

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES WILLIAMS,

Grievant,

v.

Docket No. 2015-1577-DHHR

**DEPARTMENT OF HEALTH AND HUMAN
RESOURCES/JACKIE WITHROW HOSPITAL,**

Respondent.

DECISION

Grievant, James Williams, filed a grievance against his employer, Respondent, Department of Health and Human Resources-Jackie Withrow Hospital dated June 15, 2015, stating as follows: “[n]onselection for supervisor 2 maintenance director.” As relief sought, Grievant seeks, “[t]o be made whole in every way including selection with [back] pay and interest.”

A level one hearing was conducted on July 22, 2016. The grievance was denied by decision dated August 12, 2016. Grievant perfected his appeal to level two on August 12, 2016. A level two mediation was conducted on September 30, 2016. Grievant appealed to level three on October 7, 2017. The level three hearing in this matter was scheduled to be held on March 13, 2017, in Beckley, West Virginia. However, in lieu of an evidentiary hearing, the parties agreed to submit this matter for a decision at level three based upon the record developed below. Grievant appeared by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Harry C. Bruner, Jr., Esquire, Assistant Attorney General. This

matter became mature for decision on April 21, 2017, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was not selected for a Supervisor 2 Maintenance Director position. The selection process was arbitrary and capricious, but Grievant failed to prove he was the most qualified candidate. Where the selection process is proven to be arbitrary and capricious, but the Grievant fails to prove that he or she should have been selected for the position, the position should be reposted and a new selection process undertaken. Accordingly, the grievance is GRANTED IN PART and DENIED IN PART.

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 licensed plumber in the maintenance division of Jackie Withrow Hospital ("JWH") since August 2014.

2. Angela Booker is employed by Respondent as the CEO of Jackie Withrow Hospital. Aimee Bragg is employed by Respondent as the Assistant Chief Executive Officer. Serena Hamb is employed as the Human Resources Director at Jackie Withrow Hospital.

3. In or about June 2015, Grievant applied for a vacant Supervisor 2 Maintenance Director position at JWH. Grievant was one of three individuals who applied for the position.

4. Candidates for the Supervisor 2 position were interviewed by a selection panel consisting of Ms. Booker, Ms. Hamb, and Ms. Bragg.

5. The selection panel interviewed Grievant for the Supervisor 2 position on June 11, 2015. The selection panel also interviewed the two other candidates, Anthony S. Mansfield and Joe Wickline. Grievant and Mr. Mansfield were already employed by JWH at the time they applied for the position and were interviewed. Mr. Wickline had previously been employed at JWH.

6. The selection panel asked each candidate the same set of questions during their interviews. The panel members scored each applicant interview based upon the following factors: oral expression; intelligence/reasoning process; tact/sensitivity; appearance; poise/confidence; and leadership potential. For each candidate, the panel members recorded their scores for each factor on an Applicant Interview Rating Form. The individual panel members' scores were then totaled to arrive at a score for each applicant. Mr. Mansfield and Mr. Wickline both received a score of 84. Grievant received a score of 66.¹

7. The members of the selection panel completed one Candidate Comparison Chart on which they made notations about each of the three candidates they interviewed. This one-page form lists the following categories to be compared: Comments on Interview; Comments on Education; Comments on Past Experience/Demonstrated Ability; Comments on References; Comments on Leadership or Growth Potential; and, Comments on Concerns w/ or Limitations of Candidate. The selection panel did not assign numeric scores to any of these categories. The Candidate Comparison Chart does not have designated spaces to record numeric scores. However, the panel noted the interview scores for each candidate on the Candidate Comparison Chart in the margin

¹ See, Joint Exhibits 1-3, candidate applications and interviewer documentation, level one.

of the form. The last column on the page is titled “Rank Candidates in Order of Preference.” The selection panel left this column blank for each candidate, and did not appear to otherwise rank the candidate in order of preference.²

8. No detailed instructions or directions regarding how to use the Candidate Comparison Chart are printed on the form. However, the following line appears on the form just below the chart: “INSTRUCTIONS: This form may be used as a tool to summarize candidates’ attributes for quick reference.” Upon information and belief, there is a policy memorandum that may address the use of this form, but that policy memorandum was not presented as evidence by either party. Therefore, such is not part of the record in this case.

9. Even though they had already evaluated Grievant’s interview performance on the Applicant Interview Rating Form, the selection panel noted comments about Grievant’s interview performance in the “Comments on Leadership or Growth Potential” and “Comments on Concerns w/ or Limitations of Candidate” categories on the Candidate Comparison Chart. Specifically, the following is written in the “Comments on Leadership or Growth Potential” column: “lacks the ability to demonstrate leadership skills in interview.” In the “Comments on Concerns w/ or Limitations of Candidate” column, the following is written: “poor communication could not follow his responses.” The panel did not note any comments regarding relevant information contained in Grievant’s written application.

10. The selection panel did not view Grievant as having performed well in his interview, and gave him the lowest score of the three candidates. Grievant used humor

² See, Joint Exhibit 3, level one, last page (unnumbered), Candidate Comparison Chart.

during the interview when answering some of the questions. The selection panel viewed such answers as “vague and obscure,” and gave them a lower score. The selection panel did not view Grievant as taking the process seriously.³

11. The selection panel chose Anthony S. Mansfield to fill the Supervisor 2 Maintenance Director position. Mr. Mansfield had worked at JWH for approximately seven years as the Assistant Supervisor for the Maintenance Department. Further, Mr. Mansfield was selected by Ms. Booker to serve as the interim Supervisor 2 Maintenance Director during the position vacancy, and had been so serving for about two months prior to the interviews.

12. At the time Grievant applied for the Supervisor 2 position, he had worked for JWH for approximately nine months. Grievant was previously employed by the West Virginia Department of Natural Resources as a Supervisor 2 in the maintenance department for two years. Further, Grievant had many years of experience supervisory experience in the private sector. Overall, Grievant had nearly eighteen years of supervisory experience in maintenance, HVAC, and plumbing. Grievant was the only applicant who had attended college, and listed on his application mechanical drafting as a course of study. Grievant also held ASE and HVAC/EPA certifications, and the same was listed in his application.⁴

13. At the time Mr. Mansfield applied for the Supervisor 2 position, he had approximately ten years of supervisory experience working in nursing homes. He had worked in two nursing homes before becoming employed at JWH. Mr. Mansfield listed

³ See, Joint Exhibit 1, level one; testimony of Angela Booker; testimony of Aimee Bragg.

⁴ See, Joint Exhibit 1, level one.

no certifications, trainings, or advanced education on his application. Mr. Mansfield had been Mr. Wickline's assistant before Mr. Wickline left employment at JWH. When Mr. Wickline left JWH, Mr. Mansfield was given a temporary upgrade to Supervisor 2, and he assumed Mr. Wickline's former duties.⁵ Mr. Mansfield was working as the interim, or temporary, Supervisor 2 Maintenance Director at the time of his application and interview.

14. Mr. Wickline had previously been employed at JWH for seven years as the Supervisor 2 Maintenance Director.⁶ Therefore, he was applying for the job he had previously held. Mr. Wickline listed on his application that he had approximately 28 years of supervisory experience, both public and private sector. Mr. Wickline also listed on his application that he had attended the Fayette VoTech Center taking courses in building and construction, and drafting and design. On his application, Mr. Wickline listed that he was a certified licensed master plumber, and that he held a West Virginia State Contractor's License.⁷

15. The selection panel concluded that Mr. Mansfield performed better in the interview than the other two candidates. Further, Ms. Booker explained that the selection panel "tipped the scales a little bit toward Mr. Mansfield because he did have the experience here in the Nursing Home working with us, and he had—his supervisory experiences that had been in long [term] care."⁸ Also, Ms. Booker explained that ". . . because he was acting in the position, was doing a very good job in that position after Mr. Wickline left, the scales tipped toward Mr. Mansfield for being the successful candidate."⁹

⁵ See, testimony of Angela Booker, level one transcript, pg. 17.

⁶ See, Joint Exhibit 3, level one.

⁷ See, Joint Exhibit 3, level one.

⁸ See, testimony of Angela Booker, level one transcript, pg. 14.

⁹ See, testimony of Angela Booker, level one transcript, pg. 17.

16. Neither party introduced DHHR Policy Memorandum 2106 as evidence in this grievance. Therefore, such is not part of the record.

17. Neither party called Mr. Mansfield or Mr. Wickline as witnesses at the level one hearing.

18. Neither the job posting for the Supervisor 2 Maintenance Director position nor its job description were presented as evidence in this grievance. Therefore, the minimum qualifications for the position are unknown.

Discussion

As this is not a disciplinary matter, Grievant bears 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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 supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant argues that he should have been selected for the position, and that the selection process was flawed. As to Grievant's argument that the selection process was flawed, Grievant asserts that Respondent violated DHHR Policy Memorandum 2106 by failing to use the Candidate Comparison Chart correctly, and made the selection decision

entirely on the candidates' performances in their interviews without properly considering the candidates' education and experience. Respondent asserts that its selection of Mr. Mansfield for the position was proper as he was the most qualified candidate for the job. Respondent denies Grievant's claim that the selection process was flawed, and argues that the selection panel used the Candidate Comparison Chart correctly.

The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. See *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. See *Mihaliak v. Div. of Rehabilitation 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. See *Thibault v. Div. of Rehabilitation 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. See *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 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 & Human Serv., 789 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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. See *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.” *Id.* (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].” *Trimboli v. Dep’t of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant’s first argument is that Respondent violated DHHR Policy Memorandum 2106 by failing to correctly use the Candidate Comparison Chart as required by the same. Thus, Grievant argues that this failure to comply with Policy Memorandum 2106 flawed the selection process. Respondent denies violating Policy Memorandum 2106. As was noted previously herein, neither party introduced DHHR Policy Memorandum 2106 into the record of this grievance. Upon information and belief, DHHR Policy Memorandum 2106 is an internal DHHR policy that was not presented as an exhibit at level one, and it is not otherwise part of the record of this case. The undersigned has not been provided a copy of Policy Memorandum 2106 to review. While the level one hearing examiner quotes one line from DHHR Policy Memorandum 2106 in the level one decision, it is not

the same provision referenced by Grievant in his proposals. Policy Memorandum 2106 is not a readily accessible public record, such as a statute, rule, or regulation. The undersigned cannot determine if the policy was violated if such is not part of the record of this case. Further, instead of presenting the policy memorandum, or quoting the same, Grievant appears to reference provisions of the policy memorandum by discussing and quoting a separate Grievance Board decision from 2014¹⁰ in which Policy Memorandum 2106 was at issue. While the undersigned understands that Policy Memorandum 2106 has been addressed in other published Grievance Board decisions, the undersigned can only consider the evidence contained in the record of this case when making this decision. Further, there is no way for the undersigned to know what the policy memorandum said at the time at issue in this grievance. Policies are often amended, or revised, and without having the policy memorandum to review, the undersigned cannot determine whether the same was violated. Accordingly, the Grievant has failed to prove his claim that Respondent violated DHHR Policy Memorandum 2106 by using the Candidate Comparison Chart incorrectly, and that such flawed the selection process.

Next, the undersigned must review the legal sufficiency of the selection process. The evidence presented demonstrates that the three candidates were asked the same set of questions by the selection panel during their interviews. The selection panel

¹⁰ In the discussion section of his proposed Findings of Fact and Conclusions of Law, Grievant refers to *Farley, et al., v. W. Va. Dep't of Health & Human Res.*, Docket No. 2012-1161-CONS (Jan. 7, 2014) in his argument about Policy Memorandum 2106. However, in the Conclusions of Law, Grievant attributes two quotations regarding Policy Memorandum 2106 to *Mickey, et al., v. W. Va. Dep't of Health & Human Res.*, Docket No. 2014-0244-CONS (Mar. 10, 2015). *Mickey, et al.*, does not address Policy Memorandum 2106 or hiring. The undersigned considers these particular citations in the Conclusions of Law section to be simple typographical errors.

members scored each candidate's interview performance, and those scores were totaled to give each candidate an overall score. Mr. Mansfield and Mr. Wickline both received the score of 84. Grievant received a 66. The interview panel found that Grievant did not perform well in his interview. One of the issues the selection panel had with Grievant during his interview was that he did not appear to be taking the interview seriously. Apparently, Grievant made some jokes when answering the selection panel's questions, and the panel was not impressed by such. For example, when they asked Grievant where he saw himself in five years, he answered "Governor, I hope," without any explanation, or any attempt to elaborate on his answer.¹¹

Ms. Booker testified that the interview panel members considered the candidates' education, experience and demonstrated abilities, and leadership potential in making the selection, noting that they completed the Candidate Comparison Chart. The panel did not score the candidates on those factors; the candidates were only scored on the interview. Ms. Booker testified that while Grievant had 18 years of supervisory experience and Mr. Mansfield had 10 years, the fact that Mr. Mansfield's experience was in "long-term care" and he had worked in the nursing home with them, "tipped the scales a little bit toward Mr. Mansfield."¹² Ms. Booker mentioned that Mr. Wickline had seven years of supervisory experience in long-term care, but did not explain why the scales were not tipped in his favor. Ms. Booker also testified that Grievant was deemed to lack the ability to demonstrate leadership skills based entirely on his interview performance, and not on

¹¹ See, Angela Booker testimony, level one transcript pg. 9; Aimee Bragg testimony, level one transcript pp. 22-23.

¹² See, Angela Booker testimony, level one transcript pg. 14.

his past work experience, supervisory experience, or other qualifications.¹³ Moreover, it appears that the fact Mr. Mansfield was already serving in the position gave him an advantage in the selection process. Ms. Booker testified, in part, as follows:

BOOKER: We didn't select Mr. Wickline. We selected Mr. Mansfield, and I think I've already explained that.

SIMMONS: Okay.

BOOKER: The reason for that was because Mr. Wickline—although they tied, Mr. Wickline had left the facility and taken other employment. Mr. Mansfield had been Mr. Wickline's assistant. He was the Assistant Supervisor for the Maintenance Department. When Mr. Wickline left, we did a temporary upgrade for Mr. Mansfield and promoted him up to the Supervisor so he acted in that role for several months. He had also covered for Mr. Wickline under other times when Mr. Wickline had to be out of the facility and so, because he was acting in the position, was doing a very good job in that position after Mr. Wickline left, the scales tipped towards Mr. Mansfield for being the successful candidate.

SIMMONS: Okay, so now Mr., so your explanation why you picked Mansfield is that you had already made him the interim acting supervisor for some period of time, right?

BOOKER: Yes, because he was the assistant supervisor, we promoted him up temporarily.

SIMMONS: So, that gave him a leg up in terms of the other candidates because you had already decided on him as the interim, is that correct?

BOOKER: Well, I can't say that we had just decided on him as the interim. That's pretty much the way all companies operate, if someone is in an

¹³ See, Angela Booker testimony, level one transcript, pg. 16.

assistant position, they're there for a reason. And if I was to leave my position, Ms. Bragg's my assistant, she's (sic) meets the qualifications, she would be promoted up to that position, I would think until somebody is appointed as the permanent person. And Mr. Mansfield was the assistant and he had been operating in that capacity for a number of years.¹⁴

From this, it certainly appears that the fact that Mr. Mansfield had been the assistant and that he was promoted to temporarily fill the Supervisor 2 position during the vacancy was a significant factor in selecting him to fill the Supervisor 2 position vacancy.

When questioned at the level one hearing by Ms. Booker about the panel's decision not to assign numeric scores for the categories on the Candidate Comparison Chart, Ms. Bragg testified, in part, as follows:

BOOKER: Amy¹⁵ on the candidate comparison chart, I think what Mr. Simmons is asking is why didn't, wasn't there, why isn't there a rating for those individuals on the comparison, candidate comparison chart?

BRAGG: **I guess, I guess we discussed it. It's obvious when I look at it that the two (2) people that we're comparing is Scott¹⁶ and Joe as their scores being eighty-four (84) and sixty-six (66), but we didn't write in the numbers right there.**

BOOKER: Right, but the numbers that are all to the side the sixty-six (66), eighty-four (84) and eighty-four (84) are the numbers that come from just

¹⁴ See, level one transcript pp. 17-18.

¹⁵ Ms. Bragg's first name appears to be spelled Aimee. However, the person who prepared the transcript from the level one hearing spelled it differently. As this is a quote from the transcript, the undersigned has not corrected the spelling of Ms. Bragg's name. It appears as it does in the transcript.

¹⁶ It appears from the testimony at level one that Anthony S. Mansfield goes by the name "Scott," and was commonly called "Scott" by more than one of the witnesses who testified.

the interview process itself, those ranking sheets, is that correct?

BRAGG: Right.¹⁷

Ms. Bragg went on to explain that the panel failed to fill in the “Rate Candidates in Order of Preference” column on the Candidate Comparison Chart by mistake. Thereafter, she testified that she would have ranked the candidates as (1) Mr. Mansfield, (2) Mr. Wickline, and (3) Grievant. No one questioned Ms. Bragg any further about her statement that it was “obvious” that the panel was comparing only Mr. Mansfield and Mr. Wickline on the Candidate Comparison Chart. The level one hearing examiner asked Ms. Bragg to “articulate what stood out for Mansfield that made you think that he should be the person who was chosen,” and Ms. Bragg responded as follows:

He demonstrated seriousness during the interview. I mean, I would have to look at his interview to get more specific, but just looking at the candidate comparison chart, he had the experience and the demonstrated ability and the education and he had some room for improvement on his communication skills as well, but had improved in his communication and seemed to be serious during the interview process.

Id. at transcript page 26. From Ms. Bragg’s testimony, it appears that the panel considered interview performance to be the most important factor in making its decision. Such is also noted from Ms. Booker’s statements about “selling” oneself in the interview,¹⁸ as well as in her testimony. Specifically, Ms. Booker testified that the panel determined that Grievant “lack[ed] the ability to demonstrate leadership skills” entirely on his interview performance, without considering past work performance or experience, education, or

¹⁷ See, testimony of Aimee Bragg, level one transcript, pg. 25, emphasis added.

¹⁸ See, Angela Booker’s cross-examination of Grievant, level one transcript, pg. 29.

anything else in his written application.¹⁹ Further, it appears that Grievant was not actually being compared with the other two applicants on the Candidate Comparison Chart. The panel completed the chart with respect to Grievant, but based upon Ms. Bragg's testimony, it appears the panel was only comparing Mr. Mansfield and Mr. Wickline in consideration for the position because they scored higher on the interview than Grievant, and their scores for the interview were identical.

It is noted that neither the job description for the Supervisor 2 position nor the posting itself was presented as evidence in this matter. Therefore, the undersigned does not know what the minimum qualifications for the position at issue are. The evidence in the record of this grievance demonstrated that Mr. Mansfield had less overall supervisory experience than both Grievant and Mr. Wickline. Mr. Mansfield had ten years of supervisory experience, seven of which were in the Maintenance Department at JWH. Mr. Wickline had approximately 28 years of overall supervisory experience based upon his written application, seven of which were at JWH as the Supervisor 2 Director of Maintenance.²⁰ Grievant had 18 years of supervisory experience, none of which were at JWH. Grievant had more education than Mr. Mansfield and Mr. Wickline. Mr. Wickline had actually held the position at issue for seven years, but chose to leave JWH for other employment, thereby causing the vacancy at issue. Mr. Mansfield had been Mr. Wickline's assistant in the Maintenance Department for seven years, and was serving as the interim Supervisor 2 Maintenance Director at the time of the interviews. It appears

¹⁹ See, Angela Booker testimony, level one transcript, pp. 13-17.

²⁰ There was no testimony regarding his exact years of experience. This number is derived from Mr. Wickline's listed years of supervisory experience in his written application. See, Joint Exhibit 3.

that Ms. Booker is the person who promoted Mr. Mansfield into the interim supervisor position. Ms. Booker testified that Mr. Mansfield was performing well in the position and had been so for a few months. Mr. Mansfield had worked in maintenance in two other nursing homes before he began working at JWH. According to his written application, he had worked in the two nursing homes for a total of six years, but only supervised employees for three of those.²¹ Given Ms. Booker's testimony, it appears that Mr. Wickline's decision to leave JWH for other employment was considered a strike against him.²² Further, the evidence suggests that Grievant's interview performance actually excluded him from any further consideration for the position.

While the selection panel completed the Candidate Comparison Chart, it does not appear that the panel actually used it to compare the candidates to determine the most qualified candidate for the position. Based upon the testimony of Ms. Booker and Ms. Bragg, it appears that the panel primarily based their decision on the candidates' interview performance, regardless of their qualifications. As Mr. Mansfield and Mr. Wickline received the same interview score, the panel had to decide between them. The panel, more likely than not, selected Mr. Mansfield because he was already serving in the position and doing a good job, and because Mr. Wickline had previously left his position as Supervisor 2 Maintenance Director at JWH for other employment. The panel members do not appear to have genuinely considered the candidates' experience, education, abilities, and leadership potential in making the selection. Such is demonstrated by the fact that Mr. Mansfield had the least supervisory experience of the three (10 years), Mr.

²¹ See, Joint Exhibit 2, Mansfield application.

²² See, Angela Booker testimony, level one transcript, pg. 17; See, quote pg. 11 above.

Wickline had the most supervisory experience, Grievant had the second most supervisory experience (18 years). It is noted that Mr. Wickline is only credited with seven years of supervisory experience on the Candidate Comparison Chart, even though he had approximately 28 years of supervisory experience listed in his written application. The panel apparently only considered the seven years he had at JWH. Further, Mr. Wickline and Grievant had certifications and/ or licenses, while Mr. Mansfield had none. Grievant and Mr. Wickline had training and/or education beyond high school, and they each had previously been employed in the position of Supervisor 2 within state government. Mr. Mansfield's only experience serving as a Supervisor 2 within state government was the time he was receiving the temporary upgrade during the vacancy for the position at issue.

Ms. Booker's explanation that Mr. Mansfield's supervisory experience in long-term care "tipped the scales" in his favor is simply not plausible because Mr. Wickline had seven years of long-term care supervisor experience in the exact position being filled. Mr. Mansfield had been his assistant. Yes, if you add Mr. Mansfield's three years of supervisory experience in another nursing home prior to coming to JWH to his seven years at JWH, that is three more years of supervisory experience in long-term care than Mr. Wickline had. Nonetheless, the long-term care supervisory experience was comparable. However, Ms. Booker's testimony suggests that the panel did not select Mr. Wickline, at least in part, because he "had left the facility and taken other employment," and that Mr. Mansfield's being in the position gave him an advantage over the other candidates. The long-term care supervisory experience justification appears more likely to be an afterthought to justify the actions taken.

For the reasons set forth herein, the undersigned finds that selection panel's decision to select Mr. Mansfield for the Supervisor 2 Maintenance Director position was arbitrary and capricious. The panel disregarded facts regarding the qualifications of the candidates, ignored information regarding the candidates, and did not rely on criteria intended to be considered in making its decision. However, in order to be instated into the position, Grievant must not only prove that the selection was arbitrary and capricious, but also that he was, in fact, the most qualified candidate. See *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008). Grievant presented limited evidence to prove that he was the most qualified candidate, appearing to focus more on his claim that the process was flawed. In fact, Grievant does not assert that he was the most qualified candidate in his proposed Findings of Fact and Conclusions of Law. "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." *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)). See also *Tanner v. Div. of Highways*, Docket No. 2015-1303-DOT (Feb. 16, 2016). Grievant has failed to prove he was the most qualified applicant, but the selection process was clearly arbitrary and capricious. Therefore, the position must be reposted. Accordingly, this grievance is granted, in part, and denied, in part.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears 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). “A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). “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. The grievance procedure is not intended to be a “super interview,” but rather, allows a review of the legal sufficiency of the selection process. See *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. See *Mihaliak v. Div. of Rehabilitation 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. See *Thibault v. Div. of Rehabilitation 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. See *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)).

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. See *Bedford County Memorial Hosp. v. Health & Human Serv.*, 789 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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

5. In order to be instated into the position, Grievant must not only prove that the selection was arbitrary and capricious, but also that he was, in fact, the most qualified candidate. See *Jones v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-340 (July 18, 2008).

6. “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.” *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)). See also *Tanner v. Div. of Highways*, Docket No. 2015-1303-DOT (Feb. 16, 2016).

7. Grievant failed to prove by a preponderance of the evidence his claim that Respondent violated Policy Memorandum 2106 by failing to use the Candidate Comparison Chart correctly, which flawed the selection process.

8. Grievant proved by a preponderance of the evidence that the Respondent's decision to select Mr. Mansfield for the Supervisor 2 Director of Maintenance position was arbitrary and capricious. However, Grievant failed to prove that he was the most qualified candidate for the position of Supervisor 2 Maintenance Director.

Accordingly, this Grievance is **GRANTED IN PART, and DENIED IN PART**. Respondent is ORDERED to repost the position of Supervisor 2 Maintenance Director within 30 days of the receipt of this decision, and undertake a new selection process selecting the most qualified candidate in compliance with applicable law and policies. The grievance is otherwise 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 (eff. July 7, 2008).

DATE: June 28, 2017.

Carrie H. LeFevre
Administrative Law Judge