WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

CINDY K. TUCKER,
Grievant,

v. **DOCKET NO. 2013-1046-DEA**

DIVISION OF REHABILITATION SERVICES,
Respondent, and

JOHN O. HAER,
Intervenor.

DECISION

Cindy K. Tucker ("Grievant"), filed this grievance on January 15, 2013, against her employer, the Division of Rehabilitation Services ("Respondent" or "DRS"), challenging her non-selection for promotion to a Rehabilitation Services Manager 1 position as the District Manager for the Charleston District. Grievant's statement of grievance reads: "I believe I was the best qualified candidate for position RS 1350 Rehabilitation Services Manager 1. I was not selected for this position, and feel the selection process was flawed. I sought to clarify this with the interview team prior to filing the grievance and received no response." As relief, Grievant is seeking "[t]o be awarded this position, and to receive back pay."

Following a Level One grievance hearing conducted on January 30, 2013, by James D. Wells, Respondent DRS denied the grievance on February 15, 2013. Grievant appealed to Level Two of the grievance procedure on February 21, 2013. On April 10, 2013, Intervenor status was granted to the successful applicant, John O. Haer ("Intervenor"), by Administrative Law Judge Carrie H. LeFevre. After mediation was

completed at Level Two on June 10, 2013, Grievant appealed to Level Three on June 17, 2013. A Level Three hearing was held before the undersigned Administrative Law Judge on September 20, 2013, in Charleston, West Virginia. Grievant appeared *pro se*. DRS was represented by Assistant Attorney General Katherine A. Campbell. Intervenor also appeared *pro se*. This matter became mature for decision on October 23, 2013, upon receipt of the last of the parties' post-hearing arguments.

Synopsis

Grievant is currently employed by Respondent DRS as a Branch Office Manager, working in the agency's Teays Valley Branch Office in Hurricane, West Virginia. Grievant applied for a posted managerial position in the Charleston District Office and was not selected for the position. She alleged that the interview process was flawed because the interview panel did not ask the same questions of all applicants, and there was a pattern of favoritism demonstrated which favored applicants who worked in the Huntington District Office at the time they applied for promotion to any key position. However, Grievant failed to demonstrate that either of these factors tainted the selection process to the extent that the decision reached represented an arbitrary and capricious result, or that the outcome of the process would have changed had the selection interviews been conducted differently. Grievant was thus unable to meet her burden of proof where the selection decision to promote Intervenor was supported by substantial evidence and a rational basis. Accordingly, this grievance will be denied.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level One and Level Three hearings:

Findings of Fact

1. Grievant is employed by the Division of Rehabilitation Services ("DRS") as the Branch Manager of the Teays Valley Branch Office.

2. Grievant has been employed by DRS for more than twenty years.

3. Grievant successfully completed Respondent's first annual Emerging Leadership Program in 2011. *See* Plaintiff's[1] Ex 3 at L 1. Completion of the Emerging Leadership Program is not a prerequisite for promotion to the Charleston District Manager's position, or any other position in DRS. Grievant also graduated from Leadership Charleston, presented by the Chamber of Commerce in 2002.

4. On November 19, 2012, Respondent posted a vacancy for a Rehabilitation Services Manager 1 to serve as District Manager for the Charleston District. The announcement listed the location for this position as "Kanawha County." *See* Plaintiff's Ex 2 at L I.

5. Grievant made a timely application to fill this position.

6. Intervenor and several other employees also applied for the position.

7. Intervenor has been employed by DRS for approximately 23 years and has over 10 years of supervisory experience with the agency.

8. Grievant met the minimum qualifications for the position, as did the successful applicant, John O. Haer, the Intervenor in this matter.

9. A three-member committee was appointed to interview all qualified applicants for the Charleston District Manager's position.

[1] The exhibits in the Level One record refer to Grievant as "Plaintiff" and Respondent as "Defendant," and will be cited accordingly.

10. The interviewing committee consisted of Marijane Waldron, Acting Director of Field Services, Michelle James, Chief Financial Officer, and Gentry Cline, Senior Manager of Client Services. Mr. Cline was the lead interviewer because he was the immediate supervisor over the position being filled.

11. Each member of the interviewing committee had previously participated in multiple interviews of applicants seeking various positions within the agency.

12. The interviewers employed a typewritten form containing 15 questions which were asked of each of the candidates being interviewed. *See* Defendant's Ex 1 at L I. Each applicant was scored on his or her responses to these same questions, except for question 15.

13. The fifteenth and final question on the form used by the interviewers was: "Do you have any questions for us?" *See* Defendant's Ex 1 at L 1. This question was not scored.

14. Grievant did not ask any question in response to question number 15.

15. In response to question 15, Intervenor inquired about working out of the Teays Valley Office rather than the Charleston Office.

16. Based upon the job posting, Grievant expected the position to be located in the Charleston District Office in Kanawha County. However, DRS has previously permitted District Managers to work out of a smaller office in the district closer to their home, and travel to the other offices in the district, as necessary. This had not previously occurred in the Charleston District.

17. During Angela Walker's interview for this same position, Ms. Waldron asked her about having any issues with commuting from her residence in Roane County to Charleston each day. Ms. Walker recalled this as being an informal discussion somewhere near the end of the interview.

18. Grievant was not asked about commuting during her interview.

19. Neither Ms. Walker, nor any other applicant, was scored based upon his or her response to a question regarding commuting issues.

20. Mr. Cline totaled the scores assigned to each applicant during the interview process and determined that Intervenor received the highest total score. In addition, Intervenor received the highest score of any applicant from each of the three interviewers.

21. Based upon the interview results, and Intervenor's experience as a successful supervisor, Mr. Cline recommended to Ms. Waldron that Intervenor be selected for the District Manager's position.

22. Ms. Waldron accepted Mr. Cline's recommendation, and selected Intervenor to fill the posted vacancy.

Discussion

Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept

as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

Certain facts relating to the promotion interview process were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res*., Docket No. 95-HHR-066 (May 12, 1995). *See Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth*., Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

In a case where Grievant is challenging her non-selection for a promotion, Grievant has the burden of demonstrating that her employer violated the rules and regulations governing hiring and promotions, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Vance v. Dep't of Transp*., Docket No. 06-DOH-418

(2007). *See Surbaugh v. Dep't of Health & Human Serv*., Docket No. 97-HHR-235 (Sept. 29, 1997). In regard to such matters, the grievance process is not intended to be 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). *See King v. Dep't of Health & Human Res*., Docket No. 2011-0527-DHHR (Oct. 12, 2012). The Grievance Board recognizes 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 not generally be overturned. *King*, *supra*; *Ashley v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-070 (June 2, 1995); *Skeens-Mihaliak v. Div. of Rehab. Serv*., Docket No. 98-RS-126 (Aug. 6, 1998). *See Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). Therefore, unless proven arbitrary and capricious or clearly wrong, an agency's decision regarding a selection determination will be upheld. *Ashley*, *supra*.

In reviewing an agency action to determine whether it is arbitrary and capricious, consideration should be given to whether the agency relied on prohibited factors, entirely ignored important aspects of the issue to be decided, explained its decision contrary to the available evidence, or whether the decision is so implausible it cannot be ascribed to a difference in view. *See Bedford County Memorial Hosp. v. Health & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985); *Woolridge v. Dep't of Transp*., Docket No. 2008-0416-DOT (Jan. 23, 2009). Although 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 his judgment for that of the employer.

Trimboli v. Dep't of Health & Human Res., Docket No. 93-HHR-322 (June 27, 1997). Ultimately, the arbitrary and capricious standard of review is a deferential one which presumes 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); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

The Administrative Rule of the West Virginia Division of Personnel contains broad guidance regarding an agency's discretion in making promotion decisions as follows:

> In filling vacancies, appointing authorities shall make an effort to achieve a balance between promotion from within the service and the introduction into the service of qualified new employees. Whenever practical and in the best interest of the service, an appointing authority may fill a vacancy by promotion, after consideration of the eligible permanent employees in the agency or in the classified service based on demonstrated capacity and quality and length of service.

W. Va. Div. of Personnel Administrative Rule, 143 C.S.R. 1 § 11.1(a) (2012).

Grievant suggested at Level Three that her non-selection for the District Manager's position may have been attributable to favoritism. Favoritism is defined in the grievance procedure as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. Va. Code § 6C-2-2(h). In order to establish a *prima facie* claim of favoritism under the grievance statute an employee must prove:

> a. that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> b. that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her;
>
> and

> c. that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Board v. W. Va. Dep't of Health & Human Res., Docket No. 99-HHR-329 (Feb. 2, 2000); *Frantz v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-096 (Nov. 18, 1999). *See Vance v. Dep't of Transp*., Docket No. 06-DOH-418 (Jan. 24, 2007).

If a grievant is able to establish a *prima facie* case of favoritism, the employer may rebut this showing by articulating a legitimate basis for its actions. Thereafter, the grievant may show that the offered reasons are pretextual. *See Board*, *supra*. *See generally Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 178 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant presented evidence from the Respondent's newsletter announcements which indicated that 4 of the last 5 promotions in the field services program, including the promotion at issue in this matter, went to employees who were employed by Respondent in the Huntington District Office at the time they were selected for promotion. *See* Plaintiff's Exs 3, 4, 5 & 6 at L I. However, there was no further analysis as to where the interviewing team and hiring manager were located, where the unsuccessful applicants were working at the time of their non-selection, or any contemporary statements or comments to suggest that these Huntington-centric selections were more than statistically coincidental. Indeed, Respondent presented credible evidence which indicated that in regard to at least one of the selections relied upon by Grievant, the person selected from the Huntington District was the only applicant at the time the selection decision was made.

There was evidence that the selecting manager, Mr. Cline, had worked with Intervenor for a period of two years or more while Mr. Cline was District Manager of the Huntington District Office. However, the mere fact that a hiring supervisor has worked with the successful applicant, standing alone, is insufficient to establish favoritism as contemplated by the grievance statute. For example, there was no evidence that Mr. Cline and Intervenor were close friends, attended the same church, belonged to some close-knit fraternal organization, or had any other special relationship beyond what was depicted as an otherwise routine working relationship. Accordingly, although Grievant's pattern and practice evidence may be relevant and admissible, it is not persuasive because it constitutes nothing more than a superficial snapshot of a segment of promotion actions, without any additional analysis to support the proposition that employees who work out of the Huntington District Office are improperly favored in regard to promotion opportunities. Accordingly, Grievant failed to establish that her non-selection for the District Manager's position was the result of prohibited favoritism.

There was also evidence that one of the members of the interviewing panel asked Angela Walker, another applicant for the position at issue, a question which was not on the prepared list of standard questions to be asked of each applicant. The question posed regarded Ms. Walker's ability to commute from another county to the District Office in Charleston. Although Ms. Waldron, the person who allegedly asked the question of Ms. Walker, could not recall the conversation, Ms. Walker testified credibly that such a conversation did, in fact, take place. Indeed, Ms. Walker's testimony at Level Three was completely candid and straightforward. In the circumstances, it is completely reasonable

that she recalled a conversation that the other participants could not. Further, Mr. Cline recalled Ms. Waldron asking a similar question, but could not remember the specific context of the inquiry. This lack of recollection by the other participants to the conversation is likewise understandable because the questions asked involved an essentially innocuous inquiry, rather than a probing interrogation. There was no evidence that this additional question improperly tainted the selection process, other than the fact that one unsuccessful applicant was asked a question that was not in the prepared script for the interview.

While Respondent followed a generally established practice of writing out the interview questions in advance, as well as having the same participants on the interview panel pose the same questions to each of the applicants, Grievant has not cited any law, rule or regulation which requires Respondent to follow this specific practice. The practice of asking uniform questions selected in advance of the interviews is a completely appropriate initiative, intended to avoid asking questions that could favor one candidate over another or, more importantly, avoid asking questions about prohibited matters which could suggest bias, prejudice, or even violate federal or state law. *See*, *e.g*., *Halpert v. Manhattan Apartments, Inc.*, 580 F.3d 86 (2d Cir. 2009); *West Coast Indus. Relations, Inc. v. NLRB*, 50 F.3d 18 (9th Cir. 1995); *King v. Trans World Airlines, Inc*., 738 F.2d 255 (8th Cir. 1984). In the context presented, the interview panel member's question about commuting directed to another applicant for the position at issue here was not such a question relating to a prohibited topic.

Even assuming this departure from established practice was an error, Grievant has not demonstrated how she was harmed by such error, or that the outcome of the promotion decision would have changed had this question not been asked of another applicant. In other words, Grievant has not shown that this particular deviation from normal protocol constituted harmful error that corrupted the selection process. *Della Mae v. W. Va. Div. of Natural Res*., Docket No. 98-DNR-204 (1999). *See Delauder v. W. Va. Dep't of Health & Human Res*., Docket No. 07-HHR-326 (Jan. 28, 2009). *See also McFadden v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-428 (Feb. 17, 1995). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

As Grievant aptly noted in her testimony at Level Three, selecting the "best" applicant from two or more well-qualified candidates involves a subjective decision-making process. Respondent exercised its discretion under the established promotion process and Grievant, though well qualified, was not chosen. This selection process has now been reviewed in some detail without the production of preponderant evidence that any prejudicial error or misapplication of any law, rule, or regulation occurred that makes Respondent's selection of Intervenor instead of Grievant improper.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va.*

Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

2. In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes 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. *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*.

3. 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 (1986)). "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 substitute [his] judgment for that of the employer." *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1987).

4. In order to obtain relief on the basis of an alleged error in a promotion action, a grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different if the selection had been conducted correctly. *Della Mae v. W. Va. Div. of Natural Res*., Docket No. 98-DNR-204 (1999).

5. To prevail in a claim alleging favoritism in violation of W. Va. Code 6C-2-2(h), an employee must prove:

> a. that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> b. that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her;
>
> and
>
> c. that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

See Board v. W. Va. Dep't of Health & Human Res., Docket No. 99-HHR-329 (Feb. 2, 2000); *Frantz v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-096 (Nov. 18, 1999).

6. Grievant failed to establish that her non-selection for the District Manager's position was the result of prohibited favoritism.

7. Grievant did not establish that Respondent violated any statute, regulation or policy, or that it abused its substantial discretion, when it selected Intervenor for the position of District Manager for the Charleston District.

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).

DATE: October 31, 2013

_____

LEWIS G. BREWER
Administrative Law Judge