

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**PHILIP PRIDEMORE, JR.,
Grievant,**

v.

Docket No. 2016-0676-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.**

DECISION

Grievant, Philip Pridemore, Jr., is employed by Respondent, Department of Health and Human Resources, in the Bureau for Children and Families. On October 21, 2015, Grievant filed this grievance against Respondent stating, "WV DOP administrative rule 9.5d shall give due consideration to those employees who apply and are eligible for the posted vacancy, for director of centralized intake." For relief, Grievant seeks: "A hearing be held, evidence presented, and reconsideration for the position."

Following the November 12, 2015 level one hearing, a level one decision was rendered on December 7, 2015, denying the grievance. Grievant appealed to level two on December 22, 2015. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on February 23, 2016. A level three hearing was held over two days on October 12, 2016 and March 16, 2017, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared *pro se*¹. Respondent was represented by counsel, Steven R. Compton, Senior Assistant Attorney General. Following the first day of hearing, and only a few days before the second day of hearing, Rebecah Carson, the successful candidate for the disputed position, sought

¹ For one's own behalf. BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

to intervene in this matter. Ms. Carson was not permitted to intervene, but was permitted to observe the second day of the proceeding and testified as a witness. This matter became mature for decision on April 24, 2017, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Child Protective Services Supervisor in the Centralized Intake unit within the Bureau for Children and Families. Grievant applied for the position of Director of Centralized Intake, and was not selected for the position. Grievant asserted the selection process was flawed and that he was the most qualified applicant. Grievant failed to prove the selection decision was arbitrary and capricious or clearly wrong. The selection committee followed a logical process in the selection. The selection committee was qualified to make this decision, their selection was unanimous, and their decision was supported by substantial evidence. The successful candidate had much greater experience with the agency and with supervision, had previously supervised the exact classification that the Director would supervise, and was better able to convey her relevant leadership qualities in the interview. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Child Protective Services Supervisor in the Centralized Intake unit within the Bureau for Children and Families.
2. Grievant applied for the position of Director of Centralized Intake.
3. Centralized Intake is a relatively new unit, established in 2014, which is

comprised of two call centers. The unit receives all initial abuse and neglect reporting calls. Supervisors in the unit review the reports and either screen the report out or refer the report to the field for investigation.

4. The selection committee for the position was Commissioner Nancy Exline, Deputy Commissioner Tanny O'Connell, and Regional Director Joe Bullington.

5. Both Commissioner Exline and Ms. O'Connell were involved in the creation of the unit. Ms. O'Connell served for four years as the lead in developing the unit. Ms. O'Connell is the direct supervisor of the position.

6. Grievant was one of three candidates selected to interview for the position.

7. The interviews were all conducted on October 5, 2015. The candidates were all asked the same questions, with the exception of a few follow-up questions. The selection committee scored the candidates independently on their interview. The candidates were scored on education, agency experience, supervisory experience, interview, and interview rating form. The selection committee unanimously selected Rebecah Carson as the successful candidate.

8. On the initial Candidate Scoring Matrix Worksheet, Grievant had thirteen points and the successful candidate had eighteen points. At the level one hearing, the hearing examiner discovered the scoring for agency experience was incorrect. A corrected Candidate Scoring Matrix Worksheet was submitted at level three in which Grievant scored sixteen points and the successful candidate scored twenty points.

9. Grievant holds a Bachelor of Social Work degree. Grievant had supervisory experience as a Child Protective Services Supervisor from June 2014 until the interview. Grievant had the following other experience with the Department of Health and Human

Resources: Health and Human Resources Specialist Senior from May 2010 to June 2014² and Protective Services Worker from January 2003 to May 2010. Therefore, at the time of the interview, Grievant's total experience with the agency was twelve years and nine months and his supervisory experience was one year and three months.

10. The successful candidate holds a Bachelor of Science degree in Psychology. The successful candidate began employment with the Department of Health and Human Resources as a Social Service Worker III in September 1994, where she served until August 2002. From August 2002 until the time of the interview, the successful candidate was employed in four different positions as a Health and Human Resources Specialist, Senior. From August 2004 to September 2014, the successful candidate supervised Social Service Supervisors. Therefore, at the time of the interview, the successful candidate's total experience with the agency was twenty-one years and one month and her supervisory experience was ten years and one month. In addition, the successful candidate's supervisory experience was directly related to the position in that she supervised Child Protective Services Supervisors, the very classification of employee that she would supervise in the position at issue.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30,

² Grievant's application states his employment dates were 5/2010 to "Current" which was obviously a mistake as he began his full-time position as a CPSS in June 2014.

1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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).

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).

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant asserts he was more qualified than the successful candidate, there were errors in the selection process, and Respondent could not explain how the successful candidate was the best fit for the job. Respondent asserts that the interview committee followed appropriate procedures and that the decision was unanimous and supported by the evidence.

Some of Grievant's allegations call into question the credibility of Commissioner Exline and Ms. O'Connell. On the interview scoring sheets the written number three on both their sheets does not have a loop on Grievant's sheet, but has a loop on the successful applicant's sheet. Grievant appears to allege that some third party scored the successful applicant's interview sheets. Accordingly, the undersigned must make credibility determinations. In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Commissioner Exline was credible. Her demeanor was professional and direct. She was responsive to questions and maintained good eye contact. Commissioner Exline offered a plausible explanation for why the numbers looked different on her interview question sheet in that they were done of the course of the day and her

handwriting changes of the course of the day. Although she had no explanation for the similarities between the questioned numbers on Ms. O'Connell's sheet and her sheet, her assertion that she scored the interview questions and that the scores are in her handwriting are credible. Although Grievant insinuated Commissioner Exline has a bias against men because the three deputy commissioners she hired were women, Grievant offered no other evidence of bias. Commissioner Exline was not biased against Grievant.

Ms. O'Connell was credible. She was calm, direct and forthcoming in her answers to questions. Her explanation that the difference in handwriting, that the loop was a cursive number, and that the third interview was late in the day, is plausible. There was no allegation that Ms. O'Connell had bias against Grievant.

Grievant's primary assertion is that he was more qualified than the successful candidate because he worked as a Child Protective Services Supervisor in the Centralized Intake unit and the successful applicant had not worked in the unit. Grievant simply refuses to acknowledge that any experience other than working directly in the unit was relevant. However, a Director position is most importantly a leadership role, not necessarily concerned with the minutia of the unit, which is properly the concern of subordinate supervisors. The position is a "big picture" position with responsibility for the direction of the unit, the physical plant, the budget, and advocating for the unit within the agency. The Director supervises the supervisors of the unit, the Child Protective Services Supervisors, and not line employees. While Grievant is familiar with the workings of the unit, it is the successful applicant who has ten years of experience supervising Child Protective Services Supervisors compared to Grievant's two years supervising line employees. In addition, the interview committee considered quality control to be an issue

with the unit and wanted the new Director to address quality control. The successful candidate had specific experience in the Division of Planning and Quality Improvement and also as a Child Welfare Consultant on the screening committee where she was part of developing a process to review compliance with screening procedures. While knowledge of the inner workings of the unit could be helpful in the position, Respondent has discretion to determine what qualities it found more important in hiring this position, and it is certainly not unreasonable to consider the successful applicant's broader experience within the agency, her specific experience supervising the same classification the Director would supervise, and her experience in quality control as more relevant. Grievant did not prove he was more qualified than the successful applicant.

Grievant also asserts the selection process was flawed in multiple ways. Grievant contends that Commissioner Exline, Ms. O'Connell, and Mr. Bullington were not an appropriate selection committee because none of them had worked at Centralized Intake or had knowledge of a call center. Grievant contends this was in violation of Administrative Rule of The West Virginia Division of Personnel § 143.1.6.1.b. This Rule is not applicable to the issue at hand. Rule 6 refers to the competitive examination process the Division of Personnel uses to certify applicants to be placed on the register for a particular classification. It does not refer to the interview process of an agency in filling a particular position. Grievant's contention that these persons were not qualified to interview for the position is also without merit. Grievant's contention that the commissioner of the agency and the direct supervisor of the position are not qualified to hire the position they supervise is absurd. Furthermore, both Commissioner Exline and Ms. O'Connell were involved in the creation of the unit. Mr. Bullington is a regional

director and thirty-year employee of the agency who is a stakeholder in the process as the reports taken by the Centralized Intake unit are referred out to the regions. While Commissioner Exline could have chosen a panel member who had experience supervising a call center, the choice of Mr. Bullington was in no way unreasonable.

In his proposed findings of fact and conclusions of law, Grievant asserts Respondent failed to follow its policy because the interview committee did not complete a specific form. However, Grievant failed to provide the undersigned with a copy of the policy he asserts Respondent violated. Grievant also asserted, and did prove, that Respondent incorrectly completed the scoring matrix. During the level one hearing, the hearings examiner determined that the scoring for experience was incorrect for all three candidates and ordered a corrected form be completed. The corrected form was entered into evidence at level three. In the original scoring matrix for experience, Grievant scored one and the successful candidate scored three. Both scores were clearly incorrect based on Respondent's scale and appears to have been caused by the scorer listing the same score for "Experience" as the score for "Supervisor Experience." Once corrected, Grievant received a score of four and the successful candidate a score of five. The total points Grievant scored was sixteen and the successful candidate scored twenty. The error was a simple mistake that was corrected and was harmless. Even when corrected, Grievant was still four points behind the successful applicant.

Grievant asserted several further errors in the interview. As discussed above, Grievant challenged the handwriting on the interview forms, seemingly asserting that Commissioner Exline and Ms. O'Connell had not actually completed the scoring they signed. As stated above, Commissioner Exline and Ms. O'Connell testified credibly that

it was their handwriting on the sheets and that they scored the interview. Grievant's allegation is without merit. Grievant challenged the notes the interviewers made of his interview, asserting they did not adequately reflect his answers. Grievant also asserted the interview forms showed his answers to be more complete than those of the successful applicant. It is unreasonable to expect an interviewer to make verbatim notes of an interview. The interviewer's notes are a tool for the interviewer to use in rating the candidates and in remembering the interview in the event of a challenge. Both Commissioner Exline and Ms. O'Connell specifically testified that their notes do not reflect the entirety of the answers given. All the committee members testified credibly and plausibly regarding the scores they gave to the interview questions and why the successful candidate's answers were rated more highly. Grievant also asserts it was inappropriate for Commissioner Exline to ask follow-up questions in his interview. Nothing prohibits the use of appropriate follow-up questions. Grievant protests that the follow-up questions were not related to his answer. Grievant's answer was very general. The follow-up questions asked by Commissioner Exline related to the original question and to her desire to understand what Grievant's approach to coaching would be as the Director.³ Commissioner Exline's follow-up questions were not inappropriate.

Grievant last contends that the interview committee could not explain how the successful candidate was the best fit for the position. At level three, no member of the interview committee was specifically asked to explain why the successful candidate was

³ Grievant recorded his interview without the knowledge of the selection committee. As the grievance procedure is not to be a "super interview" Grievant was not permitted to enter the recording into evidence, but was allowed to play the portion of the recording where he believed Commissioner Exline had asked inappropriate follow-up questions.

the best fit for the position. Ms. O'Connell was asked that question at level one and gave the reasonable answer that the successful candidate had more years of experience with both the Bureau for Children and Families and with supervision and that in the interview she had ideas about how to manage the unit differently than it had been previously managed. In contrast, she stated Grievant and the other candidate had ideas that "were basically things that were already in place at Centralized Intake and maybe just some suggestions that they would be expanding what was already done." This was consistent with how Ms. O'Connell answered questions at level three regarding the different scores given to Grievant and the successful candidate. She stated multiple times that Grievant's answers to questions were more from a supervisor role than that of a director. Mr. Bullington explained that he was looking for the best leader. Commissioner Exline stated that in her interview the successful candidate was able to convey a vision of her leadership and coaching and the changes she would make. She explained that the successful candidate had more experience and had demonstrated ability in dealing with partners within the agency.

Grievant failed to prove the selection decision was arbitrary and capricious or clearly wrong. The selection committee followed a logical process in the selection. The selection committee was qualified to make this decision, their selection was unanimous, and their decision was supported by substantial evidence. The successful candidate had much greater experience with the agency and with supervision, had previously supervised the exact classification that the Director would supervise, and was better able to convey her relevant leadership qualities in the interview.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "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. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of*

Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. Grievant failed to prove the selection decision was arbitrary and capricious or clearly wrong.

Accordingly, the 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: June 5, 2017

Billie Thacker Catlett
Chief Administrative Law Judge