum 2106, also at B5, requires that significant factors in the employment decision be documented. 19. Ms. Grimes did not fill out OPS-13 when selecting the successful applicant, nor was she apparently aware of this form. (See footnote 6) Test. Ms. Grimes at Level III Hearing.

20. Section IX of the Policy Memorandum 2106, at B6, states the following factors should be considered during the selection process: demonstrated ability, work history, references (for outside candidates), education, and the interview. "The ultimate selection decision should be based on the interviewer's judgement as to which candidate would best do the job."

21. Ms. Grimes's personal knowledge as a long-term supervisor, as well as her review of Grievant's personnel file, revealed Grievant had multiple problems for many years with interpersonal skills and following Agency Policies. Ms. Grimes had repeatedly received complaints about Grievant's conduct from co-workers and supervisors. This information was supported by the Interrogatory responses of co-worker Kim Toler, a Legal Assistant, who described Grievant's behavior as "childish, annoying, over-bearing, pushy, and harassing, at times." (See footnote 7) Resp. Ex. No. 2, at Level III.

22. On January 6, 2000, Ms. Grimes announced the selection of Ms. White for the Child Advocate Administrative Assistant position. (See footnote 8) The employees were not ranked for the position. 23. Little information was given about the third in-house candidate, but he had greater experience and education than Grievant and the successful applicant.

24. DOP's reviewers concluded at the Level III hearing that from the information presented there, the successful applicant was not qualified for the position, as she did not possess the specific type of supervisory experience required in the class specification. (See footnote 9) Both DOP employees believed there must have been additional information presented to them, but it was not found in the information given to Grievant's attorneys and placed in the record. Although the successful applicant was a witness at the hearing and was asked about her education and experience, Grievant did not ask her if the information he possessed was all the material she had presented to DOP in her amended application.

25. The undersigned Administrative Law Judge takes administrative notice that the minimum qualifications for the Child Advocate Administrative Assistant position have now changed, and the successful applicant would now be qualified for the position at issue in this grievance if it were reposted.

26. In approximately 1982, Grievant filed a grievance to separate smokers and nonsmokers. This grievance upset many co-workers and managers. During that period Grievant was harassed, and although he reported this harassment, he believed management did nothing to support him or protect him from this harassment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23- 174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). It may not be determined by the number of witnesses, but by the greater weight of all evidence, the witnesses' opportunity for knowledge, information the witnesses possess, and the witnesses' manner of testifying; these factors determine the weight of the testimony. Black's Law Dictionary, 5th Ed., p. 1064. "If the evidence is evenly balanced between the parties, there can

be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772, 98 S. E. 2d 712 (1957).

In a selection case, the grievance procedure is not intended to be a “super interview,” but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes that promotion decisions are largely the prerogative of management. While individuals selected for promotion should be qualified and able toperform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such promotion decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR- 070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89- WCF-208/209 (Aug. 7, 1989). An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault, supra. Grievant's burden is to demonstrate Respondent violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. Surbaugh v. Dep't of Health and Human Serv., Docket No. 97-HHR-235 (Sept. 29, 1997). If the Grievant can demonstrate that the selection process was so significantly flawed that he or she might reasonably have been the successful applicant if the process had been conducted in a proper fashion this Board will require the employer to review the qualifications of the grievant versus the successful applicant. Thibault, supra; Jones v. Bd. of Trustees/W. Va. University, Docket No. 90- BOT-283 (Mar. 28, 1991).

"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 Healthand Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D.

Va. 1982)). "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 [an agency]. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra; See Hattman v. Bd. of Directors, Docket No. 98-BOD-439 (Apr. 30, 1999).

Generally, when applying an "arbitrary and capricious" standard of review, the inquiry is limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94- 20-537 (Mar. 22, 1995). Further, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286. 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. Additionally, "[t]he employerretains the discretion to discern whether one candidate has superior qualifications than another, without regard to seniority as a factor." Lewis v. W. Va. Dep't of Admin., Docket No. 96-DOA-027 (June 7, 1996). See Board v. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2,1999).

Here, Grievant demonstrated that pursuant to the evidence presented at hearing, the successful applicant was not minimally qualified for the position. However, that is not the end of the discussion. Ms. Grimes made it crystal clear that education and experience were not all that was required for the position. The key quality for the person who was to be selected would be the ability to work closely and well with supervisors and co-workers. Grievant had previously demonstrated his inability to do this, and had demonstrated his difficulty in accepting legitimate management decisions and following Agency rules and regulations. Grievant's response to these written reprimands and other documents was that it did not matter if he broke the rules if he got the job done. This attitude is not one a rule-intensive agency such as HHR is likely to want in a supervisor.

It was noted by the undersigned Administrative Law Judge that many of the written reprimands were many years ago, and they alone would not carry much weight, but Ms. Grimes credibility testified that Grievant's behavior has continued, and she has frequently received complaints about

Grievant and passed these on to his immediate supervisors. Additionally, the letter referred to in Finding of Fact 14 was only six months old at the time of the selection, and shows Grievant's disregard for management decisions, and his blatant hostility when he is required to listen to material with which he disagrees. Further,in this letter Grievant reported his co-workers' embarrassment over his behavior at the workshop and their unsuccessful attempts to get him to curb and/or control his tongue.

Accordingly HHR's management reasonably concluded from Grievant's past behavior that he would not be a good supervisor. It was clear from the testimony that, even if Ms. White had not been chosen as the successful applicant, Grievant would still not have received the position for the reasons discussed above.

It should be noted that while Grievant certainly has a right to express his opinions, Ms. Grimes and HHR also have a right, and indeed a duty, to select an employee with the management and people skills necessary to the position. See Sheppard and Gregory v. Dep't of Health and Human Resources, Docket Nos. 97- HHR-186/187 (Dec. 29, 1997). An agency is not required to select an employee who would be unable to complete successfully the duties of a position. This action would be unfair to the agency, to the applicant, and to the citizens they serve. It is also noted that there were qualified outside applicants for the position.

Consequently, in this case, the record does not support a finding that the agency acted in an arbitrary or capricious manner, relied on improper factors, ignored important aspects of the candidates' credentials or their background, expressed their decision in a manner contrary to the findings, or reached an implausible decision.

The issue of retaliation will be discussed next. W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant, witness, represen tative or any other participant in the grievance procedure either for an alleged injury itselfor any lawful attempt to redress it." To demonstrate a prima facie case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Gruen, supra. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has not established a prima facie case of reprisal. Although Grievant did file a "grievance" which apparently caused a great deal of dissension, this act occurred almost twenty years ago, and the resolution of this issue was approximately fifteen yearsago. Thus, Grievant's non-selection, "the adverse action" did not follow "within such a period of time that retaliatory motivation can be inferred."

While Grievant did testify he was told in the mid-1980's by both co-workers and management that he would never receive a promotion, he only identified one person who made such a statement. This individual was only a back-up supervisor, who did not have any administrative responsibilities. Additionally, she left HHR approximately ten or fifteen years ago. Further, although not essential to proving retaliation, Grievant did not identify any other promotions he sought and did not receive. This information would have been helpful in demonstrating the pattern Grievant believes exists. (See footnote 10) Thus, the undersigned Administrative Law Judge finds Grievant has not established a prima facie case of reprisal.

Even if Grievant had met his burden of proof, Respondent has demonstrated legitimate, non-retaliatory reasons for its decision not to hire Grievant in the Child Advocate Administrative Assistant

position. The position requires an individual who will follow Agency decisions, enforce rules and regulations, and has the proven ability to workwell with others. Grievant has not shown an ability to do this. Although it is clear Grievant has the education and experience, it is also clear Grievant has difficulty accepting directions and orders from others. Since there was no evidence that the previous regulations and directions were unreasonable, but indeed were "legitimate", Respondent's decision not to hire Grievant in the position cannot be found to be arbitrary and capricious or clearly wrong.

Grievant has failed to establish that he would have been selected for the position, was the most qualified candidate for the position, or even that he was qualified for the position given its requirements, even if it were reposted and the applicants were reassessed; thus, he has not met his burden of proof and this grievance must be denied. (See footnote 11)

This situation that was caused by neither HHR nor the successful applicant. Given the following factors, the undersigned Administrative Law Judge declines to change the status quo. First, by the time this Decision will be issued, the successful applicant will have eleven of the twelve required months of experience. (See footnote 12) Second, the class specification was changed on June 12, 2000, and the successful applicant would bequalified for the position by those standards. Third, although Grievant met the minimum qualifications for the position, Ms. Grimes did not believe Grievant was a proper choice for the position because of the reasons previously listed above. Thus, a reposting would serve little purpose in this particular situation.

Grievant has also argued HHR did not follow all the requirements identified in multi- paged Policy Memorandum 2106. It is noted Ms. Grimes did follow almost all the requirements. Nevertheless, Grievant's assertion is correct; Ms. Grimes did not utilize the required form, even though she considered the factors outlined on this form. She also did not retain her notes for one year. Notwithstanding this failure, Grievant has failed to demonstrate how these defects have caused him harm. Ms. Grimes was clear in the factors she used to make her selection, she was clear in why she did not believe Grievant was the proper person for the job, and Ms. Grimes followed most of the key requirements listed in this multi-page Policy.

The above-discussion will be supplemented by the following Conclusions of Law.

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 Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. While individuals selected for promotion should be qualified and able to perform the duties of their new position, absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such promotion decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehabilitation Serv., Docket No. 98-RS-126 (Aug.3, 1998); Ashley v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR- 070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89- WCF-208/209 (Aug. 7, 1989).

3. An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

4. Grievant failed to prove he was qualified for this supervisory position, or that HHR's decision was otherwise arbitrary and capricious or clearly wrong.

5. Grievant has failed to prove by a preponderance of the evidence that HHR's action in selecting Ms. White for the position in question was unreasonable or arbitrary and capricious in any respect, as its decision was predicated upon DOP's assessment the successful applicant was qualified for the position.

6. Reprisal is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. Va. Code § 29-6A-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by proving the following elements:

1) that he/she engaged in protected activity, e.g. filing or participating in a grievance;

2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and/or

5) the adverse action followed the employee's protected activity within such a period of time that retaliatory motivation can be inferred.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986) ; Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94- BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

7. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverse action. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

8. Grievant did not establish a prima facie case of retaliation, as he did not demonstrate that his non-selection, "the adverse action", followed "within such a period of time that retaliatory motivation can be inferred."

9. Even, if assuming arguendo, Grievant established a prima facie case of retaliation, Respondent demonstrated a legitimate nondiscriminatory reason for not selecting Grievant for the position at issue. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). 10. Grievant has failed to establish that he would have been selected for the position, was the most qualified candidate for the position, or even that he was qualified for the position given its requirements, even if it were reposted and the applicants were reassessed; thus, he has not met his burden of proof and this grievance must be denied.

11. Grievant has not shown where he was harmed by the failure of HHR to follow each and every requirement of Policy Memorandum 2106, specifically the utilization of form OPS - 13, and the retention of her notes for one year.

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." Any 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: November 30, 2000

Footnote: 1

Grievant was represented by attorneys Debra Price and Robert Sayre, and Respondent HHR was represented by Assistant Attorney General Anthony Eates.

Footnote: 2

It also appears many of these issues were discussed during the Level III hearing.

Footnote: 3

It is noted the Grievance Board was not in existence at that time, and his grievance was handled through another mechanism other than the current grievance procedure.

Footnote: 4

No information was given about whether Mr. Lewis kept his notes, and this question was not asked by Grievant.

Footnote: 5

This acronym was not explained.

Footnote: 6

Contrary to Grievant's assertions, Ms. Grimes, per her testimony, did review many materials and considered multiple factors in making her decision. She relied on DOP to assess education and experience and did not see any reason to address these issues further.

Footnote: 7

Grievant sent out interrogatories to multiple employees prior to the Level III hearing.

Footnote: 8

She informed the applicants earlier of this decision.

Footnote: 9

The successful applicant had many years of supervisory experience prior to her employment with the state, but it was

not the specific type then required on the class specification.

Footnote: 10

At the Level IV hearing, Rita Straight, a co-worker, testified multiple people had treated Grievant badly over the years because of the smoking grievance. She gave no specifics other than her opinion. She identified the petition referred to in Finding of Fact 14 as being related to the smoking grievance and stated many people were pressured to sign it. Two of the people she believed had treated Grievant badly were his most recent supervisors about whom Grievant had no complaints. Further, one of these supervisors had recommended Grievant, as well as others in his Section, to receive a reclassification and ten percent pay increase.

Grievant also presented an unsworn statement of a currently employed co-worker dated September 25, 2000, in lieu of her testimony. This letter was admitted over the objections of HHR's attorney, but it was noted at the time that it was hearsay and could be afforded little weight. This statement said Grievant was a good worker, but did not say he had been treated badly because of the smoking grievance.

Footnote: 11

As for the successful applicant being unqualified for the position, HHR's action in selecting Ms. White was not arbitrary and capricious. Its decision was based on DOP's assurance Ms. White was qualified, and DOP is the Agency with the authority to make such assessments. HHR is to rely on DOP's decisions in these matters, and this is what HHR did. Accordingly, there was no evidence presented that the application of Ms. White was improperly considered. DOP said the successful applicant was qualified, and HHR considered her. Seven months later, after Ms. White was selected and was performing the duties of the position, DOP changed it mind, possibly based on incomplete data.

Footnote: 12

Even if the position were to be reposted, the successful applicant would be allowed to keep the experience she has earned in the position because the necessity for reposting was not caused by any wrongdoing on her part.