

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DEBORAH S. SMITH,  
Grievant,**

**v.**

**Docket No. 2017-0959-DHHR**

**DEPARTMENT OF HEALTH AND  
HUMAN RESOURCES/BUREAU  
FOR CHILD SUPPORT ENFORCEMENT,  
Respondent, and**

**VICKI ANDERSON,  
Intervenor.**

## **DECISION**

Grievant, Deborah Smith is employed by the Department of Health and Human Resources ("DHHR") as a Child Support Technician 2 in the Bureau for Child Support Enforcement ("BCSE"). By form dated September 6, 2016, Ms. Smith filed a grievance alleging, "non-selection for specialist." As relief, Grievant seeks, "placement onto specialist position with back pay and interest." On November 28, 2016, the parties agreed to proceed directly to level three.<sup>1</sup> Vicki Anderson was granted Intervenor status by Order dated April 27, 2017. A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on July 11, 2017. Grievant was present and represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared through David Alter, Esquire, and was represented by Michael E. Bevers, Assistant Attorney General. This matter became mature for decision on August

---

<sup>1</sup> See W. VA. CODE § 6C-2-4(a)(4) "An employee may proceed directly to level three upon the agreement of the parties . . ."

23, 2017, upon receipt of the last of the parties' Proposed Findings of Facts and Conclusions of Law.

### **Synopsis**

Grievant and two other DHHR employees applied for a posted position of Child Support Specialist. Respondent selected Intervenor to fill the position. Respondent has adopted Policy Memorandum 2106 as an objective and uniform procedure for selecting successful applicants to fill vacancies within the agency. Grievant alleges that Respondent failed to follow the procedures in Policy 2106 rendering the decision arbitrary and capricious. Respondent argues that the policy was followed and a fair decision was made. Grievant proved by a preponderance of the evidence that the selection panel did not adhere to the requirements of Policy 2106, and the process was arbitrary and capricious. Grievant did not prove by a preponderance of the evidence that she would have been selected had the process been followed.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, Deborah Smith, was first employed by the DHHR in January, 2003. She worked as an Office Assistant for a year. Grievant transferred to the Child Support Technician 1 classification and remained in that classification until May 2007 when she transferred to the Child Support Technician 2 position she now holds. (Grievant Exhibit 2).

2. Prior to coming to the DHHR, Grievant was employed as a receptionist for the Social Security Administration for three months, a cashier in a grocery store for four

years, and a desk clerk/auditor for The Inn at Williamson for 10 months where she supervised five employees.<sup>2</sup> Thereafter, Grievant worked cashier for another supermarket for five years, four months as a collection clerk for a bank, and ten years at the Heilig-Meyers Furniture store. She supervised thirteen employees for the last seven years at that store.<sup>3</sup> *Id.*

3. Grievant worked closely with the public for more than fifteen years before working for the DHHR. For approximately eight of those years she was supervising other employees. *Id.*

4. Respondent posted a vacancy for a Child Support Specialist 2 with the posting closing date of July 23, 2016. (Grievant's Exhibit 1). Grievant, Deborah Smith, Intervenor, Vicki Anderson, and one other DHHR employee,<sup>4</sup> submitted applications for the position before the closing date.

5. Grievant had previously applied for a Child Support Specialist 2 position but Henrietta Webb, the Bureau's Regional Manager at the time, told Grievant that she was ineligible to apply for the position because she had not been a Child Support Specialist 1. Manager Webb was incorrect and Grievant was allowed to apply and compete for the posting for this Child Support Specialist 2 position.<sup>5</sup>

6. A five-member selection panel was assembled and conducted interviews on August 3, 2016. The panel consisted of: BCSE Supervisor 2, David Cantrell; Henrietta

---

<sup>2</sup> Three desk clerks, a maid and a maintenance worker.

<sup>3</sup> Five warehouse workers, five sales associates and three cashiers.

<sup>4</sup> Respondent asked that the name of the third applicant not be made a part of the record and Grievant did not object.

<sup>5</sup> Grievant did not contest Ms. Webb's previous decision that Grievant was ineligible for a Child Support Specialist 2 position.

Webb, then Regional Manager;<sup>6</sup> Connie Altizer, now Regional Manager; BCSE Attorney, Leslie Bowen; and, BCSE Child Support Supervisor, Teresa Darnell.

7. DHHR Policy Memorandum 2106, *Employee Selection* (“Policy 2016”) sets out the procedure to be followed for filling positions in the agency.<sup>7</sup>

8. Policy 2106 indicates that the Department advocates a structured approach to interviews including “asking similar questions, providing similar information and providing similar courtesies to applicants interviewed. To that end, an interviewer(s) should prepare one list of questions which are related to an applicant’s ability to function in the position.” Multiple member interview panels are encouraged but not required. *Id.*, Art. IX. § B, ¶ 2.

9. Policy 2106 requires that efforts be made “to compare applicants’ relative strengths and weaknesses, based upon similar factors.” Deciding factors and the relative weight assigned to each factor must be decided prior to the interview. “**Significant factors in the employment decision should be documented.**” (Emphasis in original). *Id.* Art. IX, § B, ¶ 5.

10. Policy Memorandum 2106, Appendix A – Interview Procedures, describes documents to be used in the interview process. It starts by stating: “Interviewers are expected to familiarize themselves with the policy and utilizing appendix A.” It then goes on to state: “Further, all interviews should be evaluated utilizing the OPS – 13, Applicant Interview Rating, and OPS – 13 A Candidate Comparison Chart.”

---

<sup>6</sup> Ms. Webb retired prior to the level three hearing.

<sup>7</sup> Respondent noted in its post hearing submission that the version of Policy 2106 provided at the hearing was not the most up to date and accurate version. Respondent attached the most recent copy of the policy as an appendix. There being no objection to this version by the Grievant, this is the version of Policy 2106 relied upon in this decision.

11. DHHR form OPS-13A,<sup>8</sup> Candidate Comparison Chart is set up as follows:

| Name | Comments on Interview | Comments on Education | Comments on Past Experience/<br>Demonstrated Ability | Comments on References | Comments on Leadership or Growth Potential | Comments on Concerns w / or Limitations of Candidate | Rate Candidates in Order of Preference |
|------|-----------------------|-----------------------|--|------------------------|--|--|--|
|------|-----------------------|-----------------------|--|------------------------|--|--|--|

12. The selection panel agreed upon a set of eighteen questions to ask each applicant. They scheduled and interviewed the three candidates. Each panelist assigned a score for each question on her/his individual score sheet which was a form entitled "Interview Questions." Each question was assigned a maximum score of five points and a minimum score of one point. Near the top of each form was written, "Scoring: 5 Excellent, 3 Satisfactory, 1 Unacceptable." (Respondent Exhibits 4 – 6 & 8 – 19.) When the totals from the five score sheets are added each applicant receives their final interview score. The maximum score for an interview was 450 and the minimum was 90.

13. The score total given to Grievant Smith and Intervenor Anderson are reflected in the following table:

| Deborah Smith |     | Vicki Anderson |     |
|---------------|-----|----------------|-----|
| D. Cantrell   | 55  | D. Cantrell    | 54  |
| H. Webb       | 54  | H. Webb        | 60  |
| C. Altizer    | 54  | C. Altizer     | 68  |
| L. Bowen      | 49  | L. Bowen       | 62  |
| T. Darnell    | 51  | T. Darnell     | 58  |
| <b>TOTAL</b>  | 263 | <b>TOTAL</b>   | 302 |

---

<sup>8</sup> § XI, B. 5 of Policy 2106 specifically provides "The OPS - 13A Candidate Comparison Chart provides a summary of factors considered for all applicants. It should be used as a tool in the selection. *Id.*

14. The OPS – 13, Applicant Interview Rating Form is set up for each panelist to score the applicant's interview responses on a set of specified factors. Each factor is assigned a score from one to five with five being the highest mark and one the lowest. A maximum total of thirty-five points is possible. The OPS – 13 form is set up similar to the following and contains these factors for consideration. The scores given Grievant Smith and Intervenor Anderson by the five panelists for each factor are included in this table.

| Factor                 | Deborah Smith |           |           |           |           | Vicki Anderson |           |           |           |           |
|------------------------|---------------|-----------|-----------|-----------|-----------|----------------|-----------|-----------|-----------|-----------|
| Oral Expression        | 3             | 3         | 2         | 3         | 2         | 4              | 4         | 4         | 4         | 4         |
| Intelligence/Reasoning | 3             | 4         | 3         | 3         | 3         | 4              | 4         | 3         | 4         | 4         |
| Judgment/Objectivity   | 3             | 4         | 3         | 3         | 3         | 3              | 4         | 3         | 3         | 4         |
| Tact/Sensitivity       | 3             | 3         | 3         | 3         | 3         | 3              | 5         | 4         | 4         | 4         |
| Appearance             | 4             | 3         | 4         | 3         | 3         | 4              | 3         | 3         | 4         | 4         |
| Poise/Confidence       | 3             | 4         | 3         | 3         | 2         | 4              | 5         | 4         | 4         | 5         |
| Leadership Potential   | 3             | 3         | 2         | 3         | 2         | 4              | 4         | 4         | 4         | 5         |
| <b>Total</b>           | <b>22</b>     | <b>24</b> | <b>20</b> | <b>21</b> | <b>18</b> | <b>26</b>      | <b>29</b> | <b>25</b> | <b>27</b> | <b>30</b> |

The total points awarded to Grievant Smith on Form OPS – 13 was 105, and the total points awarded to Intervenor Anderson was 137.<sup>9</sup>

15. The panelist combined the scores from the interview sheets with the score from the Form OPS – 13 to find the final score for each candidate which was: Grievant 368; Intervenor 439.<sup>10</sup>

---

<sup>9</sup> All the forms and scores for the three applicants may be found in Respondent Exhibits 4-6 and 7-19.

<sup>10</sup> The final score for the third applicant was 316.

16. At the end of the interviews the panelists entered into a discussion of the applicants and each panelist was asked to rank the applicants as “top choice,” “second choice,” and “third choice.” When the panelists compared their choices they all had picked Intervenor as top choice, and Grievant second. At that point the scores had not been tallied. The rankings were based upon the panelists’ impressions from their discussion and were not reflective of the scores on either form.<sup>11</sup>

17. The selection panel did not utilize form OPS – 13A Candidate Comparison Chart. Yet, the panelists all testified that they considered the applicants, work history, education, leadership, and work ethic, in addition to the interview. These characteristics are specific factors set out in OPS – 13A. See FOF 11 *supra*, (going left to right the second, third and fifth factors).

18. Intervenor has worked as an Economic Service Worker in the Mingo County office of the DHHR Bureau for Children and Families (“BCF”) since May 2010. During that time, she has served as a backup supervisor in income maintenance for six years. A back up supervisor covers the supervisor’s duties during the supervisor’s absence. She may assign work but does not approve leave, evaluate employees or recommend discipline. She has no experience in the Bureau for Child Support Enforcement. (Respondent Exhibit 2).

19. Prior to coming to work for the DHHR, Intervenor worked as a Teller/Loan Assistant at Community Trust Bank for four years, and as a Sales Associate for Burchett Catalog Sales for four years. She is a high school graduate.

---

<sup>11</sup> Level 3 testimony of Henrietta Webb.

20. David Cantrell testified that education made up twenty-five percent of the final scores but could not identify any place in the scoring documents where that calculation was reflected.<sup>12</sup> On the Form OPS – 13, on the factor for “Intelligence, Reasoning Process,” Mr. Cantrell rated Grievant as “3” and Intervenor as “4”. There were no questions asked by the panelist related to this area and Mr. Cantrell testified that he did not know how he arrived at that rating. For the “Leadership” factor he again gave Grievant a 3 and Intervenor a 4 because she has experience as a backup supervisor, but he gave no credit to Grievant’s ten years of supervising ten employees in her prior employment.<sup>13</sup>

21. More than one of the panelists stated that Grievant socialized excessively during the work day and Intervenor did not. It was also noted that Grievant’s quality of work was excellent but the quantity was not good. Grievant has not received any notice of that she was excessively socializing on her Employee Performance Appraisals (“EPA”) which were consistently good.<sup>14</sup> The issues of Grievant’s work load and socializing came up in the panel discussion but were not reflected or documented in any of the scoring.<sup>15</sup>

22. While there was no actual factor or question identified where “education” was scored, the panelist agreed that all the applicants were equal in this area because they all had high school diplomas. Grievant was not given any credit for completing nearly 100 hours of college courses because she had not earned a degree.<sup>16</sup>

---

<sup>12</sup> After being unable to identify where the education score was documented, Mr. Cantrell stated that he might be mistaken.

<sup>13</sup> Level 3 testimony of David Cantrell.

<sup>14</sup> Level four testimony of Henrietta Webb, who stated that she had reviewed all Grievant’s EPAs as part of the selection process.

<sup>15</sup> *Id.*

<sup>16</sup> Level 3 testimony of Connie Altizer.



23. The Child Support Specialist 2 classification requires the successful applicant to have regular contact with the public. Some panelists note that Intervenor's job gave her an advantage in the area because it required her to often interact with clients while Grievant's did not. The panelists did not consider Grievant's fifteen years of experience in prior jobs such as sales and banking which required constant public interaction.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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, the party bearing the burden has not met its burden. *Id.*

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 Rehabilitation 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); *Underwood v. Dep't of Health & Human Res.*, Docket No. 2012-0237-DHHR (Dec. 6, 2013).

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). 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-CORR-384 (Feb. 28, 2005); *Delauder v. Dep't of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

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)).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 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)). "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]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

It is a long-held principle in West Virginia Law that, "an 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. Dep't of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994); *Stewart v. Dep't of Health & Human Res.*, Docket No. 2016-0970-DHHR (Aug. 10, 2017); *Kidd v. Dep't of Health & Human Res.*, Docket No. 2017-1874-DHHR (Oct. 5, 2017).

Grievant argues that Respondent did not follow Policy 2106 in selecting the applicant to fill the posted position of Child Support Specialist 2, rendering the decision arbitrary and capricious. Grievant also asserts that she should be placed the posted position because she was the most qualified applicant. Respondent counters that it conducted an organized and fair interview process which was not arbitrary and capricious.

Policy 2106 establishes the procedure Respondent must follow when making selection decisions. The policy requires that a selection panel be convened, the panel must decide which candidates must be interviewed based upon the requirements of the position, and select a set of questions which must be asked of all the applicants during the interview. *Id.* Art. IX, § B, ¶ 2.

The Policy also requires that efforts be made “to compare applicants’ relative strengths and weaknesses, based upon similar factors.” Deciding factors and the relative weight assigned to each factor must be decided prior to the interview. “**Significant factors in the employment decision should be documented.**” (Emphasis in original). *Id.* Art. IX. § B, ¶ 5.<sup>17</sup> In order to ensure that specific uniform factors are utilized and documented, Policy 2106 provides certain tools to be used by the selection panel. § XI, B. 5 of Policy 2106 specifically states: “The OPS - 13A Candidate Comparison Chart provides a summary of factors considered for all applicants. It should be used as a tool in the selection. *Id.* That requirement is repeated and added supplemented by Appendix A – Interview Procedures, states: “. . . all interviews should be evaluated utilizing the OPS – 13, Applicant Interview Rating, and OPS – 13 A Candidate Comparison Chart.” *Id.* § XI, B. 5 of Policy 2106 specifically provides “The OPS - 13A Candidate Comparison Chart provides a summary of factors considered for all applicants. It should be used as a tool in the selection. *Id.*<sup>18</sup>

The selection panel started well by interviewing the three candidates who met the minimum qualifications, selecting a set of eighteen questions to ask all applicants, and independently scoring the answers to those questions. The panel also utilized Form OPS – 13 to additionally assess the interviews based upon its seven required criteria. However, the panel did not utilize the required Form OPS – 13A which assesses candidates upon

---

<sup>17</sup> The emphasis given to this provision by the drafters speaks to its importance.

<sup>18</sup> The use of the word “should” in the policy is significant because it is the past tense of the verb “shall” and is also “[u]sed to express obligation or duty.” *American Heritage Dictionary*, Houghton Mifflin Co., 2d College Ed., 1991. “‘Shall’ is the mandatory sense that drafters typically intend and Courts typically uphold.” *Black’s Law Dictionary*, 8<sup>th</sup> Ed. 1999.

factors not necessarily revealed in the interview. Included in those factors are “education,” “past experience/demonstrated ability,” “leadership ability and growth potential,” and “limitations of a candidate.”

After completing the interviews and the forms they used, the panel entered into a discussion of the candidates. One of the issues discussed was the comparative education of the applicants. All the panelists said that this was an important factor in their selection process but there was no documentation that this factor was considered. Mr. Cantrell’s testimony illustrates the difficulty with this process. He testified that education was twenty-five percent of the final decision but could not identify where the education of the candidates was compared. While the education of the candidates was available to all the panelists there was no process agreed upon as to how it fit into the decision or whether college course credits short of a degree would be given any consideration. Had such issues been decided before the interviews, this factor could have affected the outcome. They should have been addressed and documented through Form OPS – 13A which the panel did not use.

Grievant’s alleged office socializing and low quantity of work, were also given as reasons for her non-selection. These could be valid considerations in the factors of past “performance/demonstrated ability” or “leadership or growth potential.” In fact at least one panelist indicated that they demonstrated lack of leadership as compared to Intervener who allegedly never socialized. There is no documentation that these factors were fairly evaluated or documented. In fact, Ms. Webb testified that these factors were not indicated in the scores but came up after the interviews in the group discussion. These are also factors which could have been objectively considered and documented had the panel not

failed to utilize mandatory Form OPS – 13A. For the factor of “past experience,” there is no indication that Respondent took into consideration that all of Grievant’s DHHR experience has been in the Bureau for Child Support Enforcement, while Intervenor’s DHHR experience has been in the Bureau for Children and Families which has a different mission and procedures. In the OPS – 13A factor of “leadership” the panelists noted that Intervenor had served as a back-up supervisor in the BCF. Yet, they apparently ignored Grievant’s years of supervisory experience in her prior employment. Had this factor been properly considered the outcome may have been different depending how DHHR experience and outside experience were compared.

Finally, the evidence does not demonstrate that the panel used the final scores they tabulated in making the ultimate selection decision. After the interviews and subsequent group discussion, each panelist was asked to rank the applicants as “top choice,” “second choice,” and “third choice.” When the panelists compared their choices they all had picked Intervenor as top choice, and Grievant second. At that point, the scores had not been tallied. The rankings were based upon the panelists’ impressions from their discussion and were not reflective of the scores on either form. See FOF 16, *supra*. The only document that was offered to demonstrate that any scores were tallied was prepared by counsel for Respondent in preparation for the level three hearing. (Respondent Exhibit 7).<sup>19</sup> While the panel documented the individual scoring of questions and certain factors, there is no evidence that those scores were tabulated and used in making the final decision. It is just as likely that the priority ranking used at the end of the

---

<sup>19</sup> Had the panel prepared such a document, Respondent’s counsel would have been obligated to produce it for Grievant in discovery.

group discussion was the deciding factor.<sup>20</sup> Ultimately, there is not documentation as to how the final decision was made as required by Policy 2106.

Grievant proved by a preponderance of the evidence that Respondent did not comply with the procedures which it properly adopted to conduct selection of candidates for vacant positions. Grievant also proved that the panelists relied upon factors and issues in making their decision which were not set out in their process. Accordingly, the decision was arbitrary and capricious.

Because the process required by Policy 2106 was not used to assess the candidates and no candidate's qualifications clearly exceed the qualifications of the others, it was not proven that Grievant would have been the successful applicant had Policy 2106 been followed. "Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he/she should have been selected for the position, the position should be reposted and a new selection process undertaken. *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)." *Forsythe v. Dep't of Admin./Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009).

Accordingly, the grievance is GRANTED in part and DENIED in part.

---

<sup>20</sup> Each individual panelist may have used the scores they gave in coming up with their individual rankings. However, there is no documentation to that effect and the evidence proves that other undocumented and unscored factors raised only in that discussion also went into the ad hoc ranking procedure

## Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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 Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).

3. 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); *Underwood v. Dep't of Health & Human Res.*, Docket No. 2012-0237-DHHR (Dec. 6, 2013).

4. 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).

5. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford*



*County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

6. It is a long-held principle in West Virginia Law that “an 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. Dep’t of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994); *Stewart v. Dep’t of Health & Human Res.*, Docket No. 2016-0970-DHHR (Aug. 10, 2017); *Kidd v. Dep’t of Health & Human Res.*, Docket No. 2017-1874-DHHR (Oct. 5, 2017).

7. Grievant proved by a preponderance of the evidence that Respondent did not abide by Policy Memorandum 2106 which is the procedure it established to make hiring decisions, and that Respondent’s decision was arbitrary and capricious.

8. Grievant did not prove by a preponderance of the evidence that she would have been the successful applicant had the requirements of Policy Memorandum 2106 been followed.

9. “Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken. *Neely v. Dep’t of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).” *Forsythe v. Dep’t of Admin./Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009).

Accordingly, the grievance is **GRANTED in part and DENIED in part**.

Respondent is **ORDERED** to repost the position Child Support Specialist 2 for the Employment Relations Section within thirty days of receipt of this decision, and select the most qualified applicant for the position pursuant to the procedure set out on Policy Memorandum 2106. Intervenor's tenure in the Child Support Specialist 2 position may not be considered.

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* 156 C.S.R. 1 § 6.20 (2008).

**DATE: October 17, 2017**

---

**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**