

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOSHUA P. LOTT,  
Grievant,**

**v.**

**Docket No. 2023-0728-DHS**

**DEPARTMENT OF HOMELAND SECURITY/  
BUREAU OF COMMUNITY CORRECTIONS,  
Respondent, and**

**CLARISSA HILL,  
Intervenor.**

**DECISION**

Joshua P. Lott, Grievant, is currently classified as a Probation and Parole Office 2 and works as a parole officer for the West Virginia Division of Corrections and Rehabilitation. On March 22, 2023, Grievant filed this action directly to level three of the grievance process requesting an expedited grievance. Grievant challenges the action of Respondent in not selecting him for a posted Probation and Parole Officer 3 position. Grievant seeks placement in the position and back pay.

The grievance was dismissed at level three and transferred to level one following the initial filing. On March 10, 2023, the grievance was waived at level one by Respondent's designee stating that the grievance was related to classification and compensation issues. There was no hearing or conference held at level one. By Order dated May 16, 2023, the Grievance Board joined the West Virginia Division of Personnel as a necessary party. On June 2, 2023, the Division of Personnel filed a motion to be dismissed as a party. After allowing the parties an opportunity to respond to the motion, the Grievance Board subsequently entered an Order dated July 14, 2023, dismissing the Division of Personnel as a party respondent.

On June 8, 2023, Clarissa Hill filed an intervention form in this matter. The Grievance Board entered an Order on July 14, 2023, granting this request to intervene. A level two mediation was conducted on September 6, 2023. Grievant appealed to level three. An evidentiary level three hearing was held on February 1, 2024, and February 12, 2024, before Administrative Law Judge Landon R. Brown, at the Grievance Board's Charleston office. Grievant appeared in person and by his counsel, Richard D. Dunber, Esq., Dunbar & Fowler, PLLC. Respondent appeared by its Assistant Commissioner Anne Thomas and by its counsel, Jodi B. Tyler, Assistant Attorney General. This case was reassigned to the undersigned for administrative reasons on or about March 12, 2024. This case became mature for consideration upon receipt of the last of the parties' Findings of Fact and Conclusions of Law on March 12, 2024.

### **Synopsis**

This grievance was filed when Grievant was not selected for a posted Probation and Parole Officer 3 position. The Intervenor, who also interviewed for the position, was ultimately offered the position and she accepted the position. The unique facts of this case demonstrate that the selection process cannot be viewed as arbitrary and capricious, and that discrimination did not play a role in the selection process. Grievant did not meet his burden of proof to establish that he should have been selected for the position or that he was the victim of discrimination.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. The West Virginia Division of Corrections and Rehabilitation is the state's correctional agency that falls under the West Virginia Department of Homeland Security. Anne Thomas is currently the Assistant Commissioner for the Division of Corrections and Rehabilitation's Bureau of Community Corrections, and the Division of Corrections and Rehabilitation's Parole Services offices operate under her direction and supervision.

2. Grievant has been employed for over fourteen years with Respondent. Grievant is currently employed by the Division of Corrections and Rehabilitation's Parole Services division as a Probation and Parole Officer 2 and has been since June 2017. Grievant serves as an Enhanced Supervisor Officer which requires him to supervise parolees who have been convicted of sex offenses or other violent crimes against the person.

3. During Grievant's time as a Probation and Parole Officer 2, he served as the temporary acting Region 5 Regional Director from September of 2022 until March of 2023, alternating every thirty days with another employee in the same office.

4. The Employee Performance Appraisals for Grievant from 2014 until 2022 showed that he had always "met or exceeded expectations" for his job duties. Favorable comments were contained in the evaluations which included a statement from his supervisor that Grievant was "the lynchpin that held the Parkersburg Office together."

5. Intervenor, Clarissa L. Hill, is currently employed as a Probation and Parole Officer 3. She holds the working title of Region 5 Regional Director and has been since March 25, 2023. In her current role she directs and supervises the entire operation of a

regional probation and parole office and its staff. Intervenor has been employed by Respondent for seventeen years.

6. In December 2022, interviews were held for the posted position of Probation and Parole Officer 3 for the Region 5 Regional Director vacancy. Only Grievant and two other employees interviewed at that time. Grievant was the recommended candidate. Assistant Commissioner Thomas advised the committee chair that the position was going to be reposted due to less than four applicants being interviewed and the because the position had recently been updated to include an experience waiver.

7. Following the second posting, the agency received additional applications, including both Grievant and Intervenor. The interview panel unanimously selected Grievant as the top selection, Intervenor as the second selection, and another employee as the third selection.

8. At the time of the second interview, both Grievant and Intervenor met the minimum qualifications of the Probation and Parole Officer 3 position and had similar scores on their Employee Performance Appraisals. However, Intervenor did have more seniority than Grievant with the agency.

9. On March 8, 2023, the panel's recommendations were emailed to Assistant Commissioner Thomas for approval. Thereafter, there were additional discussions between the interview panel and Ms. Thomas regarding her specific reservations about selecting Grievant for the position. On March 15, 2024, the chair of the panel sent a second email to Ms. Thomas and other members of the interview panel, which stated: "Per our conversation, due to the first selection not being an option at this time; I am going

to have to go to our second selection that we all had chosen on the panel, Clarissa Hill. We will submit her needed information to start the process.”

10. By letter dated March 20, 2023, Southern District Supervisor, Doug Workman, informed Grievant that he was not selected for the position.

11. In explaining her decision to not approve Grievant for the promotion in this case, Assistant Commissioner Thomas indicated that due to her knowledge of a prior internal investigation involving the Grievant, she was not confident that he had the necessary leadership abilities to supervise and direct an entire Regional Office. Ms. Thomas clarified that she was not aware of an incident involving Grievant and a parolee that occurred in December of 2019, until April of 2022, when the agency was made aware of litigation against the agency.

12. The litigation revealed that Grievant and his supervisor, former Region 5 Regional Director, David Jones, improperly apprehended an absconding parolee by striking the parolee’s bicycle with a state-owned vehicle, causing an injury to the parolee. The Respondent initiated an investigation into the incident, and it was completed on July 14, 2022.

13. Ms. Thomas was concerned about Grievant’s decision making process because he admitted to telling his supervisor to perform a “precision immobilization technique” maneuver to knock the parolee off a bicycle with a state-owned vehicle when the officer was not trained or authorized to use such a technique. In addition, Grievant did not provide vital information about how the arrest occurred when he initially reported the incident, and Grievant did not complete the incident report in a timely manner.

14. Grievant was not disciplined for the December 31, 2019, incident. Grievant was not aware of the Investigative Report dated July 14, 2022, until it was presented on the first day of the level three hearing.

15. Several of the interview panel members had little or no knowledge of the nature of the Grievant's involvement in the 2019 incident, or the investigation that substantiated Grievant's policy violations.

16. Assistant Commissioner Thomas acknowledged that Grievant's recommendation was the first panel selection that she did not approve but explained that selections are typically discussed with her as the Assistant Commissioner who oversees Parole Services.

17. Assistant Commissioner Thomas added that this was not the first time in the agency's history that a selection recommendation had been overruled by an administrator in the chain of command.

18. Respondent's relevant policy provides that "[t]he interview panel and interview should consider and assess relevant factors for the posted position. Among potential factors to be considered are: 1. An applicant's experience, education, functional knowledge of the posted position, and abilities to carry out the duties and functions of the position. 2. Intangible factors such as an applicant's attitude and work ethic. 3. Any other factors which the interview panel determines are relevant." Respondent Ex. 3.

19. In addition to the applicable policy, WEST VIRGINIA CODE § 15A-3-5 provides:

(a) The commissioner, or his or her designee, has the authority to manage and administer the finances, business, operations, security, and personnel affairs of correctional units and juvenile facilities under the jurisdiction of the division.

(c) All persons employed at a state-operated correctional institution or correctional unit are subject to the supervision and approval of the superintendent and the commissioner, or his or her designee . . . Respondent Ex. 11.

20. WEST VIRGINIA CODE § 15A-7-1 provides:

(a) The commissioner shall establish a Bureau of Community Corrections. The commissioner shall establish which adult facilities or institutions shall appropriately be managed by the Bureau of Community Corrections.

(b) The commissioner shall appoint an assistant commissioner, who shall oversee the Bureau of Community Corrections. Respondent Ex. 11.

21. WEST VIRGINIA CODE § 15A-7-3 provides:

(b) The commissioner shall, in the manner provided for in § 15A-3-5 of this code, hire all probation and parolee officers, assistants, and employees required to carry out the duties as prescribed in this code for management of the parolee population, and probation population, as set forth in § 15A-7-4 and § 62-13-2(b) . . . Respondent Ex. 11.

### **Discussion**

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *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).

Grievant applied on two occasions for a promotion to the position of Probation and Parole Officer 3. Grievant was selected by both interview panels as the top candidate, but his recommendation was not approved by Assistant Commissioner Thomas. Grievant asserts that he is more qualified and has more experience than the successful applicant.

Grievant argues that his non-selection for the position was the product of prohibited discrimination.

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 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. *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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

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*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996);" *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).



The record did not establish by a preponderance of the evidence that Respondent's selection of the successful applicant was arbitrary and capricious. The record shows that the qualifications and experience of all the applicants were reviewed. Grievant asserts that his work experience and favorable performance evaluations made him the most qualified applicant. Grievant also relies heavily on the undisputed fact that his selection by both interview panels further supports his argument. The Assistant Commissioner and members of the interview panel acknowledged that Grievant was qualified for the Probation and Parole Officer 3 position; however, one particular prior action was considered by the Assistant Commissioner as a relevant intangible factor that caused doubt on Grievant's overall ability to lead an entire regional office. This scrutiny in the process cannot be viewed as arbitrary and capricious.

When considering the qualifications and performance of Grievant and Ms. Hill, both had the basic knowledge, experience, and ability to perform the position and had comparable performance appraisals. However, Respondent's promotion policy allows for the agency to consider not just an applicant's basic minimum qualifications, but also "intangible factors." These factors include an applicant's attitude and work ethic, and also any other factors deemed relevant. Grievant's perceived poor decision-making was a factor considered when determining which candidates should be selected for the position. Assistant Commissioner Thomas went into detail to explain why she did not believe that Grievant was the most qualified candidate for the position based on the findings of the internal investigation, even though Grievant was not disciplined based on the policy violations.

As cited above, statutory authority mandates the West Virginia Division of Corrections and Rehabilitation Commissioner, and the appointed Assistant Commissioner, are responsible for overseeing all hiring decisions related to parole officers or other employees under the Bureau of Community Corrections. Based upon the intangible and relevant factors considered in this case, the undersign cannot rule that Respondent's selection of the successful applicant was without meaningful consideration, and in disregard of the facts and circumstances of this case. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*. For the undersigned to substitute his judgment for that of the Assistant Commissioner, based on the basically undisputed facts of this case, would be an abuse of discretion as set out by the applicable case law precedent.

Grievant also asserts that discrimination played a part in the selection process. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);

- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

While not fully developed on the record, Grievant argues that he was treated differently than all other employees who had applied for a promotion within Parole Services of the Bureau of Community Corrections. This assertion was addressed by the Assistant Commissioner during the level hearing, and she clarified that this was not the first time in the agency's history that a selection recommendation had been overruled by an administrator in the chain of command. In any event, Grievant failed to identify a similarly-situated employee in which any difference in treatment was not related to the actual job hiring criterion. Another applicant may be deemed more qualified based on specific qualities the agency determines are specifically relevant, and, standing alone, this allegation is insufficient to establish discrimination as contemplated by our statute.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *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).

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 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. *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 v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. 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*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996);" *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant failed to prove by a preponderance of the evidence that the selection of Ms. Hill for the position was an arbitrary and capricious decision.

6. Grievant failed to establish a claim of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Intermediate Court of Appeals.<sup>1</sup> Any such appeal must be filed within thirty (30) days of receipt of this Dismissal Order. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal

---

<sup>1</sup>On April 8, 2021, Senate Bill 275 was enacted, creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend W. VA. CODE § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**Date: April 23, 2024**

---

**Ronald L. Reece**  
**Administrative Law Judge**