THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBORAH L. HALE,

GRIEVANT,

v. **Docket No. 2010-1327-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS,

RESPONDENT, and

v.

KRISTEN COOK,

INTERVENOR.

DECISION

Grievant, Deborah L. Hale, is employed by the West Virginia Department of Transportation, Division of Highways ("DOH") as an Office Assistant III. Ms. Hale filed a level one grievance on April 1, 2010, stating as follows:

> I bid on the Administrative Services Manager 1 position in District Ten, DOT1000087, I was notified on March 16th, 2010 that the position was given to someone that Mr. Black felt was best qualified. The successful bidder has never worked in Highways, I have worked for 34 ½ years in the personnel field and would like to know why I was overlooked and Ms. Cook was chosen.

As relief, Ms. Hale requested the following: "I feel that I should have been given the opportunity for this position and the upgrade in pay associated with the position."

A conference was held at level one of the grievance process on April 16, 2010, and a decision denying the grievance was issued on May 5, 2010. Grievant appealed to level

two on May 14, 2010. The level two mediation held on July 9, 2010, was unsuccessful.

Grievant filed a timely appeal to level three on July 13, 2010, completing another Grievance form in which she listed the following as her statement of grievance:

> I bid on the ADMINSRVMGR 1 position on posting DOT 1000087, Jeff Black, (DOP), awarded this position to an individual with no experience with Highways or Human Resources. He ignored my experience with highways and the years of supervision I have with highways and the private sector his decision was based on Ms. Cook having the "feel" for HR, even though she has no experience. Mr. Black rated me, **no relevant experience,** but gave Mr. Cook, **Meets**, gave me **does not meet** in Possesses Knowledge, skills, and abilities. But yet again, put Ms. Cook, **Meets**, after review of her application and question you will find Mr. Black had no reason to give her meets on any of these areas. He not only ignored my **qualification, training and experience** he has put in writing his opinion of my work knowledge and experience, I want to know what his reasons were to belittle my years of hard work and dedication, in his own words he has labeled me **uneducated, inexperienced, and lacking skills**, as an OFASST3, you need nerves of steel, alligator skin, knowledge of all aspects of Highway administration, policy and procedures, and the ability to do all this with little or no recognition from the Division of Personnel.

See Grievant's Level 3 Grievance Form dated July 13, 2010. (emphasis included in original grievance form and attached second sheet).

In her filing dated July 13, 2010, Grievant stated the following as her relief sought:

> To be awarded the position of Administrative Services Manager 1 in district Ten, the 60% pay increase given to Ms. Cook, with back pay from the date of her hire, an explanation in writing from the DOP with clarification to why this discrimination was allowed to happen and how the DOP can ensure that this type of blatant discrimination does not affect another dedicated worker.

See Grievant's Level 3 Grievance Form dated July 13, 2010.

An Order was entered on July 30, 2010, granting intervenor status to Kristen Cook. On September 28, 2010, a level three grievance hearing was held at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person and by counsel, J. W. Feuchtenberger, Esquire. Respondent DOH was represented by counsel, Jason C. Workman, Esquire. Jeff Black, DOH Director of Human Resources, appeared in person as the agency representative. Intervenor Kristen Cook appeared in person *pro se.* The presiding Administrative Law Judge[1] noted on the record at the commencement of the hearing the Grievant's use of "DOP" in her grievance forms, is referring to DOH, and not the Division of Personnel.

At the conclusion of the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law by November 19, 2010. The Grievant and the Respondent submitted proposed Findings of Fact and Conclusions of Law to the Grievance Board by letters dated November 19, 2010. Such were received by the Grievance Board on November 22, 2010. Intervenor Cook did not submit proposed Findings of Fact and Conclusions of Law. Accordingly, this matter became mature for decision on November 22, 2010.

Synopsis

Grievant is employed as an Office Assistant III at the Division of Highways ("DOH"). She applied and interviewed for the position of ADSVMG 1 and was not the successful candidate. Based upon the evidence presented, Grievant has met her burden of proof in

[1] The undersigned was not the ALJ who presided over the Level 3 hearing. ALJ Wendy A. Elswick presided. ALJ Elswick left the WVPEGB in February 2011, and the undersigned was assigned this case thereafter.

establishing that Respondent's selection of Intervenor for the position was arbitrary and capricious. Therefore, the grievance is GRANTED.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant, Deborah L. Hale, is employed by DOH as an Office Assistant III (OA 3), in Wyoming County, West Virginia, in DOH's District Ten.

2. Grievant has been employed by DOH for over thirty-five years in this, or a substantially similar, capacity.[2] However, in years past, this position had at least one other title, "Clerk 4."

3. Until the year 2004, Grievant supervised two employees. As part of her supervisory duties, Grievant conducted these employees' evaluations and managed their time-keeping records.

4. In the year 2004, one of the employees whom Grievant supervised retired, and that position was not filled. In the year 2006, the other employee retired, and her position was not filled. Thereafter, Grievant became responsible for performing the duties and responsibilities of those two former employees.

5. In her position of Office Assistant 3, Grievant completes numerous tasks related to the field of human resources, including, but not limited to, completing human resources and personnel paperwork, accident reporting, requesting job postings, and time keeping. Grievant is further responsible for explaining insurance, retirement, workers'

[2] Grievant's position title has changed over the years, but her job duties have remained substantially similar.

compensation and unemployment compensation paperwork and related issues to employees.

6. Grievant performs certain functions in District Ten that deal with tracking the budget for materials and labor.[3]

7. Grievant performs some clerical duties and some data entry work in her current position, but that is not the full extent of her job duties.

8. Grievant utilizes her knowledge of various human resources issues, such as workers' compensation claims and reporting, affirmative action, EEO, and worker discipline procedures, in performing her job duties.

9. In the past, Grievant participated in interviewing candidates for employment in District Ten. Over the years, her participation in interviews has ceased. However in these interviews, Grievant has both participated as an active interviewer asking questions, and as a note-taker.

10. Until recent years, Grievant actively participated in evaluating DOH employees with her supervisors. However, she now only types the evaluation forms for her supervisor.

11. In her position as an OA 3, Grievant has been responsible for training newly hired office assistants.

12. Grievant has further management and human resources experience that she acquired while she and her late husband owned and operated a convenience store which employed, at times, between ten and thirteen individuals.

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[3] See testimony of Linda Langridge.

13. Grievant applied for the position of Administrative Services Manager I (ADSVMG 1) for DOH District Ten on September 29, 2009.[4]

14. The job posting for the ADSVMG 1 position lists the following as requirements for the position: " [t]raining: graduation from a regionally accredited college or university with the degree in the area of assignment. Substitution: experience as described below may substitute for the training requirement on a year-for-year basis. Experience: four years of full-time or equivalent part-time experience paid administrative or supervisory experience in the area of assignment. Special Requirement: A valid West Virginia driver's license may be required."[5]

15. The job posting for the ADSVMG 1 position lists the following as duties of the position:

> [u]nder administrative direction, manages an organizational unit providing administrative and support services, involves the supervision of professional, technical, and clerical employees. The scope of responsibility includes planning the operations and procedures; directing the work of employees; developing employees; evaluating unit operation; developing budget needs; researching new procedures and improvements; interpreting statutes, regulations and policies. Responsible for all personnel/payroll training, EEO, and drug/alcohol duties for District 10. Performs related work as required.[6]

16. Grievant, Intervenor Kristen Cook, who, at the time, was not employed by the

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[4] See Grievant's Exhibit 3.

[5] See Joint Exhibit 1.

[6] See Joint Exhibit 1.

State of West Virginia, and others interviewed for this position after applying.[7]

17. Both Grievant and Intervenor met the minimum qualifications for the ADSVMG 1 position.

18. Jeff Black, Director of Human Resources for DOT/DOH, and Gene Godfrey, Administrative Services Manager II, both from the district office level and not from the Wyoming County/District Ten office, conducted the interviews for the position of ADSVMG 1 on or about February 3, 2010. No one from the District Ten office participated in these interviews or the selection process.

19. In the past, individuals, unrelated to this matter, have filed grievances that were related to filling the ADSVMG 1 position in the District Ten office.[8]

20. Jeff Black and Gene Godfrey conducted these interviews at the request of the Commissioner, as part of the Commissioner's new initiative, "to take these [ADSVMG 1] positions out of the political realm," to make sure they were filled by professional, qualified people, and to have them play a direct role with the district office in the administration of the human resources functions in the agency.[9]

21. Grievant was not selected for the position of ADSVMG 1. Instead, another candidate, Intervenor, Kristen Cook, was selected for this position.

22. Intervenor, Kristen Cook, has a Bachelor's Degree in Business Management

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[7] It is not clear from the record how many people were interviewed for the position of ADSVMG 1.

[8] These other grievances have been decided and the decisions are now of public record. Those grievance matters do not otherwise relate to this action.

[9] See testimony of Jeff Black.

and Administration, with an emphasis in Finance from Concord University.

23. Intervenor's having a college degree was a key factor in her being selected for the position of ADSVMG 1.[10]

24. Kristen Cook took one course in human resources while in college.[11]

25. Kristen Cook provided Respondent with documentation of her degree at some point after her interview, as such was not attached to her application.

26. During her interview, Kristen Cook informed the interviewers that she was unfamiliar with topics such as affirmative action, EEO, and workers' compensation.[12]

27. Kristen Cook's application for the position of ADSVMG 1 contained factual errors as to her dates of employment with past employers Tamarack and Wildcat Trucking.

28. Ms. Cook's application indicated that she did not want her former employer, Tamarack, contacted by DOH during her application process. However, Ms. Cook explained her request by stating that she did not think her employment at Tamarack was relevant, as such had occurred five years prior to her application for employment at DOH.[13]

29. Ms. Cook's application stated that she had supervisory duties while working for two prior employers: Tamarack and Wildcat Trucking. In her application, Cook claimed to have supervised seven employees at Wildcat Trucking and fourteen employees at Tamarack. However, Ms. Cook admitted during testimony that she did not supervise any

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[10] See testimony of Jeff Black.

[11] See testimony of Kristen Cook.

[12] See Grievant's Exhibit 1.

[13] See testimony of Kristen Cook.

other employees at either job.

30. Documentation from Ms. Cook's former supervisor at Tamarack, Dwight E. Trent, obtained by Grievant for this proceeding, states that Ms. Cook had no supervisory responsibilities while she was employed at Tamarack.[14]

31. ADSVMG 1s at DOH are required to schedule drug testing for certain employees and to take necessary follow-up measures with those employees. The drug testing is administered and analyzed by a third-party contractor. The random sampling for the drug testing is also conducted by the third-party contractor.

32. Intervenor performed certain duties in her former position with Wildcat Trucking that related to drug testing the company's contract truck drivers. Intervenor arranged payment for the drug testing, ensured that drivers were tested, and made sure the drug testing results were sent to the drivers.[15] A third-party firm was contracted to collect samples and to perform drug testing for Wildcat Trucking.

33. The candidates for the position of ADSVMG 1 were interviewed by the same two interviewers, asked the same set of questions during their interviews, and they were rated by the two interviewers on a standard Application Evaluation Record form.

34. Jeff Black rated Intervenor as "Meets" for each of the following six qualification areas: education; relevant experience; possess knowledge, skills & abilities; interpersonal skills; flexibility/adaptability; and, "presentability." Black did not mark any

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[14] See Grievant's Exhibit 2.

[15] See testimony of Kristen Cook.

ratings for Intervenor in the categories of "optional measures" or "overall evaluation." [16]

35. Jeff Black rated Grievant as "Does Not Meet" in the following qualification areas: education; relevant experience; and, possess knowledge, skills & abilities. He rated the Grievant as "Meets" in the following qualification areas: interpersonal skills; flexibility/adaptability; and, "presentability." Black did not mark any ratings for Grievant in the categories of "optional measures" or "overall evaluation."[17]

36. Jeff Black noted on Grievant's Application Evaluation Record that [Grievant had] "no relevant education or professional HR experience. Has some technician type HR experience" despite Grievant's thirty-five year career at DOH working in the human resources field, her owning, operating, and managing a private business for fourteen years, and her having supervised two DOH employees for over twenty years while at DOH.

37. Jeff Black noted comments on Intervenor's Application Evaluation Record that he paraphrased[18] as follows: although experience is mainly in financial area she demonstrated in the interview a strong feel for the HR function, particularly, the experience at Wildcat Trucking, an environment that is similar to DOH. [A] Reference [is made] to [Intervenor's] CDL Drug Testing involvement at Wildcat Trucking.

38 Both Jeff Black and Gene Godfrey selected Intervenor, Kristen Cook, for the position of ADSVMG 1 primarily because of her having a college degree. Both characterized Intervenor's having a college degree as "critical."

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[16] See Grievant's Exhibit 1.

[17] See Grievant's Exhibit 3.

[18] See testimony of Jeff Black. This statement was paraphrased by Mr. Black because the copy of the Intervenor's Application Evaluation Record was illegible.

39. In addition to Intervenor's having a college degree, Jeff Black looked to Intervenor's experience, demeanor, and attitude as factors considered in her selection.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health 7 Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence 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). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met her burden. *Id.*

Grievant argues that she was the most qualified candidate for the position of ADSVMG 1,[19] and that Respondent's selection of Intervenor for this position was arbitrary and capricious. Grievant further asserts that the interviewers erred in rating her relevant training, experience, knowledge, skills, and abilities as she was evaluated as "does not meet [qualifications]" for these factors.

In a selection case, the grievant must prove, by a preponderance of the evidence,

[19] Grievant argues that she is the most qualified candidate because she is more qualified than the successful candidate.

that he was the most qualified applicant for the position in question. *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). 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).

The 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). 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*. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

"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 Hospital v. Health and Human Serv.,* 789 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and 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*, 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." *Id. (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*.

The interviewers, Jeff Black and Gene Godfrey, who also made the selection, stated that the Intervenor's having a college degree was a huge part of why they selected her. The position posting clearly states that the requirement of a college degree could be substituted with four years of experience. Therefore, even though Grievant did not have a college degree, she and Intervenor were both qualified for the job. Grievant's experience should have been considered in the selection process. At the time she was interviewed, Grievant had at least thirty-four years experience working for DOH in the human resources field and fourteen years experience owning, operating, and managing her own business. However, the interviewers gave Grievant no credit whatsoever for her experience, knowledge, and skills in her evaluation. Grievant also had extensive experience with DOH and State policies and procedures, as well as, with the operation of DOH. Again, the interviewers gave her no credit for this on her evaluation. The interviewers, Jeff Black and Gene Godfrey, instead characterized Grievant's work experience as "low level" and as "technical," as opposed to "broad" skills requiring "complex human resource decision-

making," as they asserted a college graduate, such as Intervenor, would have. The undersigned is not at all persuaded by Respondent's argument. Clearly, Grievant deserved to be given proper credit for her many years of work experience and practical knowledge.

The interviewers/selectors placed tremendous weight on Intervenor's possession of a college degree in making their selection. However, Intervenor's degree is in Business Administration with a concentration in Finance and Business Management. Her degree did not have a concentration, or focus, in the area of human resources. Further, Intervenor admitted that she had taken only one three-hour class in human resources while in college. In her interview, Intervenor informed the interviewers that she had no familiarity or experience with human resources issues such as affirmative action, EEO, and workers' compensation. It should be noted that one of the job duties listed on the posting explicitly involves EEO. Grievant, on the other hand, has extensive experience in, and a working knowledge of, affirmative action, EEO, and workers' compensation, in addition to many other aspects of human resources. The interviewers appear to have focused on Intervenor's attitude, demeanor, "HR feel,"[20] and her fit in making their decision, as opposed to focusing on concrete experience and relevant credentials.

Intervenor's application lists her work experience and her past duties. It troubles the undersigned that Intervenor listed incorrect dates of employment for two of her prior jobs. It further troubles the undersigned that the interviewers/selectors did not catch this error when checking Intervenor's references, which presumably occurred prior to Intervenor's

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[20]See testimony of Jeff Black.

hiring. The fact that Intervenor listed on her application that she supervised seven employees at one past employer and fourteen people at another, and such turned out to be false, is also very troubling. Regardless of whether Intervenor simply embellished her duties on her application, the interviewers/selectors should have discovered this discrepancy when checking Intervenor's references prior to offering her the job. Intervenor clearly testified at the hearing that she had no supervisory duties in her past jobs. This should not have been difficult to discover.

Grievant has supervisory experience with DOH, as well as in her role of owner, operator, and manager of her former private business. The interviewers discussed the Grievant's owning and operating a convenient store during the interview, and Grievant's application clearly shows that she supervised two employees at DOH. Still, the interviewers gave her no credit for any management experience on her evaluation. The interviewers erred in not assigning any credit to Grievant for this very relevant experience.

The interviewers/selectors appear to have placed a great deal of weight in making their decision on Intervenor's experience in dealing with the drug testing program at Wildcat Trucking. However, this experience is clearly clerical and involved what can only be described as "lower level" tasks, to use the words of Mr. Black. Intervenor scheduled the drivers for testing, arranged for payment for the testing, made sure the drivers appeared for testing, and then mailed the drivers the results. The samples were collected by a third-party administrator and the testing was performed by the same third-party administrator.

Further, the evidence suggests that at DOH, the ADSVMG 1 has a small role in the employee drug testing process. The ADSVMG 1 schedules the testing and possibly shows

up at the site. However, the drug testing is largely a pass-through function that is administered by a third-party contractor who performs the random sampling, collects the samples, analyzes the samples, and reports the test results. Dealing with employee drug testing is not a large part of the duties of the ADSVMG 1. However, this appears to be the only concrete experience that Intervenor had which coincided with a duty of the ADSVMG 1 position at DOH. It should also be noted that Wildcat Trucking did not even mention the Intervenor's drug testing work as part of her job duties and responsibilities on the DOH reference form it completed and submitted to DOH.[21]

Grievant's relevant work experience clearly exceeds the work experience of Intervenor. Grievant has experience interviewing employees, supervising and evaluating employees' performance, working with certain DOH budgetary matters in District Ten, completing appropriate personnel forms, accident reporting, dealing with workers' compensation issues, working with the employee disciplinary process, with DOH operations, and with DOH and State policies and procedures, among other things. Intervenor has no such experience. Grievant's experience is actual work experience that gives the Grievant a strong working knowledge of human resources subject matters. Intervenor has only a very limited amount of actual experience that would be transferable to the job of ADSVMG 1. Jeff Black indicated that he was not concerned with Intervenor's lack of knowledge in the areas of affirmative action, EEO, and workers' compensation. He commented that those were technical aspects of the job that she could learn. My question

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[21] It is also noted on this form that DOH states the Intervenor "has applied for employment with the Department of Transportation/Division of Highways as a *Trainee* and has given your name/company as a contact for an employment reference." (Emphasis added).

is who will teach her those aspects? Would it be Grievant? However, the undersigned simply cannot speculate on that issue.

If the Grievant and the Intervenor were on equal footing when they walked into their respective interviews (because they both met the minimum qualifications for the position), as they should have been, Grievant should have scored higher on the ratings than Intervenor had Grievant been properly evaluated and credited her knowledge, skills, and experience. However, such did not occur. Clearly, Grievant's evaluation was rated incorrectly and Grievant was not given credit where she was due. Instead, the interviewers/selectors overtly favored the Intervenor, rated her higher than Grievant, and proceeded to hire Intervenor granting her a salary well above the minimum starting salary for the position's classification.

It is well-settled that the grievance process is not to be a "super-interview." In reviewing the selection process of the position of ADSVMG 1 for District Ten, the evidence presented firmly establishes that Grievant was not given the ratings she deserved during her interview. It is also noted that Grievant has asserted, and Respondent has not contested, that Jeff Black excused himself from Grievant's interview a number of times due to his having a cough. It appears from the evidence presented that Grievant was not afforded a valid, professional interview at all. This evaluation of the selection process is certainly no "super-interview."

Given Grievant's extensive professional experience, knowledge, and skills, and the lack of a valid explanation for why Grievant was not given credit for the same during her

interview,[22] the undersigned can only conclude that the Respondent's selection of the Intervenor for the position of ADSVMG 1 in DOH's District Ten office is arbitrary and capricious. Therefore, this grievance is **GRANTED**.

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health 7 Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990). "A preponderance of the evidence is evidence 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). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met her 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 Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994).

3. The Grievance Board recognizes selection decisions are largely the

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[22]All of Grievant's work experience and duties were listed on her application and Grievant testified, and it was uncontested, that her duties and experience, including her owning, operating, and managing the convenience store, were discussed at the interview.

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). 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*. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

4. "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 Hospital v. Health and Human Serv.,* 789 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and 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*, 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." *Id. (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*.

5. Respondent's selection of Intervenor for the position of ADSVMG 1 was arbitrary and capricious.

6. Grievant has met her burden in this matter and has proved that the selection of the Intervenor was arbitrary and capricious, and that she was the most qualified candidate for the position of ADSVMG 1.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to place Grievant in the position of ADSVMG 1 in the DOH District Ten office in Wyoming County, West Virginia. Respondent is further **ORDERED** to increase Grievant's compensation with any and all additional pay and benefits she would have received, plus back pay, and appropriate statutory interest and benefits, beginning April 1, 2010.[23] It is noted that placing Grievant in the ADSVMG 1 position, results in Grievant being promoted to a higher pay grade than that of her current position of OA 3.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of

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[23]April 1, 2010 is designated as the interviews were conducted in February 2010, and Grievant's rejection letter was dated March 9, 2010. Therefore, it is reasonable to expect that the successful candidate would have started on April 1, 2010. However, nothing in the evidence presented states on which date the Intervenor started working at DOH.

its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: June 3, 2011.

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CARRIE H. LEFEVRE
ADMINISTRATIVE LAW JUDGE