THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KIMBERLY S. MURPHY,
Grievant,

v. **DOCKET NO. 2012-1264-MAPS**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/TYGART VALLEY REGIONAL JAIL
Respondent, and,

AMBER BROOKE CURRENCE,
Intervenor.

DECISION

Grievant, Kimberly S. Murphy, filed this grievance against her employer, the Regional Jail and Correctional Facility Authority, on May 4, 2012, challenging the selection of Amber Brooke Currence for the new position of Administrative Services Assistant I. Grievant alleged in the lengthy statement of grievance that she was the most senior candidate and was more qualified than the successful applicant; that she was the victim of age discrimination;[1] and that Respondent violated WEST VIRGINIA CODE SECTION 29-6-

---

[1] Inasmuch as Grievant has proven the selection process was flawed, this argument need not be addressed. It should be reiterated, however, WEST VIRGINIA CODE § 6C-2-2(d) defines discrimination, for purposes of the grievance procedure, as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." This definition encompasses all types of discrimination, including discrimination based on age. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by WEST VIRGINIA CODE § 6C-2-2(d). *Black v. Dep't of* Transp., Docket No. 99-DOH-362 (Jan. 21, 2000); *Clark v. Kanawha County Bd. of Educ.,* Docket No. 99-20-088 (Aug. 19, 1999). See *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995); *Hendricks v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-215 (Sept. 24, 1996).

10(4), 143 C.S.R. 1, Section 11.1, and West Virginia Regional Jail and Correctional Facility Authority Policy and Procedure Statement Documents No. 3003 dated May 15, 1997, and 3041 dated October 6, 2009. As relief, Grievant sought instatement "into the Adminstrative Services Assistant 1 position at the Tygart Valley Regional Jail with a fifteen percent increase which is in compliance with the WV Administrative Rule including all back pay, benefits, and interest to the date from selection on 17 April 2012."

A hearing was held at level one on May 15, 2012, and a decision denying the grievance at that level was issued on May 23, 2012. Grievant appealed to level two on May 25, 2012, and a mediation session was held at level two on July 19, 2012. Grievant appealed to level three on July 24, 2012. Two days of hearing were held at level three before the undersigned Administrative Law Judge, on November 7 and December 5, 2012, in the Grievance Board's Westover office. Grievant was represented by Bader C. Giggenbach, Esquire, Brewer & Giggenbach, PLLC, and Respondent was represented by Travis E. Ellison, III, Respondent's General Counsel. This matter became mature for decision on February 11, 2013, on receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was not selected for a newly created Administrative Services Assistant I position at the Tygart Valley Regional Jail, which was a Human Resources position for the facility. Grievant had been performing many of the duties of the position at the facility for several years, and her work had been essential to getting the facility operational at its inception. She was seen by her supervisors as a skilled, excellent employee. The successful applicant had been a state employee for less than two years, and had no

experience or education in the area of human resources, but was selected because the interviewers preferred her based on her performance in the interview, and it would cost less in terms of salary requirements to place her in the position. Grievant demonstrated that Respondent violated the statute which requires that consideration be given to seniority in situations such as this, and that the selection was made in an arbitrary and capricious manner.

The following Findings of Fact are made based upon the evidence developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Regional Jail and Correctional Facility Authority ("RJA") at the Tygart Valley Regional Jail ("TVRJ") as an Accounting Technician 3, pay grade 7. She has been in this position since January 2006, and has been a state employee for 23 years. Grievant is over 50 years old.

2. On February 16, 2012, notice was given in a Job Bulletin that applications would be accepted for an Administrative Services Assistant I, pay grade 10, at each of the regional jails in the State. The notice stated:

> The Regional Jail Authority plans to expand its administrative support in the area of Human Resources at various facilities statewide. *We are looking for persons with administrative support experience. Administrative Supervisory experience a plus.* You will perform administrative work in providing support services such as fiscal, human resources, personnel, records, payroll or procurement. Develops or assists in developing and implements plans/procedures for resolving operational problems and in improving administrative services. Work is typically varied and includes inter- and intra-governmental and public contact. Performs related work as required.

(Emphasis added.)

3. On February 21, 2012, the new Administrative Services Assistant I positions were posted.[2] The duties listed were:

> This position will serve as the human resource contact at the TVRJ to assist the central office as well as the employees with all human resource issues, including but not limited to all aspects of the hiring process, recruitment and retention issues, payroll issues, all benefit issues, worker's compensation issues, unemployment issues, leave and tenure issues. This employee must also maintain field files and monitor employee performance evaluations. This employee must have knowledge of regulations, process and procedures of the WV Regional Jail Authority, knowledge of general office practices, knowledge of state/federal laws and regulations, ability to collect and compile accurate information, the ability to prepare flowcharts, graphs and status reports, the ability to communicate with a wide variety of people both orally and in writing, and be able to perform basic arithmetic. This employee will distribute work to others, check the work of others, train subordinate employees, establish unit policy/procedures in the area of employment and other human resources and recommend new hires for approval.

4. RJA has in place Policy and Procedure Statement No. 3003, dated December 27, 1988, related to Oral Interview Boards. That Statement sets forth under "Policy" that "[t]he Authority shall employ, retain and promote those individuals who are best qualified to function in their respective job classification." It further states, "[c]ertain personality and behavioral characteristics can best be assessed in an interview situation; therefore, the Authority will consider the interview a critical element of the selection process." The Statement requires that "[a] written summary of the findings of the Oral Interview Board shall be submitted to the agency's personnel officer with a recommendation from the Board." The written summary is to be forwarded to the

---

[2] Wayne Armstrong, Director of Human Resources for RJA, testified that the position could be filled as a trainee position, but no documentary evidence was placed into the record to explain the differences between the position as posted and a trainee position, or how this would occur. Mr. Armstrong testified that he filled the trainee position.

Executive Director with the personnel officer's indication of whether he concurs. This policy does not state that salary is to be a consideration in the selection decision.

5. By Memorandum dated September 29, 2006, Department of Administration Cabinet Secretary Robert W. Ferguson, Jr., sent to all Cabinet Secretaries, Bureau Chiefs, and Agency Heads, information regarding appointments in the classified service. Attached to this Memorandum was a document developed by the Division of Personnel entitled Best Practices Regarding Appointments in the Classified Service, effective September 1, 2006. That document sets forth standards that should be applied to all merit system posted vacancies, and states that "due consideration" should be given to at least five applicants. Due consideration is defined as a review of the Division of Personnel application and an interview. This document offers guidance on how to conduct the selection process.

6. Grievant applied for the posted position at TVRJ, and six applicants were interviewed on April 11, 2012, by a three member interview panel. The members of the interview panel were Wayne Armstrong, Human Resources Director for RJA, Scott Villers, Administrator at TVRJ, and Katrina Kessel, an Administrative Services Assistant 3 for RJA, Mr. Armstrong's assistant. Mr. Villers has been the Administrator at TVRJ since October 2011, and was Acting Administrator for about two months before being named Administrator. Mr. Armstrong has been employed by the RJA since September 2011, and was employed by the Division of Corrections as the Director of Human Resources for over 10 years before accepting this position. From 1992 to 2001, Mr. Armstrong was the Administrative Assistant to the Director of Human Resources at the Department of Transportation. Ms. Kessel began working at RJA in February 2012. She was employed

in the same position at the Division of Corrections, in the Human Resources office, from 2007 to 2012.

7. Those interviewed were Grievant, Amber Currence, Teresa Johnson, Kelly Broughton, Mel Miller, and Cindy Graziano.[3]

8. Mr. Armstrong chose 21 questions to ask the applicants, from a bank of questions he has available to him from other interviews. One of the questions, "[h]ave you ever had to address HR policy issues that you thought may have been unlawful or not in accordance with professional principals," was asked of Ms. Currence, but was not asked of any of the remaining applicants. Mr. Armstrong chose these questions in order to try to get a general feel for the applicants, and to see how they interacted with him. Several of the questions, however, inquired as to the applicant's knowledge and experience in duties of the posted position as listed in the posting.

9. All three interviewers took notes on the answers given during the interview. Mr. Villers scored the answers, using 1 as the lowest rating and 5 as the highest, and he scored all those interviewed in the areas of manner, appearance, self-expression, visual contact, responsiveness, and sincerity of answers. Mr. Villers did not note on his interview sheets that Grievant appeared nervous and stumbled over wording, but recalled this from his memory at the hearing, even though he recalled very little else about his reasons for assigning particular scores.

---

[3] Some of the applications were submitted after the closing date in the posting. The Division of Personnel's Legislative Rules provide at Section 9.5 that applications may be accepted after the closing date.

10. In scoring the answers given during the interview, Mr. Villers did not score the adequacy of the answer, or whether the answer indicated that the applicant had any background in the subject area, but rather, his scoring was totally subjective, based on the way the answer was delivered, that is, the body language and tone.

11. Ms. Kessel rated some of the applicants on manner, appearance, self-expression, visual contact, responsiveness, and sincerity of answers, and some of the applicants on the answers to the questions. At some point Mr. Armstrong told her she did not need to rate the applicants, and she quit doing so.

12. Mr. Armstrong did not rate the answers of any of those interviewed, nor did he score any of the applicants on any category. He did make notes beside the questions.

13. Mr. Armstrong acknowledged that "in a perfect world" the applicants should be scored on the responses to the questions. Mr. Armstrong had one month to fill ten new human resources positions at the regional jails across the state. Mr. Armstrong did not spend a lot of time reviewing the many applications received for these positions.

14. One of the questions asked during the interview was, "[w]hat kind of people do you find the most difficult to work with? Why?" Grievant's response was that she found younger kids most difficult to work with because they had a chip on their shoulder, or felt they are owed something, and they need guidance. Mr. Villers thought this was a horrible answer because most of the employees at the TVRJ are young. Mr. Villers did not indicate in his testimony, however, that he was aware of Grievant having any real difficulty working with anyone at the facility during her many years of employment there.

15. Mr. Villers was not provided with the applications of any of those interviewed so that he could review their work experience. Ms. Kessel had reviewed the applications of all applicants for all the positions posted.

16. At the conclusion of the interviews, Mr. Armstrong asked Mr. Villers and Ms. Kessel who their top three candidates were. Mr. Villers told Mr. Armstrong his top three candidates were Ms. Currence, Ms. Johnson, and Grievant, in that order. Ms. Kessel told Mr. Armstrong her top three candidates were Ms. Currence, Ms. Graziani, and Grievant, in that order.

17. Ms. Kessel did not consider seniority in making her choices because she believed that it did not play a role when the applicants are all minimally qualified, and she did not rate the applicants on the adequacy of their background and experience.

18. Mr. Armstrong made the decision as to who should be selected, and he selected Ms. Currence for the position, effective May 1, 2012. Mr. Armstrong did not provide a written summary of his findings for his supervisors.

19. In making his decision, Mr. Armstrong considered the interview to be the most important factor. He also considered the fact that if he chose Ms. Currence, the cost of placing her in the position would be significantly lower than the cost to place Grievant in the position, because Ms. Currence made just over $18,000.00 annually, while Grievant made $32,616.00 annually, and both would be entitled to at least a 15% pay increase if placed in the position. Mr. Armstrong gave very little consideration to experience. He saw this as an entry-level position, and intended to train the successful applicant. Mr. Armstrong saw no need to consider the Division of Personnel's Best Practices guidelines.

20. Mr. Armstrong gave no consideration to seniority in making his decision.

21. Mr. Armstrong did not believe Grievant performed well during the interview. He supported this conclusion by relating that the first thing Grievant said during the interview was that she wanted a 15% increase in pay, and that she said it several times, which "turned him off." None of the notes taken by any of those conducting the interviews mention that Grievant said anything about a 15% increase in pay at any time during the interview. The question most likely to have elicited such a response was the second question, which was, "[w]hy are you leaving your present job?" Ms. Kessel's notes indicate that Grievant said she was ready for a new challenge, was excited to start in the HR position, and had the knowledge to do the work. Mr. Armstrong's and Mr. Villers' notes related to this question are similar. Mr. Armstrong's explanation for the failure to note this statement at all in his notes was that he did not write it down because he was busy observing Grievant.

22. Grievant did not state at any time during the interview that she wanted the job because she wanted the 15% pay increase that would come with the promotion from a pay grade 7 to a pay grade 10 under Division of Personnel Rules. The first time it was mentioned that Grievant was seeking a 15% pay increase was on the relief sought in the statement of grievance.

23. Mr. Armstrong participated in the level one hearing as Respondent's representative, and was aware of the grievance statement and relief sought.

24. Ms. Kessel believed Grievant gave a "great" interview.

25. Mr. Armstrong believed that Ms. Currence presented a good attitude and exhibited enthusiasm in answering the questions. Ms. Kessel gave Ms. Currence a rating of 2 in responsiveness, 5 in sincerity of answers, and a 4 in every other category, although

she believed Ms. Currence exhibited enthusiasm about certain aspects of the job, such as recruiting.

26. Ms. Currence is five foot six inches tall, weighs 125 pounds, is thirty years old, has long red hair, and is well-endowed.

27. On May 2, 2012, an employee came to Grievant's office to inquire about a personnel matter. Grievant told the employee that he needed to see Ms. Currence. Ms. Currence sent the employee back to Grievant's office. Grievant asked Lieutenant Brian McClain if she was supposed to continue to handle insurance and benefits for the employees. Lt. McClain asked Mr. Villers and was told that she was "to continue with all her duties until I advise her otherwise. Employee benefits are part of her current duties." Lt. McClain told Grievant that Ms. Currence did not have the resources or knowledge to do this work. These duties were not reassigned to Ms. Currence until August 2012, and Grievant continued to perform these duties for these three months after Ms. Currence was placed in the position.

28. Grievant submitted, as part of her application for the position, a detailed work history, including her job duties in each previous position she had held.

29. Grievant began working at TVRJ before it was built, as an Office Assistant 1, in March 2005. There were only five employees of TVRJ at that time, and they worked out of a house. When she began working at TVRJ she participated in recruitment, calling individuals on the telephone to encourage them to apply. She also maintained employee files, entered data on the computer, and got files ready for the Director of Inmate Services and the Lieutenant to take on recruiting trips. Her application states that she worked "with pre-employment files to recruit employees before the opening of the jail."

30. From August 2005 to October 2005, Grievant was an Office Assistant II at TVRJ, acting as the First Sergeant's secretary. In this role she entered data, provided clerical support, worked on pre-employment files for prospective employees, assisted with schedules, created forms, and communicated with the public and internal and external agencies.

31. From October 2005 to January 2006, Grievant was the Acting Fiscal Clerk at TVRJ, planning, directing and supervising fiscal activities at the facility, coordinating fiscal policies and procedures, coordinating the processing and maintenance of accounting and office records, including personnel records, and performing various duties related to inventory, among other things.

32. Grievant began working as an Accounting Technician 3 (Fiscal Clerk) at TVRJ in January 2006. Grievant is responsible for all fiscal activities at TVRJ, including all inmate money coming in and going out, preparation of year-end financial and other reports, and maintains and monitors inventory. She supervises four employees.

33. From January 2006 until August 2012, over six and a half years, Grievant also sat on interview boards and participated in the selection process, maintained all new employee pre-employment files, and prepared benefit packages for new employees, maintained all employee benefit files, counseled and assisted employees in making changes to their insurance, and sent out memoranda reminding employees of the open enrollment deadlines every April.

34. Prior to her employment at TVRJ, Grievant worked for RJA at the Central Regional Jail as an Office Assistant I from November 2004 to March 2005. In this position she answered the telephone and directed calls to the proper person, opened and sorted

all the mail, checked in inmate visitors, received and entered receipts for money orders received for inmates, entered inmate visitor data, and prepared indigent packets for inmates.

35. From June of 2000 to June of 2004, Grievant worked for the Division of Motor Vehicles as a Customer Service Representative, and then for four years as a Lead Customer Service Representative. As a Lead Customer Service Representative, Grievant assisted in scheduling and training employees, and assigning and reviewing their work.

36. From 1990 to 2000, Grievant worked for Hayes Scott Fence and Lumber as an Administrative Assistant, assisting the owner in many tasks involved in the operation of a small business. Grievant did the payroll for 40 employees, oversaw the worker's compensation and unemployment claim forms, prepared the quarterly tax reports and Bureau of Labor Statistics reports, and various other forms that had to be filed.

37. From 1979 to 1990, Grievant worked for the Division of Corrections at the Huttonsville Correctional Center as a Clerk I, II, III and IV. For part of this time she had supervisory duties, participated on hiring boards, conducted interviews, maintained inmate account records and prepared monthly inmate account records, completed disciplinary reports and was required to testify at magistrate hearings, and acted as the back-up for the payroll clerk.

38. Grievant was employee of the year at TVRJ in 2009-2010, and employee of the quarter for the fourth quarter of 2006.

39. Grievant's evaluations at TVRJ were stellar.[4] Grievant's evaluation for the period March 2009-March 2010 was performed by M.K. Martin, former TVRJ Administrator, and endorsed by Tony Davis. The written comments were as follows:

> Kim is a true asset to me, the jail, as well as the authority. She is very thorough in her work and demonstrates a willingness to reseasrch [sic] and expend the extra effort necessary to do an excellent job. She is very organized and precise in her paper work. She demonstrates a very good thorough knowledge of the Fiscal Clerk's responsibilities and operates with awareness of the need for cost cutting. She promotes Teamwork and the same to those around her. She has a very good rapport with co-workers, staff, all venders, the general public, as well as the inmate population. She is a true "Role Model" to those who work with her and around her. Amongst her busy schedule, she keeps up with our inventory to make sure we do not run out of items that [are] used on a daily basis. She takes great pride in her duties and her organizational skills. When she took over as Fiscal Clerk, January 2006, the department was a total disarray and she worked very hard and diligently to get it where it is today. This was not a task that she accomplished over night, it took her several months of being very persist[e]nt to get accounts to balance. Kim's credibility, dedication, and hard work does not go unnoticed, she is very much appreciated. There is not enough words to put on paper to give her credit for the job that she does. She is a very important part of our administrative team and I would be lost without her. Thanks, keep up the good work. Again, she is a true asset to me and it is a pleasure to work with a person that takes some [sic] much pride in her job, being dependable, and setting the standard for those around her to follow. Again, thanks.

40. Grievant did not receive an evaluation for 2008-2009. Her 2007-2008 was performed by Mr. Martin and Mr. Davis, and included the following comments:

> Kim is a dedicated, dependable, and a hard worker. She is liked by all. She takes a lot of pride in her job as well as being very profic[i]ent. She goes above and beyond the call of duty to cut cost[s] and eliminate waste in the jail. She is a very valuable resource at the Tygart Valley Regional Jail as well as the Authority. She has carried out all assigned tasks in a timely and professional manner. She displays a highly professional attitude not only in the facility, but with inmates, vendors, and public. She is very receptive to

---

[4] Grievant did not include her evaluations as part of her application, but they were in her personnel file.

> new ideas, open minded, and makes it a point to work with her supervisor(s) to complete her duties or to help when and where a helping hand is needed. She is a true asset to (TVRJ) as well as the Authority. Keep up the good job, you are very appreciated. Thanks.

Grievant wrote in the comment section on this evaluation, "I love my job here at TVRJ as the fiscal clerk."

41. Grievant's evaluation for 2006-2007 was performed by E.T. Wensell, Administrator, and Mr. Davis, and included the following comments: "Kim . . .is a team player, who gives her all. Kim displays enthusiasm in her work and excells [sic] at performing with great accuracy."

42. Grievant's evaluation for the period March 16, 2005, through September 16, 2005, was performed by First Sergeant Brian Clouser and Lieutenant M.K. Martin. Lt. Martin stated that Grievant "can work at any duty station asked of her and do it above minimum requirements. She possess[es] the ability to learn quickly. Mrs. Murphy also possess[es] the technical skills that this job requires to be proficient at it. She has shown to be an asset to this facility." First Sgt. Clouser agreed, and further stated that, "[w]ithout her dedication and dependability we would not have had the staff that we required to open."

43. Ms. Currence was first employed at TVRJ in August 2010, as an Office Assistant 1. Grievant served on the interview panel when Ms. Currence was hired, and was her supervisor.

44. In her position as an Office Assistant I, Ms. Currence worked the reception/booking area of the jail, where inmates are brought in for booking. When Grievant was Ms. Currence's supervisor she verbally counseled her twice for wearing attire

which was inappropriate in a jail setting, and in violation of the Dress Code Policy. On one of these occasions Grievant sent her home to change.

45. As an Office Assistant I, Ms. Currence answered the telephone and transferred calls, set up inmate visitation, and filed. Ms. Currence did not have any supervisory duties.

46. In October 2011, Ms. Currence was placed in an Office Assistant II position, pay grade 5,[5] as the Lieutenant's secretary, and was moved to a conference room near Mr. Villers' office. Immediately preceding the placement of Ms. Currence in this position, a position had been posted for an Office Assistant II in booking, where the work hours would require the employee to work rotating shifts and some holidays and week-ends. Ms. Currence applied for that position. Grievant served on the interview board, Ms. Currence was interviewed for the position, and was the successful applicant. When Ms. Currence was made an Office Assistant II, she was not placed in booking, and her work hours were 8:00 a.m. to 4:30 p.m., Monday through Friday.

47. While in her position as an Office Assistant II, Ms. Currence would go into Mr. Villers' office several times a day, close the door, and remain in the office for an extended period of time. Laughter could often be heard coming from the office. Mr. Villers would often eat lunch with Ms. Currence, and took her to lunch on her birthday. Mr. Villers has not taken the other Office Assistants who work in the same area to lunch on their birthdays.

---

[5] The undersigned has taken administrative notice of the pay grade, which can be found in the classification specifications for all positions developed by the Division of Personnel.

This behavior has resulted in rumors about what is occurring behind closed doors, and dissention.

48. As an Office Assistant II, Ms. Currence performed secretarial duties, including composing memos and reports, transcribed meeting minutes, answered the telephone, and did filing. She managed and monitored the inmate phone system, prepared subpoenaed telephone records, scheduled visitation, and prepared inmate mail for distribution. She did not supervise any other employee.

49. Ms. Currence worked for Bellas of Bowden as a waitress/bartender from February to August of 2011, performing duties typical of the position. From July 2008 to November 2011, she worked for the Elkins/Randolph County YMCA at the front desk, answering the telephone, assisting customers, and performing basic office duties. She did not supervise any other employee in these positions.

50. From January 2001 to June 2006, and from February 2007 to July 2010, Ms. Currence worked for the Davis Trust Company as bookkeeper and an internet banking representative, assisting customers, handling a cash drawer, doing bookkeeping, distributing mail, balancing items on the computer, and answering the telephone. Ms Currence had no supervisory duties.

51. From June 2006 to January 2007, Ms. Currence worked for Information Manufacturing Corporation as a conversion worker, converting confidential records from paper to media form using scanners. She had no supervisory duties.

52. Ms. Currence was served with a subpoena to appear at the level three hearing held on November 7, 2012. Ms. Currence asked to be excused from the subpoena. The undersigned entered an Order denying the request that the subpoena be

quashed, however, Ms. Currence did not honor the subpoena, nor did she appear for the December 5, 2012 hearing.[6]

53. Ms. Broughton is employed by the TVRJ as an Office Assistant II, and has been a state employee since October 1994. She had also worked for a state agency from June 1986 through August 1988. Her work history on her application showed that she had supervised college and high school interns when she worked for the Division of Natural Resources for 15 years as an Office Assistant III, and that she also prepared worker's compensation forms, kept track of leave time and overtime for 20 officers, and took public complaints, as well as performing a wide variety of other duties related to licenses and permits. Ms. Broughton also had secretarial experience in the medical field and the insurance industry, but none of this was experience in the human resources area.

54. Ms. Miller has been employed at the TVRJ since December 2011 as a booking clerk, filing, faxing, answering the telephone, entering data, copying, transferring

---

[6] Ms. Currence did attend the level one hearing as an Intervenor, but when Grievant attempted to question her, Mr. Armstrong objected because Grievant had not subpoenaed her. Mr. Armstrong was Respondent's representative at the hearing, and the record does not reflect that he was serving as Ms. Currence's representative. The Grievance Evaluator then asked Ms. Currence if she felt comfortable answering any questions from Grievant, and when she said no, the Grievance Evaluator precluded Grievant from asking Ms. Currence any questions. It is unclear to the undersigned why Mr. Armstrong felt the need to protect Ms. Currence when she chose to appear at the hearing without a representative, or what procedural rule or Rule of Civil Procedure would support the ruling of the Grievance Evaluator. No such rule was cited in making the ruling. Mr. Armstrong is not an attorney. Grievant argued for the first time in post-hearing written argument that an inference should be drawn from the failure of Ms. Currence to appear that her testimony would have been adverse to Respondent citing *Page v. Columbia Natural Resources, Incorporated*, 198 W. Va. 378, 480 S.E.2d 817 (1996). This argument should have been raised at the level three hearing so that Respondent had the opportunity to respond. Accordingly, it will not be considered. The undersigned would note, however, that Grievant did not assert or demonstrate that Ms. Currence was a material witness.

inmates, contacting county courts, and reading and maintaining legal orders. From July 2011 to November 2011, she worked as a fuel attendant clerk at Krogers, and from January 2011 to August 2011 she worked as a teacher's assistant at a daycare facility. She supervised no employees in any of these positions. From October 2005 to April 2010, she was the Manager of a Movie Gallery, where she supervised eight employees. She assisted with interviewing in this position. She also performed general secretarial duties and maintained financial records for Beauty Essentials from October 2003 to October 2005.

55. Ms. Johnson has been employed at the TVRJ since April 2007, as a booking officer, hearing officer, transportation officer, and CPR Instructor. Her duties included transporting inmates, assisting in ordering supplies, training and testing new employees in CPR, booking and processing inmates, and holding hearings on in-house charges against inmates. From May 2001 to November 2006, she was the Assistant Manager of Jenkins Ford Mercury, Inc., Body Shop, where she supervised seven to eight employees and reviewed applications for hiring. She performed no human resources type work in this position.

56. Ms. Graziani has been employed by the Division of Corrections at the Huttonsville Correctional Center since December 2006, as an Office Assistant for a year, a Payroll Assistant for three years, and an Office Assistant III/Benefits Coordinator since December 2011, a period of four and a half months at the time of the interview. Her duties as an Office Assistant II involved purchases and deliveries. As a Payroll Assistant, she entered data into the payroll system, calculated weekly overtime and entered the information into the database, updated and filed monthly overtime and leave reports,

maintained payroll files and reports, worked with employees on payroll issues, and calculated deductions of payroll for disciplinary actions. In her few months as an Office Assistant III, Ms. Graziani managed health and life insurance employee benefits, administered worker's compensation, including filing forms and issuing paperwork, issued employee leave of absence paperwork and investigated the employees' qualification for leave, and tracked leave of absence hours. Ms. Graziani had worked for various companies and attorneys in the private sector from 1981 through 2006 as a secretary, receptionist, legal secretary, and paralegal, performing duties typical of the positions. From 2002 to 2006 she also was the health plan administrator for her employer for the company health insurance, and prepared all new employee files. For a few months in 2000, she supervised one employee, and prepared the payroll for herself and that employee. From November 1983 to July 1985, she was part owner/manager of a news stand, and supervised three employees, and was responsible for payroll. Ms. Graziani submitted several letters of recommendation from her supervisors and others at the Huttonsville Correctional Center.

57. Mr. Armstrong had worked with Ms. Graziani when he worked for the Division of Corrections, and stated that her qualifications for the position were far superior to Grievant's. Ms. Kessel also believed that Ms. Graziani had more experience with the duties of the position than Grievant.

58. The preceding findings of fact support the finding that Ms. Graziani has far more experience than Grievant in payroll matters, but Grievant had been handling employee benefits for TVRJ for six years, had been a supervisor for more than six years, had maintained new employee files for more than six years, had been involved in

recruiting, had experience with worker's compensation and unemployment claims, and had sat on interview boards and participated in the selection process for six years. Ms. Graziani had no experience in some of these areas, and far less experience than Grievant in the rest of these areas. Ms. Currence had no training or work experience in any of these areas.

59. Grievant has been a state employee longer than any other applicant for the position at issue.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 defined as 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. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

In a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter, supra*. 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 agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

Grievant argued that she should have been selected because she was the most qualified applicant for the position. However, she also pointed out that she had the most seniority of all the applicants, and that this should have been a consideration. WEST VIRGINIA CODE § 29-6-10(4) provides, in pertinent part:

> 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.

The first question presented by this statutory language is not which applicant is the most senior, but rather were any of the applicants' qualifications "substantially equal" or "similar." *Ward v. Dep't of Transp.*, Docket No. 96-DOH-184 (July 24, 1997). "Where the grievant and the successful applicant meet the minimum qualifications for the job, but one applicant, or in this case, seven applicants, are more qualified than the grievant, their qualifications are not substantially equal or similar, and seniority need not be considered. *Mowery, supra*." *Sheppard and Gregory v. W. Va. Dep't of Health and Human Resources,* Docket No. 97-HHR-186/187 (Dec. 29, 1997). "The employer retains 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). "If the qualifications of the applicants are similar or substantially equal, the statute still does not require that the most senior applicant be selected. It says that seniority must then be considered as a factor in the decision-making process." *Honaker v. Bur. of Emp. Programs*, Docket No. 01-BEP-623 (Mar. 18, 2003).

Grievant clearly established that her experience performing the duties of the position at issue, that is, her qualifications for the position at issue, were superior to those of Ms. Currence, and were at least similar to, if not superior to the qualifications of the other four individuals interviewed. It is also clear that Respondent did not evaluate the qualifications of the applicants to determine whether they were similar or substantially equal. This statutory provision requires that in a case such as this, seniority be considered. Ms. Kessel testified that she did not consider seniority in making her recommendations. Mr. Armstrong testified that he did not give seniority much consideration, however, at another point he testified that seniority plays no role in the selection process, as far as he knows. It is clear to the undersigned from Mr. Armstrong's testimony that he did not consider seniority or qualifications at all. Grievant has demonstrated that this statutory provision was violated in the selection process.

In making the determination that Mr. Armstrong gave no consideration to seniority or qualifications, the undersigned has found that Mr. Armstrong's testimony was not credible. 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 and 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's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

The transcript of the level one hearing gives the impression that Mr. Armstrong bore hostility toward Grievant, and the grievance process. Mr. Armstrong stated at the level one hearing, "[t]o me this is just a grievance about sour grapes. You['re] wanting me to say that uh you should have gotten the job and the 15% increase. And that was the first statement that you made in the interview. That it is about getting a 15% increase and I was looking for someone to run HR. And I did not get that feeling from you during my interview." Grievant denied that she made any statement whatsoever about salary during the interview, and the notes taken by the interviewers never mention such a statement. Even if Grievant had done so, there is certainly nothing wrong with an employee desiring to improve her financial position. When it was pointed out to Mr. Armstrong at the level three hearing that the grievance statement request for relief contained the request for a 15% increase, and his notes from the interview did not make any mention of this, and that

perhaps this was not something Grievant mentioned in the interview, but rather he saw this on the grievance form, Mr. Armstrong refused to accept the obvious, stating that he had not noted this key statement on his numerous interview notes because he was busy observing Grievant. Mr. Armstrong's testimony on this point is not consistent with the other evidence in the record, and is not plausible.

Further, Mr. Armstrong was defensive during his testimony, stating that he was being accused of doing something wrong, and he had not done anything wrong. He stated that he had filled this position the same way as he had filled positions for 25 years, and that he had relied on his gut. He repeatedly stated that he had a limited amount of time to fill 10 positions, for which there were many applicants.

Further, it was not until after cross-examination that Mr. Armstrong stated that it was most important that the successful applicant be a good recruiter. The undersigned certainly cannot disagree with the conclusion that Ms. Currence's youth and personality might assist in the recruitment of young men to work as officers at the jail. However, this late justification is simply not credible. Not only would the undersigned have expected this statement to have been put forward when Mr. Armstrong was being questioned on direct examination regarding his reasons for choosing Ms. Currence, but it is inconsistent with the statement quoted above from the level one hearing that he was looking for someone to run human resources. Frankly, at this point the undersigned finds it difficult to believe any of the justifications made by Mr. Armstrong for selecting Ms. Currence.

It is exceedingly clear from the record that Grievant was an excellent employee with excellent qualifications for the posted position, and that she provided the documentation with her application to support this. She has been performing most of the duties set forth

in the posting for many years at the TVRJ, and has, by all accounts been doing a bang-up job. In fact, she continued to perform these duties for three months after Ms. Currence was placed in the position. Grievant has gone above and beyond what was expected of her in every position she has held since before the facility opened. She may not have performed well in the interview, although at this point the undersigned, quite frankly, questions whether even that is true. While the interview may certainly be given great weight in the selection process, this does not give Respondent carte blanche. No effort was made to analyze the interview responses and the qualifications of the applicants. No wonder Mr. Armstrong did not make the written report to his supervisors that is required by RJA policy. Based on the overwhelming evidence in the record supporting that Grievant had an excellent work record, including evidence from those who were very familiar with her work, it is clear that Mr. Armstrong's impressions of Grievant were flat out wrong, and he could not have considered her qualifications for the position at all in making his decision. The undersigned cannot conclude at this point that the decision is supported by substantial evidence or by a rational basis.

Grievant demonstrated that the selection process was completely subjective, and that no consideration was given to the qualifications of the applicants. The undersigned would also point out here that Respondent presented no policy, procedure, rule or regulation that would justify the decision to ignore the qualifications of the applicants when a position is being filled as a trainee position, which will then become a non-trainee position without additional posting, or to give more weight to salary considerations than to qualifications, and the undersigned is not aware of any such policy, procedure, rule or

regulation. To the contrary, the legal standards applicable to the review of the decision all point to the importance of the qualifications of the applicants.

Grievant further demonstrated that she was more qualified for the posted position than all the other applicants, except perhaps Ms. Graziani. Ms. Graziani has more experience than Grievant in payroll, but Grievant had been handling employee benefits at TVRJ, and doing an excellent job at it, for far longer than Ms. Graziani has been handling such matters, she has more supervisory experience, and her experience is specific to TVRJ and its personnel. Grievant had actual work experience in almost every area listed in the posting. The undersigned concludes that Grievant demonstrated that she was the most qualified applicant for the posted position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that she was the most qualified applicant for the position in question. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). 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 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*.

4. 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)). "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 [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

5. WEST VIRGINIA CODE § 29-6-10(4) requires that seniority be considered as a factor in the selection only if the qualifications of the applicants are similar or substantially equal. Even then, "the statute still does not require that the most senior applicant be selected. It says that seniority must then be considered as a factor in the decision-making process." *Honaker v. Bur. of Emp. Programs*, Docket No. 01-BEP-623 (Mar. 18, 2003).

6. "The employer retains 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).

7. In this case, Respondent did not consider the qualifications of the applicants or make a determination as to whether Grievant's qualifications were superior to those of the other applicants.

8. Grievant demonstrated that her qualifications for the position were at least similar or substantially equal to those of the other applicants.

9. Respondent violated WEST VIRGINIA CODE § 29-6-10(4) when it failed to consider the seniority of the applicants in making a selection. Grievant demonstrated that the selection process was flawed.

10. Grievant demonstrated that she was the most qualified applicant for the posted position at TVRJ.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to place Grievant in the Administrative Services Assistant I position at Tygart Valley Regional Jail within thirty days of receipt of this decision. Respondent is **FURTHER ORDERED** to pay Grievant all back pay to which she would have been entitled, plus interest, from May 1, 2012, as though she had been placed in the position on that date, and to adjust her benefits which would have been affected by this promotion retroactively to this date.

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 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: March 26, 2013