ROSE SPEARS,

Grievant,

v.

Docket No. 04-HHR-284

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU

FOR CHILDREN & FAMILIES,

Respondent.

DECISION

The grievant, Rose Spears ("Spears") brings this grievance to challenge her non- selection for a position as a Family Support Specialist, which is also called a West Virginia Works Worker. Spears is currently employed by the respondent, the West Virginia Department of Health and Human Resources ("DHHR") as an Economic Service Worker assigned to the Bureau for Children & Families ("BC&F).

Spears initially filed this grievance on January 23, 2004, alleging as follows:

> I have applied for WVa Works position several times. I feel that I am more qualified for the position than the people hired over me. It was also proven in a Level 3 grievance that I had done a good job for DHHR and that I was qualified but yet I am not being hired. Also other people in the office are being asked why they don't apply or why they didn't.

In her request for relief, Spears states "I want the position, and or I want to know why I am not being hired. Along with a position as a WVa Works worker."

The grievance evaluators at Levels I and II lacked authority to grant the grievance. A Level III

evidentiary hearing was conducted on June 1, 2004. (See footnote 1) A Level III decision denying the grievance was issued on July 9, 2004. Spears then appealed to Level IV. ALevel IV evidentiary hearing was held on January 20, 2005, in the offices of the West Virginia Education and State Employees Grievance Board in Charleston.

At the Level IV hearing, Spears was represented by attorney Dwight J. Staples. The respondent, DHHR, was represented by B. Allen Campbell, Senior Assistant Attorney General, and Jennifer K. Akers, Assistant Attorney General. This grievance matured for decision on March 18, 2005, which was the deadline agreed upon by the parties for submission of proposed findings of fact and conclusions of law. (See footnote 2) Spears did not avail herself of the opportunity to submit proposed findings and conclusions.

During the grievance process the parties introduced evidence with respect to two different Family Support Specialist vacancies for which Spears unsuccessfully applied. The first vacancy was filled by Steve Varney ("Varney"). It does not appear that Spears takes serious issue with his selection. Rather, the selection of Charise Lindsey ("Lindsey"), formerly Charise Hale, for the second vacancy was the focus of Spears's evidence and arguments. Therefore, resolution of this grievance will be based upon a review of the selection process as it applies to the vacancy ultimately filled by Lindsey. Varney's selection will be addressed by way of background and context.

In addition, prior to the posting of the first position at issue in this grievance, Spears had been involved in an on-going grievance. The Level III decision in that grievance was dated October 3, 2003. Tr.82. Although the prior grievance was touched upon during the evidence, it does not appear that Spears has pursued a claim of reprisal and, accordingly, this issue will not be addressed further.

After careful review of the entire record, including the Level III transcript and exhibits, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1. Spears is employed by DHHR as an Economic Service Worker assigned to BC&F.

2 2. Spears applied for a position as a Family Support Specialist, also known as a West Virginia Works Worker, that had been posted on November 17, 2003. Gr.Exh.2 at Level III.

3 3. Spears has unsuccessfully applied for a Family Support Specialist position six or more

times. Tr.90.

4 4. Three DHHR employees, including Spears, applied for this first vacancy. Lindsey, who was one of the three, withdrew her name before interviews were conducted. 5 5. DHHR Policy Memorandum 2106 (See footnote 3) ("Policy 2106") governs the selection process for considering applicants for posted positions, conducting employment interviews, and making a selection from among several candidates. Tr.25.

6 6. The overarching principle of DHHR's selection policy, as set forth in Policy 2106, is that "[h]iring decisions should be based on an individual's qualifications for the essential duties of the position." To achieve this goal, Policy 2106 instructs that, "[w]hen selecting one employee from among several applicants, demonstrated ability, work history, references, education and the interview should be considered. The ultimate selectiondecision should be based upon the interviewer's judgement [sic] as to which candidate would best do the job."

7 7. Policy 2106 also directs that "[s]ignificant factors in the employment decision should be documented."

The First Vacancy

8 8. Spears and the successful applicant, Varney, were interviewed by a committee (collectively "the Interview Committee") consisting of Judy Simmons ("Simmons") and Eric Dotson ("Dotson"), each of whom is a Family Support Supervisor.

9 9. A standard set of questions was posed to Spears and Varney during their interviews. The Interview Committee made notes and scored their responses.

10 10. Each member of the Interview Committee also completed a standardized form, entitled "Applicant Interview Rating," with respect to each of the applicants. Portions of this form may have been filled out during the interview, but the form was completed in its entirety immediately after the interviews were concluded.

11 11. Thereafter, Simmons and Dotson met to compare their individual perceptions and scoring results. Dotson then filled out a form entitled "Candidate Comparison Chart." This is a standardized form that is ultimately submitted to the Division of Personnel. With respect to the initial vacancy, the task of completing the Candidate Comparison Chart fell to Dotson because the position in question was under his supervision.

12 12. Simmons and Dotson selected Varney for the position but, before his name was

submitted to the Division of Personnel for approval, a second Family Support Specialist vacancy was posted ("the second position"). At this point Varney was not aware that he was considered the successful applicant for the first position. 13 13. Dotson's opinion was that Varney was the "best fit for the job." Tr.41.

The Second Vacancy

14 14. Lindsey told co-workers, including Spears, that Dotson asked her to apply for the Family Support Specialist openings. Tr.59-61, 87, 93.

15 15. Spears, Varney, and Lindsey applied for the second position.

16 16. Again, the Interview Committee consisted of Simmons and Dotson. The interview process for the second position was conducted in the same manner as for the first.

17 17. Simmons completed the Candidate Comparison Chart for the second position because it fell under her supervision.

18 18. At the conclusion of the interview process, Lindsey was ranked first, Varney second, and Spears third. Accordingly, Lindsey was selected to fill the second Family Support Specialist vacancy.

Work History

19 19. Spears has been employed as an Economic Service Worker since July 1999. Tr.31. Her prior work experience included Prestera Center for five or six months, Pied Piper (Tr.33), and Associates Finance Services (Tr.34).

20 20. Lindsey has been employed by DHHR as an Economic Service Worker since October 2002. Tr.29. Prior to that, she had worked as a cashier at Kroger's, a clerk at Sears, a volunteer in a law firm, and a clerk at Super America. Tr.30-31.

21 21. At the time she applied for this second Family Support Specialist vacancy, Spears had been employed by DHHR as an Economic Service Worker for approximatelyfive years. Lindsey had been an Economic Service Worker for approximately eighteen months.

22 22. Dotson conceded that, as compared to Lindsey, Spears had "more time at a job" and "the types of jobs [were] more relevant" to the position of Family Support Specialist. Tr.34.

23 23. Simmons acknowledged that Spears "has the most years of qualified experience[.]" Tr.72. Nonetheless, Simmons stated that "knowing what I know, about the two individuals, I would have to say I have [made] the correct decision." Tr.72. Simmons never explained the basis for this

cryptic remark.

Demonstrated Ability

24 24. During her tenure with DHHR, Spears was one of two Economic Service Workers selected to work in the Food Stamp, Employment, and Training Program ("FSE&T program"). Tr.32.

25 25. The duties of a Family Support Specialist are analogous to the duties Spears performed in the FSE&T program (Tr.32, 33, 67) in that, in both programs, the goal is to help people "meet a work participation requirement." Tr.47. The FSE&T program was, however, simpler and more limited in scope than the West Virginia Works program.

26 26. Pamela Mills ("Mills") supervised Spears for approximately fifteen months in the FSE&T program. Tr.49. As her supervisor, Mills had occasion to evaluate Spears's work performance.

27 27. In addition, Mills is familiar with the role of a Family Support Specialist, or West Virginia Works Worker, having worked as a Family Support Specialist and havingsupervised the West Virginia Works program in Kanawha County for at least the past two years. Tr.47.

28 28. Spears's work in the FSE&T program gave her "a better background" than other Economic Service Workers for becoming a Family Support Specialist. Tr.47. Working in the FSE&T program would have been the only place an Economic Service Worker could have gained such analogous experience. Tr.47.

29 29. Mills is of the opinion that an employee such as Spears, who had experience in the FSE&T program, would be able to move easily into the duties of a Family Support Specialist and that such employee would require "a lot less training[.]" Tr.49-50.

30 30. Mills perceives Spears to be "[v]ery competent, good, caring[.]" Tr.47. Spears "knew policies, [and] made every effort to apply them correctly." In addition to being a good, dependable worker, Mills observed that Spears "had a good way with clients and did a good job motivating them." Tr.47.

31 31. Fellow DHHR employee, Mary Reynolds, who works in Quality Assurance, always contacted Spears whenever Quality Assurance required information about the FSE&T program. Spears was "always very reliable." She provided correct information and referred Quality Assurance to the appropriate provisions in the manual. Tr.63.

32 32. Based on an estimate by Simmons, Lindsey had only been working a full case load three to four months as an Economic Service Worker before she received the promotion to Family

Support Specialist.

33 33. Based on her Level IV testimony, it appears that Simmons's opinion was that Lindsey had “the better potential to do the work[.]”

Evaluations

34 34. An employee appraisal form, dated September 9, 2003, reflects that Spears exceeded expectations in eleven areas of performance as an Economic Service Worker. Tr.27-28. Her numeric evaluation score was 2.48. Tr.28. This evaluation was conducted by Earlene Johnson (“Johnson”), who was Spears's supervisor at that time. Tr.43.

35 35. Dotson discounted Johnson's evaluation of Spears because Johnson does not supervise Family Support Specialists. Specifically, Dotson testified that he did not respect Johnson's opinion.

36 36. Based on informal discussions at some unknown time, Simmons thought that Johnson agreed with her that Lindsey “did good work.”

37 37. No deficiencies in Spears's work have been identified or called to her attention. Tr.89.

38 38. In his role as her supervisor, Dotson completed an employee appraisal evaluation form for Lindsey, dated September 12, 2003. (See footnote 4) According to this evaluation, Lindsey exceeded expectations in the category of “adapts to new situations in a positive manner.” In all other categories she was deemed to have met expectations. Tr.26. Her numeric score was 2.04. Tr.27.

39 39. At the time he completed Lindsey's performance appraisal, Dotson reported that, based on her level of experience, Lindsey was “doing fine.” He noted that she had the “necessary attributes to develop into a capable ESW.”

References

40 40. Dotson had supervised Spears for approximately four or five weeks near the end of 2003. Tr.6. He never conducted an evaluation or performance appraisal for Spears. Tr.23. He considered some of her work to be below the quality he would expect from an Economic Service Worker with Spears's level of experience but he did not elaborate on what he considered to be her deficiencies. Tr.35. However, Dotson never wrote her up, counseled her, or offered her any suggestions on how he thought her performance could be improved. Tr.35.

41 41. At the time Dotson supervised her, Spears had been working in the FSE&T program and was in the process of making the transition back to carrying a caseload as an Economic Service

Worker (See footnote 5) . Tr.35. As conceded by Dotson, “you would be rusty going back into caseload after doing FSE&T work for that period.” Tr.35.

42 42. The Interview Committee did not obtain any formal, written references for Spears. Rather, the Interview Committee relied upon Dotson's limited, outdated experience as her supervisor and upon informal discussions with others in the agency. Tr.36. These informal discussions pre-dated the selection process at issue in this grievance.

43 43. Neither Dotson nor Simmons identified with specificity any negative information, received in the course of such informal discussions, that would have indicated that Spears was not a good candidate for the Family Support Specialist position. Tr.36. 44 44. Simmons affirmed that she did not contact any of Spears's supervisors orformer supervisors other than Dotson. Tr.72. Instead, she relied upon Dotson's comments regarding Spears because she considered him to be “very creditable.” Tr.72.

45 45. Dotson did not contact any references for Lindsey until after the interview process had been completed. Instead, he relied upon his own experience as Lindsey's supervisor. Tr.37.

Education

46 46. Although Lindsey has a Regents Bachelor of Arts degree in Business and Pre-Law, neither member of the Interview Committee considered the degree to be pertinent to the position of Family Support Specialist. Tr.73.

47 47. Others who do not have college degrees are employed as Family Support Specialists. Tr.82.

The Interview

48 48. In discussing the discretion afforded interviewers with respect to scoring answers to questions, Dotson stated, “I have discretion only in that I choose who is going to be the best fit, my opinion of who is the best fit and qualified candidate for the job.” Tr.42.

49 49. Spears had the impression the Interview Committee considered her interview a waste of time. Tr.90.

The Selection Decision

50 50. At Level III, the explanation offered by Simmons for Lindsey's selection was that “[w]e chose that candidate because we feel that candidate at that particular time would be the best fit for that particular position.” Tr.80. 51 51. When asked what Lindsey brought to the table that

Spears did not, Simmons indicated that the Interview Committee looked at educational level. Tr.78. As previously noted, Simmons acknowledged that Lindsey's degree was not really relevant to the position in question. Tr.73.

52 52. Simmons also identified Lindsey's seeming maturity and her good oral communication skills as factors in Lindsey's favor. Tr.78. She may have been implying that Spears was immature, lacked good oral communication skills, or both, but she never said so.

53 53. Each of the applicants had provided a written statement as part of the application. Simmons praised Lindsey's written communication skills and cited them as a factor that distinguished Lindsey from Spears. (See footnote 6) Tr.78.

54 54. Dotson espoused the belief that the "[u]ltimate selection decisions should be based upon the interviewer's judgement [sic] as to which candidate would best do the job. It is who I feel is the best fit for the job." Tr.40.

Discussion

An unsuccessful applicant, such as Spears, who grieves her non-selection for a posted position bears the burden of proving, by a preponderance of the evidence, that the employer "violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005) (citing *Surbaugh v. Dep't of Health & Human Serv.*,Docket No. 97-HHR-235 (Sept. 29, 1997)). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

It is well-established that the grievance procedure is not intended to be a "super interview," meaning the Grievance Board's job is not to engage in the selection process but rather to conduct a "review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994)." *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). In conducting such review, the Grievance Board has consistently maintained that "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." *Jordan*, (citing *Skeens-Mihaliak v. Div. of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 3, 1998)).

The selection process at DHHR must comport with the provisions of DHHR Policy Memorandum

2106 ("Policy 2106"). In addition to prescribing the mechanics of the selection process, Policy 2106 states as follows:

> When selecting one employee from among several applicants, demonstrated ability, work history, references, education and the interview should be considered. The ultimate selection decision should be based upon the interviewer's judgment as to which candidate would best do the job. Hiring decisions should be based on an individual's qualifications for the essential duties of the position.

With respect to selection for the second vacancy, it appears that the Interview Committee focused upon the statement that "[t]he ultimate selection decision should be based uponthe interviewer's judgment as to which candidate would best do the job," to the exclusion of the rest of the quoted language.

In one form or another, Simmons and Dotson have reiterated throughout the grievance process that each thought or felt that Lindsey would be the best fit for the Family Support Specialist position. Such conclusory statements are not helpful in understanding the basis of their decision to select Lindsey, despite her shorter tenure, more limited experience, and inferior evaluation, as compared to the evaluation received by Spears in the same time frame.

There is no doubt that it is permissible to base a selection decision on a determination that a particular applicant would be the "best fit" for the position in question. However, the individuals making such a determination should be able to explain how they came to the conclusion that the successful applicant was, indeed, the best fit. Such explanations have previously served to support the selection of a successful applicant.

For instance, in *Coleman v. Dep't of Health & Human Res*., Docket No. 03-HHR-318 (Jan. 27, 2004), the grievant, Coleman, challenged the selection of an employee named Kelly for the position they both sought. The evidence adduced during the grievance proceeding in *Coleman* established that "Mr. Majic had experienced some problems with Grievant's performance in the past, and while those problems were not of any magnitude, they caused him concern and influenced him in his decision to give Ms. Kelly the position." *Coleman, supra.* Mr. Majic specified that the grievant "often needed prompting and reminding about deadlines, and that she could not accept any constructive criticism." *Coleman*, *supra*. Given that the reasons underlying the decision were made clear, the selection of Kelly, rather than Coleman, for the position in question was upheld. This grievance is distinguishable on its facts from cases such as *Coleman* because no meaningful explanations have been provided by Dotson or Simmons as to the bases for their opinions that Lindsey was the best fit

for the second Family Support Specialist position. Neither Dotson nor Simmons offered an explanation that tied Lindsey's perceived strengths to the specific types of duties she would be required to perform as a Family Support Specialist.

Nor were Simmons and Dotson forthcoming about any perceived deficiencies on the part of Spears. For example, at Level III Dotson reported, obliquely, that “there was some basic input on handling the job as far as policy interpretation and application and professional attitude and behavior in the workplace.” Tr.36. This vague assertion was obviously supposed to have negative implications for Spears but Dotson failed to specify such things as 1) what “basic input” he had received, 2) why he deemed it credible, 3) whether his sources had made conclusory statements or, instead, offered specific examples of conduct to support their conclusions about Spears, 4) whether the information was current or part of ancient history, or 5) any other information that would allow someone outside the selection process to meaningfully review the information relied upon by Dotson and Simmons in not selecting Spears for the second vacancy.

The following colloquy is illustrative of the dancing that was done on the issue of why Spears was not selected:

Staples: Okay. Did you tell her [Simmons] that Rose Spears could do the job?

Dotson: No.

Staples: Is it your opinion, sir, that Ms. Spears could not do this job?

Dotson: It is my opinion that she is not the best fit for the positions in question. Staples: I didn't ask you that.

Dotson: She is qualified to do the job.

Staples: Is it your opinion that she can't do the job?

> Dotson: It is my opinion that she can't do the job as well as the other applicants I have had so far.

Tr.20. The question of why Dotson thought Spears could not do the job as well as Lindsey goes begging.

If there were legitimate grounds for denying Spears a promotion to a Family Support Specialist position, either Dotson or Simmons should have stated those reasons plainly and clearly on the numerous occasions throughout this grievance process when they were invited to do so. Their vague explanations and repeated reliance upon their opinion as to the best fit make it difficult to engage in

any meaningful review of whether the factors of demonstrated ability, work history, references, education and performance during the interview were duly and fairly considered, as required by Policy 2106. The implication is that those required factors were not given due consideration, rendering the selection decision arbitrary and capricious.

Without offering a reasoned explanation for doing so, the Interview Committee ignored the facts that Spears 1) had considerably more experience than Lindsey as an Economic Service Worker, 2) received a much better evaluation than Lindsey in the Fall of 2003, and 3) had specialized experience in the FSE&T program, where her duties were markedly similar to some of the responsibilities vested in a Family Support Specialist. The Level III decision was critical of this failure on the part of the Interview Committee to explain its reasoning. It would have been reasonable to expect that such criticism would havespurred Simmons and Dotson to come to the Level IV hearing prepared to fully explain the grounds upon which the selection was based. Their failure to do so is more than curious. It strongly suggests that the selection process was flawed.

There was a reference to Spears having limited abilities. However, this criticism seems to have originated with Dotson and been adopted, wholesale, by Simmons. Dotson had only supervised Spears for a very brief period. Neither Dotson nor Simmons ever gave a clear explanation of what this conclusory phrase was supposed to mean or what actions on the part of Spears supported the characterization that she had limited abilities.

Further, Dotson's characterization of Spears as having limited abilities appears to be contrary to the opinions held by both Johnson and Mills. It is clear from the record that Mills supervised Spears for a much longer period than Dotson did. Mills testified as to her opinion that Spears was a good employee who would make a fine Family Support Specialist. Mills was familiar with the duties and responsibilities of a Family Support Specialist and with the work performance of Spears. As such, her testimony in this matter is afforded great weight. Unlike the Interview Committee members, Mills was able to clearly support and explain her opinions.

Although it is not readily discernible how long Spears was under Johnson's supervision, it was at least long enough for Johnson to prepare an employee performance appraisal of Spears. The assessment that Spears exceeded expectations in most of the performance appraisal categories is, again, at odds with Dotson's characterization that Spears had limited abilities. When confronted with this dichotomy, Dotson quite candidly acknowledged that he did not respect Johnson's opinion

because she did not supervise Family Support Specialists. At most, this might provide a basis for rejecting her opinion as to whether a specific applicant would be able to fulfill the duties of a Family Support Specialist. It does not provide any reasonable predicate for rejecting Johnson's assessment of how her supervisee, Spears, was doing as an Economic Service Worker. This is especially true in light of Simmons's testimony that she thought Johnson believed that Lindsey did good work. Johnson's opinion ought to carry the same weight for Spears as it does for Lindsey.

It is understood that references are not usually sought when the applicants for a vacancy are already DHHR employees. Nonetheless, the Interview Committee relied upon what appears to be nothing more than water cooler gossip and their own beliefs as to the opinions of other supervisors. Dotson was specifically asked if any of the previous supervisors indicated to him that Spears could not do the job of a Family Support Specialist. He responded, quite firmly, “Yes.” When asked to identify who those supervisors were, Dotson said that it was his opinion and that it was Simmons's opinion. He also said that it was his belief that two other supervisors, Dale Browning and Jonathan Smittle, would also have the same opinion. In other words, Dotson believed he knew what opinions would be expressed by other people.

He could have ascertained for certain what opinions other supervisors held. All he had to do was ask. Rather than relying upon the odd remark, Simmons and Dotson should have inquired about the other supervisors's opinions in a manner that signified that the purpose of the question was to aid in selecting a successful applicant for a particular vacancy. This would have ensured an appropriately tailored response based on recent knowledge. As it was, Simmons and Dotson seem to have relied upon comments that could have been made in the context of a dispute, a bad day, or a misunderstandingbetween the supervisor and employee. Neither Simmons nor Dotson would be aware of how much credence to give such *ad hoc* comments. The supervisor might have been venting about a momentary frustration, with no intention whatsoever of blocking the employee's advancement.

Further, there is nothing to establish the time frame for the remarks relied upon by the Interview Committee during this particular selection process. If there is no requirement for, or indication of, timeliness, an employee who went through a bad patch for some reason would never be able to redeem himself. Under the procedures used by this Interview Committee, one error in judgment or one personality clash with a supervisor could forever blight a career.

Policy 2106 expressly states that **"[s]ignificant factors in the employment decision should be documented**." (Emphasis in original.) The inability or the reluctance of the Interview Committee to clearly articulate the grounds for Lindsey's selection (or the grounds for Spears's non-selection) does not comport with this requirement.

The statement in Policy 2106 that the "ultimate selection decision should be based upon the interviewer's judgement [sic] as to which candidate would best do the job" should not be read to mean that selection can be based solely on the Interview Committee's subjective, personal preferences. Yet this is what appears to have happened in this case, which means that the selection of Lindsey was flawed in that it was arbitrary and capricious. The deference afforded an employing agency in a selection case does not extend so far as to shelter a decision, such as the one at issue herein, that is arbitrary and capricious and, further, is at odds with the provisions and spirit of the provisions of Policy2106. *Bedford County Mem'l Hosp. v. Health & Human Serv*., 769 F.2d 1017 (4th Cir.1985)("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, [or] explained its decision in a manner contrary to the evidence before it[.]").

The Supreme Court of Appeals of West Virginia has stated that the deferential, arbitrary and capricious standard, which is employed in reviewing an administrative agency's decisions, is based upon a presumption that "'an agency's actions are valid *as long as* the decision is supported by substantial evidence or by a rational basis.'" *Preston Mem'l Hosp. v. Palmer*, 213 W. Va. 189, 193, 578 S.E.2d 383, 387 (2003)(*per curiam*)(quoting Syl. pt. 3, *In re Queen,* 196 W.Va. 442, 473 S.E.2d 483 (1996)). The Court further stated that "despite the limited nature of judicial review of such contested cases, a court 'cannot uphold a decision by an administrative agency . . . if, while there is enough evidence in the record to support the decision, the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result.'" *Preston Mem'l Hosp.*, 213 W. Va. at 193, 578 S.E.2d at 387 (quoting *In re Queen,* 196 W.Va. at 447, 473 S.E.2d at 488).

In the selection process at issue, the logical bridge between the evidence and the result is missing. Spears has met her burden of proving that the selection of Lindsey was arbitrary and capricious and contrary to DHHR's own selection policy, as set forth in Policy 2106. This grievance must be granted.

CONCLUSIONS OF LAW

1 1. This is not a disciplinary grievance. Therefore, Spears bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. In a selection case, such as this, a grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005)(citing *Surbaugh v. Dep't of Health & Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997)).

3 3. "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

4 4. "In matters of non-selection for state employees, the grievance process is not that of a 'super interview,' but rather, serves as a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994)." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005).

5 5. "[S]election 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)." *Jordan v. Dep't of Transp.*, Docket No. 04- DOH-202 (Jan. 26, 2005). 6 6. "An agency's decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994)." *Jordan v. Dep't of Transp*., Docket No. 04-DOH-202 (Jan. 26, 2005).

7 7. DHHR failed to give due consideration to the factors set forth in Policy 2106 as reflected by the following:

7.0.a a.
The Interview Committee chose to disregard the employee performance appraisal for Spears;

7.0.b b.
The Interview Committee could not provide legitimate, objective grounds for ignoring the fact that Spears had

considerably more experience than Lindsey as an Economic Service Worker;

7.0.c c. The Interview Committee ignored the fact that Spears had extensive experience in the FSE&T program, which required skills that would be applicable in performing the duties of a Family Support Specialist;

7.0.d d. The Interview Committee did not obtain references, formal or otherwise, from anyone other than Dotson, who had supervised Spears for a very limited amount of time;

7.0.e e. Instead of asking other supervisors for their opinions, Dotson made, and relied upon, assumptions on his part about what opinions other supervisors held with regard to Spears; and

7.0.f f. The Interview Committee failed to identify objective criteria that explained or supported the members' opinions that Lindsey was the best fit for the position in question.

8 8. Spears has met her burden and proven, by a preponderance of the evidence, that DHHR's refusal to select her for the second Family Support Specialist position was arbitrary and capricious.

This grievance is **GRANTED**. Accordingly, the respondent, the West Virginia Department of Health and Human Resources, is **ORDERED** to instate the grievant, Rose Spears, into the subject Family Support Specialist position and to grant her back pay, seniority and any other benefits to which she would have been entitled had she been placed in the position at the time it was originally awarded.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty days of receipt of this decision. W. Va. Code § 29-6A-7 (1998).

Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 27, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

References to pages in the Level III transcript shall appear herein as "Tr.__."

Footnote: 2

The original date for post-hearing submissions was March 4, 2005. The deadline was extended by agreement of the parties.

Footnote: 3

The copy of the policy admitted into evidence at Level III as Grievant's Exhibit 5 contains extraneous underlining and handwritten notations of unknown origin.

Footnote: 4

Tr.43.

Footnote: 5

FSE&T was contracted out.

Footnote: 6

Objectively speaking, Lindsey's essay does not appear to outshine the written statement submitted by Spears. It does, however, appear that Lindsey invented a new word.