

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT STEWART,
Grievant,**

v.

Docket No. 2016-0970-DHHR

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/CHIEF OPERATING OFFICER
FOR ADMINISTRATION,
Respondent.**

DECISION

Robert Stewart, Grievant, is employed by Respondent Department of Health and Human Resources ("DHHR"), in the Office of Accountability and Management Reporting ("OAMR"). His position is classified as an Accountant 3, and he has held that position for more than twelve years. Mr. Stewart filed a level one grievance form dated December 8, 2015, contesting his "Nonselection for ASM3 posting FNSR160009." As relief, he seeks to "be placed in the position with back pay and interest."

A level one hearing was held on September 22, 2016. Grievant was represented at that hearing by Gordon Simmons, UE Local 170. Respondent appeared by and through the OAMR Director, Jeffery Bush. A decision denying the grievance was entered by Grievance Evaluator, Christina M. Bailey, Esquire, dated October 14, 2016. Grievant appealed to level two on the same day. A mediation was conducted on December 6, 2016, and Grievant appealed to level three by form dated December 12, 2016.

Grievant continued to be represented by Gordon Simmons and Respondent has been represented by James "Jake" Wegman, Assistant Attorney General since level two.

The parties agreed to submit this grievance for decision based upon the evidentiary record created at the level one hearing and Proposed Findings of Fact and Conclusion of Law. This matter became mature for decision on May 30, 2017, with receipt of both fact/law proposals.

Synopsis

Grievant alleges that the decision to select another candidate for a management position was invalid because DHHR Policy Memorandum 2106 was not strictly followed, he was the most qualified candidate and the decision made was arbitrary and capricious. Grievant was unable to prove by a preponderance of the evidence that he was objectively the most qualified or that the selection process was arbitrary and capricious. Additionally, Grievant did not prove that any errors in the implementation of DHHR Policy Memorandum 2106 would reasonably affect the outcome of the selection decision.

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, Robert Stewart, is employed as an Accountant 3 by the DHHR in the Office of Accountability and Management Reporting ("OAMR"). He has been so employed since April 2004, giving him more than twelve years of continuous employment with the agency. (Respondent Exhibit 2). He holds a Bachelor of Science degree from the University of North Carolina – Charlotte.

2. Prior to joining the DHHR, Grievant was employed by Arnett & Foster PLLC, as an Auditor Supervisor, for twenty-two months, and by Ernst & Young as an Auditor Supervisor for thirty-one months before that. Grievant has more than sixteen

years of experience as an auditor, nearly four and one half years of which was in a supervisory role. He also has six years of experience as an accounting officer at two banks in North Carolina. *Id.* Grievant has not been a supervisor during the twelve years he has been employed by the DHHR.

3. Respondent posted a position for an Administrative Services Manager 3 (“ASM3”) for the OAMR. Grievant and six other individuals applied for the vacancy. Three of the applicants did not meet the minimum qualifications for the position. The other four, including Grievant, were interviewed for the position during late October and early November 2015.

4. In June 2015, the DHHR Medicaid office was merged with the OAMR. The reason for the merger was that Grievant’s supervisor, Kent Hill who held the ASM3 position, was retiring. DHHR management felt it was a good time to consolidate the Medicaid functions and staff with the OAMR so that duties could be more evenly distributed among the management and staff of these offices. As a result of this merger, Grievant and Accounting Auditor 4, Leigh Ann Moore as well as the ASM3 vacancy were transferred and reorganized under the supervision of OAMR Office Director, Jeffrey Bush.

5. Because of the merger, the ASM3 position was involved in rate setting for the entire OAMR including Nursing Homes, Group Homes, and Birth to Three, which were not all Medicaid related which was the limit of the prior position.

6. The interviews were conducted by a two-person committee consisting of the OAMR Office Director, Jeffrey Bush, and Director of Accounting, Kellie Carper.

7. The interview team chose a set of questions which they asked each person interviewed. The interview team also asked additional questions of some applicants which

they characterized as “follow-up” questions. The committee asked Grievant why he had not applied for an Accounting 4 vacancy for which he served on the interview committee. They asked two other applicants how quickly they could learn Medicare issues as well as rate computation issues because each of the two applicants lacked experience in one of the areas. Finally, they asked the successful applicant about her views on integrating the new management unit.

8. After each interview, the committee members discussed the applicant, and jointly filled out a DHHR Policy 2106, form OPS-13 which rates each applicant on specific factors observed in the interview. The factors are rated 1 through 5 with 5 being the best. The forms and scoring for the four applicants were as follows:

Factor	Jeanne Snow	Debbie Zegeer	Robert Stewart	Susan Linville
Oral Expression	4	4	4	3
Intelligence/Reasoning	4	4	3	4
Judgment/Objectivity	4	3	3	3
Tact/Sensitivity	5	4	4	4
Appearance	5	5	5	5
Poise/Confidence	4	5	4	3
Leadership Potential	5	4	3	3
Other Factors	4	3	5	2
TOTAL	35	32	31	27

9. DHHR Policy Memorandum 2106, *Employee Selection* (“Policy 2016”) sets out the procedure to be followed for filling positions in the agency. (Respondent Exhibit 1).

10. 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.” *Id.*, Art, IX, § B, ¶ 2.

11. Policy 2106 requires that efforts be made “to compare applicants’ relative strengths and weaknesses, based upon similar factors,” and that the factors be documented. Deciding factors and the relative weight assigned to each factor must be decided prior to the interview. *Id.* Art, IX, § B, ¶ 5. This paragraph also provides:

The OPS-13A Candidate Comparison Chart, provides a summary of factors considered for all candidates. *It should be used as a tool in the selection process.* (Emphasis added).

12. DHHR form OPS-13A, Candidate Comparison Chart is set up as follows:

Name	Comments on Interview	Comments on Education	Comments on Past Experience/ 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
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13. Following the interview, Directors Bush and Carper apparently created a document which listed the score each applicant received on his or her interview and ranked the candidates accordingly. This document looked similar to the following:

Name	Interview Date	Rating Score	Internal Rank
Susan Linville	10/28	27	4
Robert Stewart	10/30	31	3
Jeanne Snow	11/3	35	1
Debbie Zegeer	11/5	32	2 ¹

¹ (Respondent Exhibit 3). The three candidates who were not interviewed were listed in the exhibit but given no scores or ranking. Those names are not included herein because they are not relevant for this decision. Additionally, comments were included by each applicant’s name. However, the comments do not factor in the scores of the applicants unless they related to the interviews, since all scores listed relate to the interviews only.

The committee included a “comments” column beside the scores and rankings for each candidate. The comments for Grievant were:

Good content experience. Very little supervisory experience.
Served as “Lead Worker” 13 years ago. Some State Plan exp.

The comments for the successful applicant, Jeanne Snow were:

19 years of Mcaid experience. Supervisory experience Rate
Setting cost staff. Has Molina and Truven experience. State
Plan exp. & SPA's.²

14. The interview committee did not utilize form OPS-14A, and did not separately score the candidates on factors set out on the form such as, “education,” “past experience,” or “leadership potential,” from the interview score. The interview score is only one of a six factors listed on Form OPS-14A to be considered in making the hiring decision.³

15. The interview committee gave Jeanne Snow the highest rating on the interview and recommended that she be hired to fill the Administrative Services Manager 3 position. The recommendation was approved and Ms. Snow was the promoted to the vacant position.

16. Ms. Snow had worked for Respondent in OAMR for six years in the Administrative Services Manager 2 (“ASM2”) classification, one year as an Account/Auditor 5, and one year as an Accountant/Auditor 4. As an ASM2, Ms. Snow supervised five employees as an AMS2, as an Accountant/Auditor 5 she supervised two and as an Accountant/Auditor 4, she supervised four.

² (Respondent Exhibit 3). The comments are set out herein as they were written on the form, including abbreviations.

³ See, page 11 of the transcript where *DHHR Policy Memorandum 2106*, which was admitted into the record as Grievant Exhibit 1.

17. Immediately prior to joining the OAMR, Ms. Snow worked as an Accountant/Auditor 4 in the DHHR Bureau for Medical Services for six years. She supervised four employees holding Account/Auditor positions during that time. Grievant also worked in the DHHR OAMR as an Accountant/Auditor 4 for one year and as an Accountant/Auditor 2 for three. She supervised four employees during the year she was an Accountant/Auditor 4 for that DHHR section. Overall, Ms. Snow has approximately eighteen years of experience working for the DHHR, immediately prior to applying for the vacant ASM3 position. Approximately fifteen of those years as a supervisor.⁴

18. Prior to her employment with the DHHR, Ms. Snow had been employed as an accountant by various private companies for roughly eleven years and as the Accountant/Office manager for Christ Church United Methodist for nine years. She holds a Bachelor of Science degree in Accounting from the University of Charleston.⁵

19. The interview materials and candidate applications were reviewed by DHHR Chief Financial Officer, Tara Buckner, and Warren Keefer, DHHR Director of Operations. They approved the recommendation to hire Jeanne Snow for the vacant position.

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

⁴ All the employees Ms. Snow supervised with the DHHR were Accountant/Auditors 2, 3, or 4s.

⁵ (Respondent Exhibit 5), application of Jeanne Snow.

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.*

Grievant alleges that Respondent failed to follow DHHR Policy Memorandum 2106 *Employee Selection* by relying solely upon the interview process to pick the applicant for a vacant ASM3 position in the DHHR Office of Accountability and Management Reporting ("OAMR"). Grievant alleges that he was the most qualified applicant for the position and the process was arbitrary and capricious. Respondent asserts that Policy 2106 was followed and the interview committee recommended the applicant whose overall qualifications best fit the ASM3 position.

It is well established that the grievance procedure is not intended to be a "super interview," meaning the Grievance Board is not to engage in the selection process, but rather to conduct a "review of the legal sufficiency of the selection process." *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). *See also Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005). "Selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned." *Jordan, supra*. Therefore, in a selection case, such as this, the Grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005).

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

Grievant points out that Policy 2106 requires that “The chart in OPS-13 should be utilized as a tool in the process of selecting a candidate; but it is not necessarily the deciding factor. Where appropriate, different factors can be weighed on the needs the job entails. Such factors must be determined prior to the interview and applied consistently to all applicants. . . . [s]ignificant factors in the employment decision should be documented.” Grievant notes that the interview committee used the chart and factors set out in the OPS-13 in evaluation the interview, but also took into account the applicants’ education and work experience. Grievant argues that the use of these factors which were not specified and scored violates the Policy 2106 mandate that all factors be determined in advance of the interviews and documented.

Regarding education, the interviewers testified that education was used to determine the applicants, minimum qualifications. All the interviewed applicants met the minimum education qualification. Grievant and Ms. Snow both hold Bachelor of Science

degrees in Accounting from accredited universities. Director Bush determined that all the applicants were equal on this factor.

The applicants' work experience was detailed on each of their applications. The interviewers reviewed the applications prior to conducting and scoring the interviews. They testified that they incorporated what they knew of the applicants' work experience into the scores on the interviews and incorporated work experience into the interview with such questions as:

- Describe your experience with Provider reimbursement and rate setting.
- Describe your experience working with a Medicaid fiscal agent or related MMIS claims data system.
- Do you have experience to run MMIS related reports? Can you customize reports?
- Do you have experience working with database or report software, and if so what types?

The applicant's supervisory experience was set out fully in each application and incorporated into the interview through management style questions and the specific question; [T]ell us about your supervisory experience and the number and type of staff you have been responsible for managing.

Grievant has been employed by the DHHR for twelve years. All of that time has been as an Accountant 3 in a division which is now part of the OAMR. He has no management experience with the DHHR but served in an accounting supervisory role for close to five years at private accounting firms before joining the DHHR.

Jeanne Snow had worked as an Administrative Service Manager 2 in an accounting division of DHHR for six years immediately prior to applying for the ASM3 position. She has roughly eighteen years of total experience with the DHHR in positions which are directly related to the work of the OAMR and fifteen of those years have been

as a supervisor of the types of employees she would be managing in the AMA3 position. Ms. Snow's greater supervisory experience was reflected in "leadership potential" section where her score was higher than all the other candidates.

Ms. Snow clearly has superior experience and specifically management experience that Grievant. Grievant argues that he served directly with the prior ASM3 for a number of years, and has learned the duties and responsibilities from his supervisor. Grievant argues that experience is so directly related to the vacant position that it overshadows the quantity of additional experience held by the successful applicant. However, the group Grievant and his prior supervisor had worked in was consolidated with the rest of the OAMR and the ASM3 position was given new responsibilities, some of which Grievant had no experience performing or monitoring. Ms. Snow's experience in more areas of the OAMR made her more prepared for the ASM3 position in the view of the interviewers. This included "supervisory experience Rate Setting cost staff," and "Molina and Truven experience," which was not present in the applications of the other candidates.

Since the interviewers listed education and experience as the main criteria for their recommendation, it certainly would have been clearer and more in keeping with Policy 2106 if the interview team had listed and scored those specific criteria in addition to the interviews, as is done when an OSP-13A is utilized. However, it is clear that work experience was included in the interview scores and the candidates were tied on education. Additionally, had these criteria been scored separately, it is more likely than not that the outcome would not have changed. As noted, the applicants had the same education level and an objective examination of the applications shows that Ms. Snow

had more general accounting experience and significantly more supervisor experience than Grievant. Additionally, her supervisor experience was with the DHHR and much more recent.

“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). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995).

“In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as ‘harmless error.’ *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PleED (Jan. 31, 2008).” *DeLauder v. Dep’t of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

In this case, it is apparent that the outcome would not have changed with careful adherence to Policy 2106. Additionally, Respondent’s decision was reasonable and related to objective standards, and not arbitrary or capricious. Accordingly, the grievance is DENIED.

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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The grievance procedure is not intended to be a "super interview," meaning the Grievance Board is not to engage in the selection process, but rather to conduct a "review of the legal sufficiency of the selection process." *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). See also *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005).

3. "Selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned." *Jordan v. Div. of Highways*, Docket No. 04-DOH-202 (Jan. 26, 2005).

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

State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. “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). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dep’t of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995).

6. “In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as ‘harmless error.’” *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PleED (Jan. 31, 2008).” *Delauder v. Dep’t of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

7. Grievant did not prove by a preponderance of the evidence that the outcome would have changed with careful adherence to Policy 2106, or that Respondent’s decision was arbitrary or capricious.

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: August 10, 2017.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE