LUKE SIMPLICIO,

Grievant,

v v.

Docket No. 03-DOH-288

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondents,

D E C I S I O N

Grievant, Luke Simplicio, filed this grievance on July 18, 2002, against his employer, the Division of Highways ("DOH"). His Statement of Grievance states:

> I was the most qualified candidate for the position of Crew Leader and was passed over in favor of a close personal friend of the County Administrator. The selection process produced a pre-ordained outcome, even though I had more experience, more years of service, more seniority performing the essential requirements of the job, and more detailed knowledge of the work territory.
>
> The following statement was added prior to Level III without objection.
>
> I believe that steps have been taken at work to undermine me and adversely affect my job performance in retaliation for my filing this grievance.
>
> Relief sought: I seek advancement to the Crew Leader position and back pay.

This grievance was denied at all lower levels. Grievant appealed to Level IV on September 17, 2003, and a Level IV hearing was held in the Grievance Board's Beckley office on February 20, 2004. This case became mature for decision on May 10, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts he was the most qualified applicant for the position, and should have been selected for the position. Grievant also asserts he has been retaliated against for filing this grievance. Respondent maintains the most qualified applicant was selected, and Grievant's low productivity, behavior toward African-Americans, and "hardheadness" prevented him from being selected.

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

Findings of Fact

1. Grievant has been employed by DOH since May of 1987, and has been an Equipment Operator III since 1992. He has worked out of the Havaco Outpost for many years.

2. Earl Crigger is Grievant's supervisor and the McDowell County Supervisor. Mr. Crigger had worked for DOH in the eighties and nineties and then went to work for the McDowell County Board of Education from 1997 to 2001. He returned to work for DOH in September 2001 as a crew leader and shortly thereafter was placed in the County Supervisor position.

3. A position for a TCCMain, or crew leader, at the Havaco Outpost was posted from April 26, 2002 to May 10, 2002.

4. Grievant and four other employees applied.

5. Interviews were conducted on June 5, 2002, by Mr. Crigger and Christine West from District 10 Headquarters. The interviewers did not ask the applicant any questions about the supervisory knowledge, skills, or abilities. The interview questionsresponses among the applicants were similar. (See footnote 2) Ms. West did not participate in the scoring. 6. The next day, on June 6, 2002, Mr. Crigger recommended George Hampton for the position. Grievant ranked last, or next to last, in the list of applicants.

7. Mr. Hampton has been employed by DOH since May of 1990, and became an Equipment Operator III in August of 1997. His most recent evaluation prior to the selection was good, a score of 2.32. He worked out of the Yukon Outpost and had been a crew leader approximately ten times prior to his selection. The successful applicant is friends with Mr. Crigger. They have gone hunting and fishing together, and their families have socialized with each other.

8. Arlie Matney, also an applicant for the crew leader position, asked Mr. Crigger why he was

not selected. Mr. Crigger told Mr. Matney, Mr. Hampton was the most qualified person for the position. Mr. Crigger also stated Mr. Hampton would be retiring in a few years, and the DOH needed to take care of its employees. Test. Matney, Level IV Hearing.

9. Grievant has been upgraded to crew leader under various administrators hundreds of times over the past ten years, frequently reaching the ninety-day maximum. His recent evaluations have been satisfactory to good.

10. At times over the years, Grievant has yelled at the men on his crew. Additionally, Grievant occasionally curses at his crew. Grievant engages in these behaviors with both African-Americans and Caucasians. 11. In February 2002, Grievant disagreed with the way Mr. Crigger handled a request Grievant made for a mechanic to help him in the field. Grievant expressed his disagreement in writing to Mr. Crigger. Grievant also stated the employee Mr. Crigger sent to resolve the field problem was inexperienced. This employee was an African-American. Mr. Crigger then expressed in writing his disappointment with Grievant's behavior and method of handling the problem. Jt. No. 1, at Level IV. Grievant did not receive any discipline for this incident.

12. Contrary to Mr. Crigger's testimony, this incident was considered in his selection decision.

13. On March 13, 2002, Grievant's most recent evaluation (for the 2001 year) prior to the selection, was completed by Mr. Crigger. Grievant received a good score, 2.35, and was rated exceeds expectations in eight categories and meets expectations in the remaining categories. These exceeds expectations categories under "MAINTAINS FLEXIBILITY" were: "Willingly accepts a variety of responsibilities"; "Displays an openness to learning and applying new skills"; and "Is resourceful and generally seeks work process improvements." Under "DEMONSTRATES CREDIBILITY" Grievant was marked as exceeding expectations in "Shares information with others when appropriate." Under "QUANTITY OF WORK," Grievant was marked as exceeding expectations in "Work output matches the expectations established." Under "AVAILABILITY FOR WORK," Grievant was marked as exceeding expectations in three categories: "Employee's attendance supports the expected level of work"; Employee's presence can be relied upon for planning purposes"; and "Employee is a dependable member." Grievant was rated as meetsexpectations in the category of "Works well with others to achieve organization's goals." Grt. No. 7 at Level IV.

14. Grievant has not been upgraded to crew leader since his Level II grievance conference, and has been assigned to work mainly by himself since that time. (See footnote 3) Grievant received a

decreased score in his most recent evaluation, down to a 2.22.

15. DOH has a Temporary Upgrade Procedure which states that employees cannot be upgraded for more than ninety days in a year. This upgrade can be extended if legitimate justification is presented. W. Va. Admin. Operating Procedures, Temporary Upgrade Procedure, Section II, Chapter 12, Article 4.

16. For the year 2003, Equipment Operator III David Wayne Stroupe has been upgraded to a TCCMain for 1,344.5 hours or 168 days in violation of the Temporary Upgrade Procedure Policy. No special request was made to extend the ninety-day upgrade period in Mr. Stroupe's case.

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 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., 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). "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. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Credibility

The first issue to address is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health & Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1)

demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'information. **(See footnote 4)** **See Holmes v. Bd. of Director./W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

The testimony of Mr. Crigger is found to be at times false, misleading, and evasive. Mr. Crigger stated Grievant was not selected because of his past behavior, but Mr. Crigger had difficulty recalling occurrences of negative behavior that occurred before the selection process. Further, some of the prior events he did recall were complaints from African-Americans when he previously worked for DOH in the mid-nineties, and were prior to his return in 2001, as well as complaints made after the selection process. Mr. Crigger also gave conflicting testimony about the February 2002 incident. When asked to give examples of Grievant's behavior, he identified this incident as an example, but had previously testified this event had no bearing on the selection process.

II. Selection law

In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994). This Grievance Board recognizes that selection decisions are largely the prerogative of management. While the individuals who are chosen 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 selection decisions will not generally be overturned. Skeens-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health & Human Res., 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 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 can require the employer to review the qualifications of the grievant versus the successful applicant. Thibault, supra; Jones v. Bd. of Trustees/W. Va. Univ., 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 Health and Human Res., 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, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized asarbitrary 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Additionally, although not cited by the parties, the undersigned Administrative Law Judge will take judicial notice of the legal guidelines which DOH must apply when comparing candidates. See Ward v. Dep't of Transp./Div. of Highways, Docket No. 96- DOH-184 (July 24, 1997). W. Va. Code § 29-6-10(4) states:

> **For promotions within the classified service which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and his or her score on a written examination, when such examination is practicable. An advancement in rank or grade or an increase in salary beyond the maximum fixed for the class shall constitute a promotion. When any benefit such as a promotion, wage increase or transfer is to be awarded, or when a withdrawal of a benefit such as a reduction in pay, a layoff or job termination is to be made, and a choice is required between two or more employees in the**

> **classified service as to who will receive the benefit or have the benefit withdrawn, and if some or all of the eligible employees have substantially equal or similar qualifications, consideration shall be given to the level of seniority of each of the respective employees as a factor in determining which of the employees will receive the benefit or have the benefit withdrawn, as the case may be. When an employee classified in a secretarial or clerical position has, irrespective of job classification, actual job experience related to the qualifications for a managerial or supervisory position, the division shall consider the experience as qualifying experience for the position. The division in its classification plan may, for designated classifications, permit substitution of qualifying experience for specific educational or training requirements at a rate determined by the division.(Emphasis added.)**

Additionally, as cited in the Division of Personnel's Administrative Rules at Section 2. "Preamble":

> **The general purpose of the Division of Personnel is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its employees, and other incidents of state employment. All appointments and promotions to positions in the classified service shall be made solely on the basis of merit and fitness.**

Further, as cited in the Division of Personnel's Administrative Rules at Section 1.1 (a), "Method of Making Promotions":

> **In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.**

(Emphasis added).

III. Merits

Both applicants were minimally qualified for the position, and it is undisputed Grievant had more experience and seniority with DOH. However, these facts alone do not necessarily make Grievant's qualifications greater than or substantially equal to the successful applicant's. When a grievant and a successful applicant meet the minimum qualifications for the job, but one applicant is more qualified than the grievant, the qualifications are not substantially equal, and seniority need not be considered. Mowery v. W. Va. Dep't of Natural Res., Docket

No. 96-DNR-218 (May 30, 1997). "The 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 & Human Res., Docket No. 99-HHR-329 (Feb. 2, 1999).

Here, the qualifications of Grievant and the successful applicant were "not substantially equal" for the position at issue. Grievant had greater seniority and greater experience for the position. Grievant had served as a crew leader numerous times over the last ten years, and he had obtained his Equipment Operator III designation in 1992. By his own admission, the successful applicant had served as a crew leader only ten times and received his Equipment Operator III designation in 1997.

Additionally, even if Grievant and the successful applicant were found to be equally qualified, then Grievant should have received additional consideration as he was the most senior. W. Va. Code § 29-6-10(4). See Ward, supra. DOH's decision with this specific set of facts is arbitrary and capricious and does not reflect a consideration of the relevant factors. Bowen, supra. Sammons v. Dep't of Transp./Div. of Highways, Docket No. 00- DOH-150 (Aug. 17, 2000).

Mr. Crigger gave various reasons why Grievant was not selected for the position. The rationale for these contentions does not hold up under an examination of the facts revealed in the record, and Mr. Crigger's contentions give the appearance of having been determined after the selection.

First, Mr. Crigger stated Grievant was not selected because he was not productive. As demonstrated by the evidence, Grievant has worked frequently as a crew leader, and Mr. Crigger rated Grievant as exceeds expectations in the area of work output on his March 13, 2003 evaluation. Prior to that time, Grievant had also received good evaluations and there was no evidence submitted to prove Grievant was not productive. Accordingly, this reason put forth by Mr. Crigger for not selecting Grievant for the position must be rejected.

Second, Mr. Crigger stated Grievant was hardheaded and wanted to do things only his way. Again, Mr. Crigger had difficulty giving relevant examples of this behavior, other than the incident discussed in Finding of Fact 11, which Mr. Crigger specifically stated he did not consider in the selection process. Additionally, this issue was not addressed on Grievant's

recent evaluation. Indeed this evaluation rated Grievant as exceeds expectations on accepting responsibilities and meets expectation on works well with others. Further, both Grievant and Mr. Crigger agree this issue was not addressed verbally at the evaluation meeting.

As for Grievant's interactions with African-Americans this assertion of Mr. Crigger was not proven. From the testimony, it appears that Grievant "hollers" at any employee on his crew that is doing something he does not think is right or safe whether they are African-American or Caucasian. (See testimony of Respondent's and Grievant's witnesses at Level IV.) Grievant did admit he may have jokingly called some employees "monkeys" in response to being called a "Wop" and other derogatory names for Italians. He does not remember when this was, and there was no evidence presented that only African- Americans were present when this conversation took place.

III. Retaliation **Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the 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 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.

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); 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 v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

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 bya preponderance of the evidence that the offered reasons are merely pretextual. Webb, supra.

Grievant has established a prima facie case of retaliation. Shortly after filing this grievance, Grievant was no longer asked to serve as crew leader, while another individual served an excessive amount of time in violation of the Division of Personnel's and DOH's rules. Further, Grievant was required to work alone, and his performance evaluation score decreased by .12. Respondent did not offer legitimate, non-retaliatory reasons for these adverse actions. Accordingly, retaliation has been proven.

After consideration of all the factors and issues, and within this specific set of facts and circumstances, the undersigned Administrative Law Judge finds the selection of Mr. Hampton for the position was arbitrary and capricious and did not rely on the criteria to be considered.

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

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., 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). "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. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. In a selection case, the grievance procedure is not intended to be a “super interview,”

but rather, allows a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehab. Serv., Docket No. 93-RS-489 (July 29, 1994).

3. This Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. Skeens-Mihaliak v. Div. of Rehab. Serv., Docket No. 98-RS-126 (Aug. 3, 1998); Ashley v. W. Va. Dep't of Health & Human Res., Docket No. 94-HHR-070 (June 2, 1995); McClure v. W. Va. Workers' Compensation Fund, Docket Nos. 89-WCF-208/209 (Aug. 7, 1989).

4. 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.

5. 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). See Jones v. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-283 (Mar. 28, 1991).

6. "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 & 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 & Human Res., 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, 196 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

7. Given this specific set of facts and circumstances, the undersigned Administrative

Law Judge finds this selection decision to be arbitrary and capricious.

8. Reprisal is defined in W. Va. Code § 29-6A-2(p) as "the 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 redress it." 9. 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.**

See Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989); 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 v. Bd. of Directors/Concord College, Docket No. 95-BOD-281 (Mar. 6, 1997).

10. 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.

11. Grievant has established a prima facie case of retaliation.

12. Respondent did not rebut this prima facie case of retaliation. Accordingly, this grievance is GRANTED.

Respondent is ORDERED to instate Grievant into the TCCMain position with back pay, interest, and all other benefits to which he is entitled from the day Mr. Hampton was placed into the position.

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 StateEmployees 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: June 30, 2004

Footnote: 1

Grievant was represented by William Flanigan, Esq., and Respondent DOH was represented by its Attorney Barbara Baxter.

Footnote: 2

The undersigned Administrative Law Judge agrees with the Level III Hearing Examiner that the questions about supervision should have been asked of the applicants during the interviews, as the TCCMain position is a supervisory position.

Footnote: 3

Many employees have complained about working by themselves and feel these types of assignments are unsafe.

Footnote: 4

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).