**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**CHARLES D. CARR,**
**Grievant,**

**v.** **DOCKET NO. 2013-0080-DOE**

**DEPARTMENT OF EDUCATION,**
**Respondent, and,**

**KENNETH S. RUBENSTEIN,**
**Intervenor.**

## DECISION

Grievant, Charles D. Carr, filed this grievance against his employer, the Department of Education, on July 20, 2012, challenging the selection of Kenneth S. Rubenstein to be Principal at the Pruntytown Correctional Center. The statement of grievance reads:

> The Grievant, Charles D. Carr applied and interviewed for the position of principal at the Pruntytown Correctional Center on the 12th of June, 2012 with the Office of Adult Education Programs. The Grievant was not selected for the position of principal. Through research and investigation I believe that one will find that WV Code 18A-4-7A has been violated. The Grievant is basing his findings on WV Code 18A-4-7A which states county boards of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications.

As relief, Grievant sought "[to] be placed in the principal position at Pruntytown Correctional Center and any applicable benefits retroactive to the date of the violation."[1]

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[1] Grievant added to the relief sought when he filed at level two a request that all administrative hirings under the "current central office staff" be "reviewed for infractions," which generated a response from Respondent that this newly requested relief was not timely filed. Grievant did not at any time indicate that he was an applicant for any other position, but was not selected. A Grievant must have standing to file a grievance. "'Standing, defined simply, is a legal requirement that a party must have a personal stake

A hearing was held at level one on August 10, 2012, and a decision denying the grievance at that level was issued on August 30, 2012. Grievant appealed to level two on September 10, 2012, and a mediation session was held at level two on November 20, 2012. Grievant appealed to level three on January 10, 2013. A hearing was held at level three before the undersigned Administrative Law Judge on April 24, 2013, in the Grievance Board's Westover office. Grievant appeared *pro se*, and Respondent was represented by Sherri D. Goodman, Esquire, Staff Attorney, West Virginia Department of Education. This matter became mature for decision on May 24, 2013, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

## Synopsis

Grievant was not selected to serve as Principal at the Pruntytown Correctional Center. Grievant did not demonstrate that the selection process was flawed, or that the decision to select another applicant was arbitrary and capricious or clearly wrong.

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

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in the outcome of the controversy.' *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). . . . Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. *See Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992)." *Lucas, et al., v. Dep't of Health and Human Res.*, Docket No. 07-HHR-141 (May 14, 2008). Grievant does not have standing to contest all administrative hirings, nor does the undersigned have authority to order a review of all hirings for infractions.

## Findings of Fact

1. At the time relevant to this grievance, Grievant was employed by the Department of Education ("DOE") as an Assistant Principal at the Industrial Home for Youth, and he had served in this position since 2008. Prior to that, he was a teacher at Tiger Morton Juvenile Center for four years. He was an Adult Basic Education Teacher on a part-time basis from 2004 to 2008, and a teacher in the public schools in West Virginia for 18 years.

2. DOE provides adult and juvenile instructional programs at correctional facilities and juvenile detention centers throughout the state, and employs Principals, Assistant Principals, and teachers whose work site is located at these facilities.

3. DOE posted a vacancy for the Principal position at the Pruntytown Correctional Center ("PCC"). The posting lists the qualifications for the position as:

> 1. Possess full certification as a school principal at the middle and secondary school levels as set forth in State Board of Education Policy 5202.
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> 2. Possess the knowledge, skills, and abilities to successfully: (a) perform the job requirements (b) work within the special setting of an institution for troubled youth[2] (c) work as part of a treatment team in concert with others (d) exhibit strong personnel management qualities; and (e) possess a strong background in curriculum.
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> 3. Knowledge and experience in providing educational services to challenging students.

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[2] Respondent's counsel discovered this reference to working with troubled youth when preparing for the level three hearing. This should have read "work within the special setting of an institution for adults." None of the applicants questioned this during the interview process.

4. DOE received 12 applications for the Principal position at PCC. The applications were screened to assure that each applicant who would be interviewed met the minimum criteria for the position.

5. Four of the applicants were interviewed by a three member interview team. The members of the interview team were Frances Warsing, Superintendent of Adult Basic Education for the Office of Institutional Education Programs, Jacob Green, Assistant Director Office of Institutional Programs, and Debra Minnix, Warden at PCC. Those interviewed were Grievant, Kenneth Rubenstein, Ronald Kittle and Kelly Tetrick.

6. A fifth person was selected to be interviewed, but she withdrew from the process. The person scheduling the interviews had left a slot for this applicant to be interviewed in the morning, and when it was discovered that she would not be interviewed, Rhonda Mahan contacted Mr. Rubenstein and attempted to contact Grievant to ask if they could come earlier to the interview. Mr. Rubenstein was able to do so.[3]

7. All four individuals interviewed held certification as a Principal.[4]

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[3] Grievant seemed to suggest that Respondent had acted improperly in attempting to reschedule his interview on the morning of the interview. The evidence does not support a finding of impropriety in simply asking the interviewees if they could come to interview earlier.

[4] Grievant asserted that Mr. Rubenstein was not "fully" certified as a principal, because his certification was an "initial"certification. Grievant offered into the record only his personal interpretation of whether Mr. Rubenstein's certification was sufficient to meet the qualifications to be Principal at PCC. Respondent's witnesses testified that Mr. Rubenstein's certification met the requirements to be Principal at PCC, as he held an administrative license, and not a permit. Mr. Green testified that an initial certification simply requires renewal in three years, but is "full" certification. Grievant's opinion on this matter is insufficient to meet his burden of demonstrating that Mr. Rubenstein was not properly certified.

8. The interview team members were provided with the applications of those interviewed for review and consideration.

9. Superintendent Warsing and Mr. Green selected the questions to be asked of each person interviewed from a bank of questions, selecting questions about security and working in an adult correctional facility. Each of those interviewed was asked the same questions, and each of the interviewers rated the answers given by each person interviewed to each question using a scale of one to five, with five being the best score possible.

10. During the interview Mr. Green focused on the knowledge of the applicants of adult correctional education, leadership ability, and their views on helping inmates to transition back into society.

11. After the interviews, the interviewers totaled their scores on the interview questions and compared the results. Warden Minnix and Superintendent Warsing assigned the highest scores to Mr. Rubenstein and Mr. Kittle, with Warden Minnix scoring both at 48 and Superintendent Warsing scoring both at 40. Mr. Green scored Mr. Rubenstein one point higher than Mr. Kittle, at 43 and 42. After discussion, the unanimous choice for the position was Mr. Rubenstein, and the unanimous second choice for the position was Mr. Kittle. Grievant was the fourth choice of Mr. Green at a score of 36, and Superintendent Warsing at a score of 36, and the third choice of Warden Minnix at a score of 43. Superintendent Warsing recommended to the State Superintendent of Schools that Mr. Rubenstein be selected for the position, and he was selected for the posted position.

12. Mr. Kittle was the Assistant Superintendent in Barbour County, and had been a Principal. He had many years of administrative experience, but had never worked with inmates or in adult education.

13. Mr. Rubenstein had worked for the Division of Corrections as a Correctional Counselor 2 at Mount Olive Correctional Center for 13 months. Mt. Olive is a maximum security adult correctional facility. Mr. Rubenstein then applied for a position with DOE as the Transition Skills/Life Skills Instructor at St. Mary's Correctional Center, and worked in that position for five months, and he has been in that same position at PCC since September 1, 2005.

14. While working at PCC, Mr. Rubenstein stepped in for the Lead Teacher[5] when she was on vacation in the summer, setting up and running the IS days. He also attended Principal/Lead Teacher meetings when the Lead Teacher at PCC was unable to attend. He was trained to be the back-up GED examiner. When the Lead Teacher at PCC retired, he was named the Acting Principal until her replacement was chosen. Other than this, Mr. Rubenstein had no experience as a Principal or Assistant Principal.

15. The interviewers decided that experience in correctional facilities was more important than administrative experience for this position.

16. Mr. Kittle and Mr. Rubenstein were dressed in suits, and presented a professional, serious demeanor during the interview. Grievant was not dressed in a suit, and did not give the impression to the interviewers that he was serious about the interview.

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[5] Principals at correctional facilities were formerly referred to as Lead Teachers. All but one Lead Teacher has been reclassified as a Principal, and the remaining Lead Teacher is taking the steps necessary to be certified as a Principal.

Mr. Green and Superintendent Warsing found the answers Grievant gave to questions were not detailed and thorough, particularly in the areas of transition and Adult Basic Education.

17. Mr. Green's impression of Mr. Rubenstein's responses to the questions asked was that he had a complete understanding of the adult educational process, and he possessed a passion for adult education and moving inmates forward to the next level.

18. The Industrial Home for Youth is a maximum security juvenile detention center.

19. PCC is a minimum and medium security correctional center housing adult offenders.

20. Grievant has a Masters Degree in Special Education. Mr. Rubenstein has a Masters Degree in School Counseling, and is enrolled in a Doctoral Program at Marshall University.

21. Grievant worked with CTE programs during his employment at the Industrial Home for Youth, and he has been involved in CEA[6] audits. Grievant is a member of the Learning Focus Strategy Team, the Special Education Steering Committee, and the Website Committee, and he has attended the Principals' Leadership Academy.

22. Mr. Rubenstein is the son of James Rubenstein, Commissioner of the Division of Corrections. No evidence was presented that this familial relationship was a factor in the selection process.

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[6] The record does not reflect what the acronyms CTE or CEA stand for.

23. Robert Matthew Kittle served as the Superintendent of Institutional Programs from December 2006 until the summer of 2008. As the Superintendent, Mr. Kittle was responsible for the hiring of teachers, principals and other staff at correctional facilities in the state. He had previously been Superintendent of a county board of education, and found the statutory criteria for selection of teachers and other professionals applicable to county boards of education to be the best way to determine which applicant was the most qualified. For this reason, when he was Superintendent of Institutional Programs he used these statutory criteria when interviewing applicants for professional positions.

**Discussion**

Grievant has the burden of proving his 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.*

Grievant argued that Respondent must evaluate the applicants for a Principal position using the same statutory criteria as a county board of education must use, and that reliance on the interview makes the process subjective. "DOE is not subject to the CODE provisions governing the selection of school personnel by county boards of

education. *See* W. VA. CODE §§ 18A-4-17(c) and 18A-1-1(a); *See Canfield v. W. Va. Dep't of Educ.*, Docket No. 97-DOE-508 (Mar. 31, 1998).[7] The selection process by DOE is reviewed using the same standard applicable to state agencies." *Collins v. Dep't of Educ.,* Docket No. 99-DOE-083 (June 25, 1999); *aff'd*, Circuit Court of Kanawha County, Civil Action No. 99-AA-131 (May 27, 2003); *appeal ref'd*, No. 032208 (Feb. 11, 2004). *Joyner v. Dep't of Educ.*, Docket No. 07-DOE-122 (May 16, 2008). Although it was repeatedly pointed out to Grievant that this was the applicable legal standard, he continued to insist that DOE must follow the statute applicable to county boards of education in selecting a

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[7] This statement of the law, however, is not applicable to all services provided by DOE. W. VA. CODE §18A-4-17(b) states:

> Professional personnel employed by the department to provide education services to residents in state department of health and human resources facilities, *corrections facilities providing services to juvenile and youthful offenders,* in the West Virginia schools for the deaf and the blind or in public community and technical colleges providing middle college services are afforded all the rights, privileges and benefits established for the professional personnel under this article, subject to the following:
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> (1) The benefits apply only within the facility at which the professional personnel are employed;
> (2) The benefits exclude salaries unless explicitly provided for under this or other sections of this article; and
> (3) Seniority for the professional personnel is determined on the basis of the length of time the employee has been professionally employed at the facility, regardless of which state agency was the actual employer.
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> (c) Professional personnel and service personnel employed by the department of education to provide education and support services to residents in state department of health and human resources facilities, corrections facilities providing services to juvenile and youthful offenders, the West Virginia schools for the deaf and the blind and in public community and technical colleges providing middle college services are state employees.

(Emphasis added.) PCC houses adult offenders.

principal, and evaluate each of the statutory criteria, as former Superintendent Kittle chose to do while he was Superintendent. This simply is not the case. Even former Superintendent Kittle acknowledged that he knew he was not required to evaluate the candidates for a position using the statutory criteria, but did so because he believed it was a good way to determine which candidate was the most qualified.

In a selection case, a grievant must prove, by a preponderance of the evidence, that he 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).

Further, “as the Grievance Board has held many times, when a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *Allen, supra*; *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005).” *Freeland v. Dep’t of Health and Human Res.*, Docket No. 2008-0225-DHHR (Dec. 23, 2008).

Grievant demonstrated that he has more administrative experience than Mr. Rubenstein. This, however, is not determinative. Despite Grievant's unsupported assertions that Mr. Rubenstein was hired for the position solely because he was the son of Commissioner Rubenstein, it is clear that Mr. Rubenstein has more experience working with adults in a correctional facility than Grievant, and working with education of an adult inmate population, which the interview team considered to be an important consideration. Grievant's experience with inmates has been with education of juvenile inmates in a juvenile detention center. Further, Mr. Rubenstein demonstrated to the interview team, and during the level three hearing, his professionalism and commitment to educating adult offenders, and helping them to transition to society, and his experience in successfully working with the personnel at the host institution. As Grievant pointed out, interviews are in large part subjective, but reliance on the interview to determine which candidate should be selected for a particular position does not amount to a flaw in the selection process, nor is it arbitrary and capricious.

Even were the undersigned to find that Mr. Rubenstein was not the best candidate, the interviewers did not rate Grievant as the second best, or even the third best candidate for the position, and Grievant certainly did not present evidence that he should have been selected over Mr. Kittle, who had many years experience as an administrator in the public schools.

Grievant argued that various provisions of the Operating Procedures Manual ("the Manual") of the Office of Institutional Education Programs were not strictly followed. Although it is not entirely clear from Grievant's written argument exactly what he is pointing to, it appears that he is arguing that this Manual requires that all qualified applicants be

interviewed, and they were not. Whether this is accurate or not is of no consequence. Grievant was interviewed. He was not harmed in any way by any failure to follow such a requirement.

Grievant argued that the Manual requires that a number of factors be used to determine which applicant is the most qualified, and that a matrix must be scored. The Manual provides at Number 3.63, part 5.4.8, entitled "Interview Process," that [u]pon completion of the interview, the matrices shall be scored and the committee shall recommend the most qualified applicant for the position. . ." No where does the Manual state that a matrix must be completed which scores the applicants in the statutory criteria applicable to county boards of education, nor is the term matrix defined. In this case the applicants were asked a number of questions related to the position during the interview. The interview committee members assessed the answer to each question, as well as the demeanor of those being interviewed in order to determine which applicant would be the best candidate for this particular position. In making the final determination they weighed Mr. Kittle's superior administrative experience against Mr. Rubenstein's superior experience working in adult education in an institutional setting. They also considered that Grievant's experience was with youthful offenders, which, in the opinion of the experienced interview committee, was far different from working with adult offenders in an educational setting. The committee members clearly considered a number of factors. They did not simply apply a mathematical formula to the process as Grievant would like.[8]

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[8] Even county boards of education are not required to give equal weight to each of the statutory criteria in selecting the best qualified applicant for a Principal position. "[A] county board of education may determine that "other measures or indicators" is the most important factor. *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5,

Grievant argued that only he and one other applicant met "all the criteria within the position announcement," pointing to his interpretation of the qualifications in the posting, and he argued that, because Mr. Rubenstein had never served in an administrative position, "[i]t would only be speculation as to whether Mr. Rubenstein could perform the job requirements of a principal." Grievant misreads the qualifications section of the posting. The posting says that the qualified applicant will "[p]ossess the knowledge, skills, and abilities to successfully: (a) perform the job requirements (b) work within the special setting of an institution for troubled youth (c) work as part of a treatment team in concert with others (d) exhibit strong personnel management qualities; and (e) possess a strong background in curriculum." The question is not whether the applicant has actually performed the tasks set forth in (a) through (e), but whether he or she possessed "the knowledge, skills, and abilities to successfully" perform these tasks. Whether anyone will actually perform well in a particular position, including Grievant, always involves some

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1998).

> All that CODE §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

*Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993). As an example, a county board of education may consider whether an applicant could be a team player at a particular school due to past conflicts. *Switzer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-013 (Apr. 11, 2003).

amount of speculation, but the experienced members of the interview committee were certainly capable of making such an assessment of Mr. Rubenstein's abilities.

Finally, Grievant argued that the scoring by Mr. Green of question 3[9] and Superintendent Warsing on question 5 during the interview was significantly flawed. Superintendent Warsing rated both Grievant and Mr. Rubenstein's answer as a 3 to this question, and wrote on Mr. Rubenstein's sheet that his answer was not a good answer. Her notes on Mr. Rubenstein's answer to this question, which involved what to do if an outstanding teacher's work began slipping, were "raise a red flag, talk to teacher - find out what going on, try to be understanding - offer assistance, talk to warden." Her notes on Grievant's answer were very similar, and are as follows: "must be in classroom, sit down and talk, could be personal." She apparently found the answers to be similar, and not the best answer. Mr. Green noted on his score sheets the failure of either Grievant or Mr. Rubenstein to mention DOE Policy 5310, and rated Grievant's answer to this question a 3, and Mr. Rubenstein's answer a 2. Warden Minnix rated Grievant's and Mr. Rubenstein's answer as a 4. The undersigned fails to see Grievant's point, but even were the rating of Mr. Rubenstein to be decreased to a 1 and Grievant's rating increased to a 5, this would have simply made Superintendent Warsing's scoring of all the answers given by these two applicants the same, and Mr. Kittle would have been 2 points ahead of both of them. Again, this would not mean that Mr. Kittle had to be selected for the position, or that Mr. Rubenstein could not be selected over Grievant.

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[9] Grievant referred to this as question 2 in his written argument, but it is clear from the description of his issue that he is actually pointing to question 3.

Mr. Green rated Grievant's answer to question 3, which asked what qualities a good administrator should have, and whether the interviewee possessed these qualities, as a 3, and Mr. Rubenstein's answer as a 5. Grievant argued that Superintendent Warsing testified that Grievant's answer was correct, and apparently concluded from this that his answer should have been rated a 5. A correct answer is not necessarily the best answer. Mr. Green's notes on Grievant's answer to this question are, "communicate, lead by example, don't be afraid to make a decision, is willing to look at the angles, getting people to buy into your vision." Mr. Green's notes on Mr. Rubenstein's answer to this question are, "fair, flexible, honesty, listen to both sides in a conflict, adherence to policy." Superintendent Warsing rated Grievant's answer to this question as a 3 and Mr. Rubenstein's a 4, while Warden Minnix rated Grievant's answer to this question as a 5 and Mr. Rubenstein's as a 3. This is apparently a question where each of the three interviewers had a different perception about what constituted the best answer, and indicates why a three member interview team is a good practice. Grievant did not demonstrate that Mr. Green's scoring on question 3 was erroneous or arbitrary and capricious.

Having reviewed the evidence and the arguments of the parties, the undersigned concludes that Grievant has not demonstrated a flaw in the selection process or that the decision to select Mr. Rubenstein for the position at issue was arbitrary and capricious or clearly wrong.

The following Conclusions of Law support the Decision reached.

## Conclusions of Law

1. Grievant has the burden of proving his 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. "DOE is not subject to the CODE provisions governing the selection of school personnel by county boards of education. *See* W. VA. CODE §§ 18A-4-17(c) and 18A-1-1(a); *See Canfield v. W. Va. Dep't of Educ.*, Docket No. 97-DOE-508 (Mar. 31, 1998). The selection process by DOE is reviewed using the same standard applicable to state agencies." *Collins v. Dep't of Educ.,* Docket No. 99-DOE-083 (June 25, 1999); *aff'd*, Circuit Court of Kanawha County, Civil Action No. 99-AA-131 (May 27, 2003); *appeal ref'd*, No. 032208 (Feb. 11, 2004). *Joyner v. Dep't of Educ.*, Docket No. 07-DOE-122 (May 16, 2008).

3. In a selection case, a grievant must prove, by a preponderance of the evidence, that he 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).

4. 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*.

5. 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).

6. Grievant did not demonstrate that the selection process was flawed or that he was the most qualified applicant for the position at issue.

Accordingly, this grievance is **DENIED**.

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: July 10, 2013**