WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENDA DELAUDER,
Grievant,

v. **Docket No. 07-HHR-326**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

DECISION

Grievant Brenda Delauder is employed as a Child Support Specialist 3 by the Department of Health and Human Resources in their Bureau of Child Support Enforcement. In January 2007 Ms. Delauder applied for the position of Child Support Supervisor 2. Another applicant was awarded the position and Ms. Delauder filed a grievance dated February 1, 2007.[1] Grievant Delauder alleged that Respondent "failed to follow the procedures set forth by policy and law" and that she was more qualified for the supervisor position than the successful applicant. As a remedy Grievant seeks to be placed in the contested position with the increase in compensation that would result from

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[1] In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are being decided under the former statutes, W. VA. CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See Executive Order No. 2-07*, May 8, 2007. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

this promotion. She also seeks unspecified damages, costs and "other relief that may be deemed appropriate."

Level one was waived by the parties and a level two conference was held on February 21, 2007. The grievance was denied the next day. On February 26, 2007, the grievance was appealed to level three. Hearings were held on four separate dates beginning on March 5, 2007, and concluding June 5, 2007. The grievance was denied at level three by a decision dated June 11, 2007. Grievant appealed to level four and a hearing was held in the Charleston office of the Grievance Board on August 6, 2008 before Administrative Law Judge, Thomas J. Gillooly.[2] Grievant was represented by Dwight J. Staples, Esquire and the Department of Health and Human Resources was represented by B. Allen Campbell, Senior Assistant Attorney General. The parties agreed to submit proposed findings of fact and conclusions of law for consideration by the Administrative Law Judge, the last of which was received at the Grievance Board on November 19, 2008. The grievance became mature for decision on that date.

Synopsis

Grievant applied for a posted supervisory position and was not the successful applicant. She alleges that Respondent violated its own policy that controls the selection of applicants and that the process utilized to fill this position was arbitrary and capricious. Respondent was able to demonstrate that the selection process was fair and unbiased. The selection was based upon appropriate criteria which were applied consistently to all applicants. The grievance is denied.

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[2] This case has been assigned to the undersigned Administrative Law Judge for administrative reasons.

The following findings of fact are based upon a thorough review of the entire record created by the parties at all the hearings held in this matter.

Findings of Fact

1. Grievant Brenda Delauder is employed by the Department of Health and Human Resources ("DHHR") in the Bureau of Child Support Enforcement ("BCSE") as a Child Support Specialist 3. She has been employed by the BCSE for more than thirty-two years and is assigned to Respondent's Cabell County Office.

2. In January 2007, Grievant applied for the vacant position of Child Support Supervisor 2 ("CSS 2") which became vacant as a result of the retirement of Darlene Cremeans.

3. Including Grievant, there were five applicants interviewed for the CSS 2 position, all of whom were BCSE employees.

4. To assess the candidates the BCSE formed an interview committee consisting of five high level employees of the Bureau. The committee members were: Sallie Elmer, BCSE Regional Manager for Region 3; Karen McComas, BCSE Regional Area Manager for Region 5; Betty Justice, BCSE Performance Evaluation Manager for BCSE; Diana Johnson, BCSE Child Support Attorney; and Paul Cooley, BCSE Lead Supervising Attorney for Regions 3 and 6. Sallie Elmer led the committee since she was going to be the supervisor of the person who was awarded the position.

5. Since all of the applicants were long term employees of Respondent, a new set of interview questions was developed so no one would have the advantage of being

familiar with the old ones. Ms. Elmer compiled twenty questions that were intended to elicit responses that demonstrated the leadership and management potential of the applicants.

6. Each applicant was asked the same series of questions. The members of the interview committee scored the applicants on each answer based upon a scale of one to five, with five being the highest score. When the interview was completed, each applicant had a possible score of 100 points from each committee member resulting in a total possible 500 points.

7. Each applicant was required to submit a completed application form stating in detail their work history, experience and education.

8. The committee did not look at specific Employee Performance Appraisals ("EPA")[3] for each candidate to judge their prior work performance and did not ask for references beyond the supervisors listed on each individual's application.

9. After the interviews were completed, the committee members discussed the applicants and rated them in order of preference. Ms. Elmer compiled a sheet with the final candidates' ratings on it but destroyed the document after the committee made their final selection.

10. All but one of the members of the interview committee filled out an OPS-13 sheet[4] to rate the candidates. Since one committee member did not fill out an OPS- 13,

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[3] The EPA 3 form is used to provide the written annual job performance evaluation for all classified state employees. EPA 1 and 2 forms are used for goal setting and interim performance appraisals.

[4] The OPS 13 is a score sheet attached as an appendix to Policy 2106 which is the policy governing the selecting of applicants by Respondent. The OPS 13 is a tool that may be used to help interview committees score candidates but its use is not mandatory.

the forms were discarded and not used in the selection of the successful applicant so that the selection process would be uniform.

11. Score sheets were filled out for each applicant, by each committee member, to rate each applicant's responses to the interview questions. These documents were maintained by Ms. Elmer.

12. All of the interviewed applicants exceeded the minimum qualifications for the job. They were very successful employees of the Respondent with good employment records. Each candidate had exceeded expectations on his or her EPA. All committee members agreed that the applicants represented the best employees of the Bureau and Ms. Elmer characterized the group as "super stars."

13. Because all of the applicants were well known to the committee members and all were very good at their jobs, the committee put the heaviest weight on the interview for the final selection. The committee felt the interview would be the best indicator for judging which candidate would have the best leadership and management skills.

14. The highest total score for the interview was given to the successful applicant, Stacy Floyd. Her total was 361.5 points out of a possible 500. The lowest score was 278. Grievant ranked fourth out of five candidates with a total of 278.5 points.

15. Stacy Floyd was employed by BCSE as a Child Support Specialist 3. Ms. Floyd has been continuously employed by BCSE for more than nine years and works in Respondent's Cabell County Office.

16. All of the committee members ranked Stacy Floyd first in the interview. Four of the committee members ranked Grievant fourth and one member ranked Grievant fifth.

17. Grievant's responses to the interview questions indicated that she mainly wanted the position to increase her salary and to increase her retirement calculation. The committee was looking for an individual who was more interested in the opportunity for leadership and could demonstrate steps he or she had taken to prepare for a management position. Members of the committee characterized Grievant's answers as unresponsive, too short and lacking insight into the position. One committee member testified that it seemed that Grievant was just going through the motions.

18. Stacy Floyd's interview response reflected her desire to advance her career and take on challenges of leadership in the Bureau. Ms. Floyd's responses were characterized as well thought out, thorough and polished. One committee member noted that Ms. Floyd demonstrated strong communication skills in the interview which was a major attribute they were seeking for the position.

19. The candidates were compared based upon their work history, education, work references and ability, as reflected in the job application and interview. Most of the information related to work history, education and work references, was drawn from the applications.

20. Grievant's application had errors related to dates of assignments and supervisors, and the activities were listed in the wrong order. Grievant incorrectly identified her present classification as a Child Support Specialist 2. Her application lacked detail with regard to duties and responsibilities she performed in her various assignments. The committee members felt the application was an indication that Grievant didn't take the job seriously and that the inaccuracies were not consistent with an applicant for a management position.

21. Stacy Floyd's application was well prepared, accurate and provided detailed information regarding her qualifications.

22. All of the committee members agreed that Stacy Floyd demonstrated the broadest grasp of the supervisory position and best demonstrated the skills they were looking for. They all agreed that she was the best candidate for the position.

23. Stacy Floyd's immediate supervisor was Darlene Cremeans. For a period of time, while working for Ms. Cremeans, Ms. Floyd was chronically tardy for work. Ms. Cremeans discussed this problem with Ms. Floyd but did not take any disciplinary action and made no mention of it in any of Ms. Floyd's EPAs. Ms. Cremeans always rated Ms. Floyd as exceeding standards on her EPA 3s.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008). "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).

It is well established that the grievance procedure is not intended to be a "super interview," meaning the Grievance Board 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). *See also Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). "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, supra*. Therefore, in a selection case, such as this, the 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-CARR-384 (Feb. 28, 2005).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citation omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

Department of Health and Human Resources Policy Memorandum 2106 ("Policy 2106") governs the selection process for considering applicants for posted positions, conducting employment interviews, and making a selection from among several candidates. In a previous decision regarding this policy, the Grievance Board noted that:

> 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 selection decision should be based upon the interviewer's judgement [sic] as to which candidate would best do the job."

Spears v. W. Va. Dep't of Health & Human Res., Docket No. 04-HHR-284 (July 27,2005).

Grievant avers that Respondent failed to follow the policies and procedures established for filing a vacant position. The main thrust of Grievant's argument is that Respondent did not comply with Policy 2106. Grievant opines that the failure of Respondent to follow its own policy renders its action arbitrary and capricious. Grievant sights a number of areas in which she believes the policy was violated.

First, Grievant states that one of the factors to be considered in comparing candidates is "references." Grievant argues that BCSE failed to consider references of the job candidates and therefore violated Policy 2106. Respondent admits that the committee did not request or consider references for the applicants beyond the supervisors listed in the applications that were submitted.

Respondent makes the argument that Policy 2106 is only intended to provide general guidelines and provide sample forms to managers and supervisors for conducting interviews and filling positions. Mike McCabe, Director of DHHR's Office of Personnel Services, stated that the policy does not dictate the use of a particular process or a specific set of factors in comparing the applicants. This position is supported by the policy statement that, "the ultimate selection decision should be based upon the interviewer's judgement as to which candidate would best do the job." Concerning the specific requirement of references, McCabe noted that the committee did not have to get individual

references from the applicants because they were all employees of BCSE and the interviewers were familiar with their work history. Again this interpretation is supported by the specific language of Policy 2106 which states, "when considering applicants that are *unfamiliar to the interviewer*, references should be obtained from educational institutions attended and/or previous employers." (Emphasis added). Clearly, no references are needed for applicants who are familiar to the interviewers.

Next, Grievant argues that Policy 2106 requires BCSE to consider the "work history" of the applicants and to do that, the committee should have compared the specific scores of the applicants' on their EPA 3s. In support of this position Grievant points to the Administrative Rule of the Division of Personnel which states that "the appointing authority shall consider performance evaluations as well as other recorded indicators of performance in determining salary advancements and in making promotions, demotions, and dismissals." 143 C.S.R. 1 § 15. Grievant notes that she has had the highest EPA 3 score for any Child Support Specialist 3 and was, therefore, the most qualified candidate for the job. She avers that the failure of the committee to consider the EPA 3s was arbitrary and capricious because it was required by Policy 2106 and the Division of Personnel Administrative Rule, and because the EPAs demonstrated that she was the most qualified candidate.

Once again, Respondent counters that the factors for consideration of applicants set out in Policy 2106, are only guidelines and the committee was not required to utilize the EPAs of the applicants. Additionally the policy does not specifically mention EPAs but refers to the applicants' "work history." BCSE notes that they considered the "work history"

of the applicants as it was reflected in the completed job applications and the interview responses. Sallie Elmer testified that the committee members were familiar with the work of all the applicants and they all had consistently received a rating of "exceeds standards" on their EPAs. It was generally noted by the committee members that all of the applicants were among the best employees of Bureau and Ms. Elmer characterized them all as super stars.

Additionally, the Division of Personnel Administrative Rule also does not require the interviewers to utilize the specific EPA forms in comparing the candidates. 143 C.S.R. 1 § 15 only requires that the interviewers consider the applicants' evaluations. If, as in this case, the interviewers are familiar with the performance evaluations of the applicants, the rule is satisfied. *Ward v. Dep't of Trans./Div. of Highways*, Docket No. 96-DOH-184 (July 24, 1997).

Finally, if all applicants are performing at a level that exceeds expectations, very little can be accomplished by examining in detail the specific evaluation scores. When comparing the evaluations of two applicants for a teaching position in a selection case, Justice Neely made the following observation:

> The central fallacy of the appellant's argument is her conclusion that quantizing the subjective evaluations of rating officers converts those evaluations from subjective judgments to objective judgments. . .[W]ith the scores being as close as they are, it is not possible for a court to infer from the scores alone that the appellant is the superior teacher. If the evaluations had shown that [the successful applicant] was consistently performing in an unsatisfactory manner while the appellant was performing at the level of either excellent or superior, then the disparity might be sufficiently palpable to warrant the inference that appellant is the superior teacher.

Higgins v. Board of Ed., Randolph County, 168 W.Va. 448 at 452, 286 S.E.2d 682 at 685, (1981).

These comments are apropos to this situation. In the employment year ending August 30, 2005, Grievant and Ms. Floyd were evaluated by the same supervisor. For that year Grievant's EPA 3 Alpha Score was 2.56 out of a possible 3. Ms. Floyd's EPA Alpha Score for the same period was 2.52.[5] Any score between 2.51 and 3, merits a rating of "exceeds standards." In this situation, the two employees are only separated by four one hundredths of one point. In a subjective system, this is not enough of a variance to conclude one employee is superior to the other. The next employment year Grievant had a different evaluator and Ms. Floyd's remained the same. In that year, Grievant received an Alpha Score of 2.7 while Ms. Floyd improved to a 2.56. This variance, while somewhat larger, could just as easily be explained by differing standards and expectations of the two supervisors as any actual difference in the job performance of the two candidates. The committee's decision not to utilize the actual EPA scores of the applicants did not violate policy and was not arbitrary and capricious. Additionally, the mere fact that Grievant had a slightly higher Alpha Score than the rest of the applicants does not prove that she is the most qualified candidate for the position, especially when all of the applicants exceed standards.

Ms. Floyd's supervisor, Darlene Cremeans testified that Ms. Floyd had a serious problem with being tardy on a regular basis. Grievant attempted to show that this made

[5] The Alpha Score is a composite score made up of all the ratings of the various indicators of performance measured in an employees annual performance evaluation.

Ms. Floyd less qualified for the management position. However, Ms. Cremeans never mentioned the issue in any of Ms. Floyd's evaluation and consistently rated her as "exceeds standards" during this period. The interview committee may or may not have known about the issue of tardiness, but since it was not serious enough to impact her performance ratings, it is was also not serious enough to diminish her standing as a candidate. *See State ex rel. Oser v. Haskins*, 179 W.Va. 789, 374 S.E.2d 184 (1988).

Grievant points to the fact that Policy 2106 has forms called OPS-13 and OPS-13A charts, for comparison of applicants that may be utilized by the interviewers for "ranking applicants based upon factors usually considered as important qualities in prospective employees." As with the remainder of the policy these forms are only suggested guides and are not mandatory. The policy specifically states that "different factors can be weighed on the needs the job entails. Such factors and weights must be determined prior to the interview and applied consistently to all applicants." In this case, the committee decided that they knew the applicants were all excellent employees. They wanted to design interview questions that drew out their skills and aptitude for the management position. Ms. Elmer compiled twenty specific questions for the interview that the committee members felt were appropriate and each applicant was to be asked the same questions. A point system was devised giving each question equal weight. Each interviewer understood the system and independently assigned points to the applicants' responses. This evaluation system was designed prior to the interviews and was applied consistently to all the candidates for the position. This process met the requirements of Policy 2106.

Grievant notes that four of the interviewers utilized the OPS-13 chart to compare the candidates and one did not. Ms. Elmer discarded the OPS-13 charts that were completed. Grievant argues that discarding the charts once they were used by some of the committee members violated the policy. To the contrary, since the forms were not completed by all of the interviewers, to use them would have been inconsistent with the policy mandates to apply all standards consistently. One interviewer's decision would have been based upon a different set of standards than those used by the remaining committee members. By utilizing only the interview questions and the applications of the candidates, all of the committee members applied the same comparison standards to all of the applicants as the Policy 2106 requires.

Grievant relies heavily on *Spears, supra,* for the proposition that failure to strictly follow the outline procedures in Policy 2106 invalidates the hiring process. That reliance is misplaced. The Administrative Law Judge in *Spears* wrote, "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." *See also Coleman v. Dep't of Health & Human Res.*, Docket No. 03-HHR-318 (Jan. 27, 2004). In *Spears* the interviewers could not provide any meaningful explanation as a basis for their selection of the successful applicant. Therefore, their selection was found to be arbitrary and capricious. In the present case, the committee utilized a reasonable format to measure attributes relevant to the position to be filled and consistently applied that process to all the applicants. The

committee members reached a unanimous decision regarding the best candidate for the position and were able to articulate valid reasons and documentation to support their reasons. Clearly, *Spears* is simply not controlling precedent with this set of facts.

The committee did commit one serious error in the interview process which was not in compliance with Policy 2106. The policy requires that “the forms, and all documents related to the employee selection process, are to be maintained for a period of one year following the completion of the process, whether or not the position is filled.” Ms. Elmer stated that there was a form used that compiled all of the ratings that the committee members made of the candidates. It would have contained additional information regarding how the candidates compared on all factors including the interviews. Ms. Elmer admits that she destroyed this information and claims that it was simply a mistake. There is no doubt that the failure to maintain this information violates the procedure set out in Policy 2106.

Normally, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995). In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been

reached, the procedural violation will be treated as "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008).

The policy requires that the decision documentation be preserved so that the selection process can be examined at a later date. The documentation will show that appropriate factors were properly considered or that the process was arbitrary. Failure to keep the information makes it more difficult to defend or attack the process. This is a very serious error and in many cases could invalidate the process completely. It leaves a shadow over the entire process because a grievant is left with no way to look behind the testimony of the selection officials. In this case, however, the lost information was not the only documentation available. The applications of the parties were maintained as well as the interview score sheets completed by all of the committee members for all of the applicants. Additionally, all of the committee members testified and were available for cross examination. The interviewers confirmed their interview scores and clearly articulated their reasons for selecting the successful applicant. Each interviewer confirmed that Ms. Floyd was the best candidate for the job and Grievant was considered to be near the bottom of a very capable group. The selection decision is validated without the lost materials and it is clear from the record that the destroyed information would not have led to a different outcome.

In the final analysis, Grievant did not prove that the selection process was arbitrary and capricious and the grievance must be denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008). "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).

2. It is well-established that the grievance procedure is not intended to be a "super interview," meaning the Grievance Board 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). *See also Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005).

3. "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 v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). Therefore, in a selection case, such as this, the 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-CARR-384 (Feb. 28, 2005).

4. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion.” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citation omitted). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. Grievant did not prove that the selection process was unreasonable or that the selection was based upon criteria not intended to be considered. Grievant did not prove that the action of Respondent was arbitrary and capricious or that she was the most qualified applicant.

6. Normally, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995). In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result

would have inevitably been reached, the procedural violation constitutes “harmless error.” *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008).

7. Grievant failed to prove that the destruction of documents that should have been maintained for a year after the end of the selection process, made any difference in the selection process. Therefore, this procedural violation of Policy 2106 was harmless error and.did not render the selection process null and void.

Accordingly, the grievance is DENIED.

Any party, or the West Virginia Division of Personnel, may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 29-6A-7 (*See* Footnote 1). 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 record can be prepared and properly transmitted to the appropriate circuit court.

DATE: January 28, 2009

WILLIAM B. MCGINLEY
Administrative Law Judge