THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KATHERINE G. KIGER,

Grievant,

v. **Docket No. 2016-1806-DHHR**

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

Respondent,

and

ERIC WAYNE DAVIS,

Intervenor.

DECISION

Grievant, Katherine Kiger, filed a grievance against her employer, Respondent, Department of Health and Human Resources ("DHHR"), Bureau for Children and Families ("BCF"), dated June 21, 2016, challenging her non-selection for the position of Social Services Supervisor in or about June 2016.[1] As relief sought, Grievant stated, "[a]t this time I am requesting a pay increase of 12% which is what the supervisory position pays and would request a transfer to the Crisis Unit."

A level one hearing was conducted on July 25, 2016. The grievance was denied by decision dated August 15, 2016. Grievant perfected her appeal to level two on August 25, 2016. Grievant attached an amended type-written statement of grievance to her level

[1] Grievant's statement of grievance on her grievance form reads: "[p]lease see attached pages." Grievant attached to the form a one-page, type-written narrative detailing her grievance. The same is included by reference herein. Also, Grievant attached a partial copy of DHHR Policy Memorandum 2106, the job posting for the position at issue, and the letter Grievant received informing her that she was not selected for the position.

two appeal form, a copy of her social worker license, and the partial copy of the policy memorandum and letter.[2] Further, Grievant amended the relief sought section of her grievance form to read, "[s]upervisor's Job and 12% increase in pay plus attorney expenses."[3] A level two mediation was conducted on February 14, 2017.[4] Following this mediation, by Order entered February 15, 2017, this matter was placed in abeyance until March 30, 2017. This abeyance was granted at the request of the parties. An Order of Unsuccessful Mediation was entered on April 26, 2017. Eric Wayne Davis filed a request to intervene in this matter on or about March 10, 2017. By Order entered March 16, 2017, Eric Wayne Davis was granted intervenor status thereby becoming a party to this action.

Grievant appealed to level three on May 10, 2017.[5] Again, Grievant amended her written statement of grievance at level three, which is hereby incorporated by reference, as well as her relief sought. In the level three filing, Grievant stated the following as her requested relief: "[s]upervisor Position in Cabell Office with 12% raise; plus attorney's fees, and back pay from start of job to July 1, 2016." The level three hearing in this matter

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[2] Again, the amended type-written page attached to the statement of grievance is incorporated by reference.

[3] "[A]n ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v. Div. of Juvenile Serv.*, Docket No. 2011-0171-MAPS (Sept. 23, 2011).

[4] This mediation had originally been scheduled to take place on November 1, 2016. Respondent moved for a continuance of the same on October 21, 2016, and the same was granted.

[5] The signature line on the grievance form for the level three appeal is dated May 5, 2017; however, the envelope in which it arrived at the Grievance Board is post marked May 10, 2017. As such, May 10, 2017, is considered the filing date.

was conducted by the undersigned administrative law judge on December 20, 2017, at the Grievance Board's Charleston, West Virginia, office.[6] Grievant appeared in person and by counsel, Hoyt Glazer, Esquire, Law Office of Hoyt Glazer, PLLC. Respondent appeared by counsel, Michael E. Bevers, Esquire, Assistant Attorney General. This matter became mature for decision on February 1, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a CPS Worker. Grievant was not selected for a CPS Supervisor position, which is a management position. Respondent selected for the position another employee who had not worked in CPS, and who had not worked for the agency as long as Grievant. Grievant argued that the Respondent's selection was arbitrary and capricious. Respondent denied Grievant's claims, asserting that it properly selected the most qualified candidate for the position. Grievant failed to prove her claims by a preponderance of the evidence. Accordingly, the grievance is DENIED.

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

Findings of Fact

1. Grievant is employed by Respondent as a Child Protective Services ("CPS") Worker in its Cabell County, West Virginia, office. Grievant has been employed in this position for approximately nine years. Grievant has not supervised employees while employed by Respondent. Grievant has been employed by the State of West Virginia for

[6] It is noted that the level three hearing had originally been scheduled to take place on September 14, 2017. Grievant moved for a continuance on September 12, 2017, and the same was granted.

over eleven years. Grievant is a licensed social worker in West Virginia and holds a drug and alcohol counselor license in Ohio.[7]

2. Grievant began working in the field of social services in or about 2000. Before coming to DHHR, from December 2000 to July 2007, Grievant worked The Counseling Center in Ohio. There she was a case manager, and became a drug and alcohol counselor in 2001. She also worked as a program coordinator there for two years, which required her to supervise employees. Prior to that, she worked in a number of jobs, including owning and operating a computer store franchise in West Virginia from 1981 to 1985, which required her to supervise a number of employees. Additionally, from 1992-1998, Grievant worked for Clarksburg Casket Company in sales, manufacturing, purchasing, and management. At the level three hearing, Grievant testified that she supervised people in this job. However, she left blank the question on her application for employment asking if she supervised employees in this position. Also, in the description of her duties in this position on the application, she makes no mention of supervisory duties. Grievant also held other employment in real estate sales, office equipment sales, as a legal secretary, and as a secretary.[8]

3. Grievant admits that she was "light" on her supervisory experience in her job application. Meaning, that she did not fully detail, or explain, her supervisory experience.[9]

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[7] *See*, testimony of Grievant; Grievant's Exhibit 2 and Respondent's Exhibit 4, Grievant's Application for Employment.
[8] *See*, Grievant's testimony; Grievant's Exhibit 2 and Respondent's Exhibit 4, Grievant's Application for Employment.
[9] *See*, Grievant's testimony.

4. At the time relevant herein, Intervenor was employed by Respondent as a Social Service Worker III. Intervenor was hired in or about February 2015. Prior to that, he had not worked for DHHR. However, he had worked for Braley & Thompson as a Contracted Youth Services Worker and as a Program Director. Intervenor also held other employment in various positions prior to working at Braley & Thompson.[10]

5. While employed at Braley & Thompson, Intervenor worked as a youth services worker, and later as a Program Director, both of which are different than from working in CPS. Intervenor supervised employees while he was a Program Director, but that was only for about seven months. During his time at Braley & Thompson, Intervenor had access to DHHR policies when he was contracted to DHHR. Intervenor received some DHHR trainings, but they were mostly specific to his job in youth services. Intervenor received no CPS training while in those positions, but had access to CPS policies and knew where they were.[11]

6. Intervenor's employment with Braley & Thompson was terminated after there was an allegation that he placed "hands on" a child. Such was considered an allegation of abuse or neglect which triggers an investigation by the Institutional Investigation Unit. The allegations made against Intervenor were not substantiated. Nonetheless, Intervenor explained that Braley & Thompson was required to "let him go."[12]

7. Prior to working at Braley & Thompson, Intervenor had been employed as a Residential Manager at the Autism Services Center for about two years during which

[10] *See*, testimony of Intervenor; Grievant's Exhibit 3 and Respondent's Exhibit 3, Intervenor's Application for Employment.
[11] *See*, Intervenor's testimony; Grievant's Exhibit 3 and Respondent's Exhibit 3, Intervenor's Application for Employment.
[12] *See*, testimony of Intervenor.

time he supervised employees. Intervenor was also previously employed as an Autism Mentor at Cabell County Schools for about five years. Before that, he worked as a "communicator" at InfoCision Management Corporation, which was a call center. Intervenor also previously worked at the Kanawha Valley Center as a Family Support Associate with children in foster care. In this position, Intervenor transported children and families to appointments and monitored visitations, taught basic living skills, and implemented behavior management plans. Prior to that, Intervenor worked as a Behavioral Rehabilitation Specialist at Prestera Center for Mental Health Services for about two years. In that position, he worked with geriatric clients with mental illnesses. Intervenor also lists that he worked for a local insurance company for about nine months, and at another call center. Intervenor did not supervise anyone in these positions, and none involved CPS work.[13]

8. Cheryl Salamacha is employed by Respondent as the Regional Director of the region that includes the Cabell County DHHR office. Janice McCoy is employed by Respondent as the Community Services Manager in the Cabell County DHHR office. At the times relevant herein, Angela Seay was employed by Respondent as the Cabell County Social Services Coordinator. It is noted that by the time of the level three hearing, Ms. Seay was no longer employed by DHHR.

[13] *See*, Grievant's Exhibit 3 and Respondent's Exhibit 3, Intervenor's Application for Employment; Intervenor's Testimony.

9. In or about April 2016, Respondent posted a vacancy for a Child Protective Services Supervisor in the Cabell County office. The closing date for the posting was May 5, 2016.[14]

10. On May 2, 2016, Grievant applied for the Child Protective Services Supervisor position. Intervenor applied for the position on April 25, 2016.[15] Grievant and Intervenor were among ten applicants for the position.

11. Candidates for the Child Protective Services Supervisor position were interviewed by a selection panel consisting of Angela Seay, Janice McCoy, and Cheryl Salamacha.

12. The selection panel interviewed the ten applicants for the Child Protective Services Supervisor position on May 19 and May 24, 2016. The panel interviewed Grievant and Intervenor on May 24, 2016. Grievant and Intervenor were already employed by Respondent at the time they applied for the position and were interviewed.

13. At the time Grievant and Intervenor were interviewed for the position, Grievant had worked for Respondent for about eight years. Intervenor had worked for Respondent for a little more than one year. Grievant had more experience working with CPS than Intervenor, as well as more supervisory experience. Grievant was also a licensed social worker. Intervenor held only a provisional social worker license which had been issued in February 2016.

[14] *See*, Grievant's Exhibit 1, Job Posting; Grievant's Exhibit 2 and Respondent's Exhibit 4, Grievant's Application for Employment; Grievant's Exhibit 3 and Respondent's Exhibit 3, Intervenor's Application for Employment.
[15] *See*, Grievant's Exhibits 2 and 3.

14. The selection panel asked each candidate the same set of questions during their interviews. The panel members then scored the candidates' answers to these questions. The panel members also scored the applicants in the following rating factors: oral expression; intelligence/reasoning process; judgment, objectivity; tact/sensitivity; appearance; poise/confidence; and leadership potential. For each candidate, the panel members recorded their scores for each of these factors on Applicant Interview Rating Forms. The individual panel members' scores for both the interview questions and the rating factors were then totaled and averaged to arrive at a total score for each applicant. Then, each candidate was assigned a rating between 1 and 6 for education, and between 1 and 4 for experience, which would be added to their total score from the interview and rating form.

15. The selection panel used an HR Solutions "Weighted Applicant Scoring Worksheet" to record the total score each candidate received for education, experience, and the interview. This scoring worksheet included columns for each of these criteria. The scores for the ten applicants were then totaled on this worksheet, and the applicants were then ranked according to the total score received.[16]

16. As reflected on the Weighted Applicant Scoring Worksheet, Grievant was initially given 2 points for education, 3 points for experience, and 94 points for the interview, for a total of 99 points. Intervenor was initially given 2 points for education, 2 points for experience, 99 points for the interview, for a total of 103 points.[17]

[16] *See*, Respondent's Exhibit 7, "Weighted Applicant Scoring Worksheet."
[17] *See*, Respondent's Exhibit 7.

17. A number of errors were discovered with respect to the scores given the Grievant and Intervenor, as well as mathematical errors in the calculation of their interview scores. Some of these errors were discovered after the level one proceeding in this matter, and some, later during the litigation of this matter, but before the level three hearing.[18] None were discovered before the selection of the Child Protective Services Supervisor.

18. It is unclear from the record how the errors were discovered. However, it was eventually determined that Grievant should have received 4 points in the experience category, not the 3 points initially assigned. Therefore, Grievant's total score increased by a point. Also, it was discovered that Ms. Seay failed to assign Grievant a score for "oral expression" on her Applicant Interviewing Rating sheet. Ms. Seay testified that her score for Grievant on the oral expression factor would have been 5. Ms. Seay had assigned Intervenor a score for this factor, which was a 4. Also, Ms. Seay miscalculated Intervenor's total score on his Applicant Interviewing Rating form. She had it listed as 22 points, but the scores she assigned Intervenor on that form total 25 points. With the corrections to Ms. Seay's Applicant Interviewing Rating form, Ms. Seay scored Grievant at 105 total points, and Intervenor at 97 points.

19. Following the selection, it was also discovered that Cheryl Salamacha made a mathematical error when totaling the Grievant's interview scores. She had recorded

[18] *See*, testimony of Angela Seay; testimony of Janice McCoy; testimony of Cheryl Salamacha; Respondent's Exhibits 1, 2, 5, 6, 9, 10, Selection Panel's interview scoring sheets; Respondent's Exhibit 7, "Weighted Applicant Scoring Worksheet"; Respondent's Exhibit 8 "Child Protective Service Supervisor Applicant Scores," prepared by counsel in anticipation of the level three hearing.

Grievant's score as 66 points on the interview questions, but that number should have been 65.

20. When at least some of the errors were discovered following the level one hearing, Janice McCoy's secretary made handwritten corrections to the "Weighted Applicant Scoring Worksheet." She marked out the 3 Grievant had originally received in the "Experience" column, and replaced it with a 4. Also, she corrected the scores for Grievant and Intervenor in the Interview column. She changed Grievant's score from 94 points to 95 points. She changed Intervenor's score from 99 points to 100. She then changed the total scores for them, changing Grievant's to 101 points, and Intervenor's to 104 points.[19]

21. Cheryl Salamacha and Janice McCoy had assigned Intervenor the highest scores of the applicants. Angela Seay had assigned Grievant the highest scores of the applicants. However, once the selection panel members' corrected scores for Grievant and Intervenor were averaged, Intervenor's average score was 100 points. Grievant's corrected average score was 95.33 points. After adding a total of four points to Intervenor's interview score for education and experience, Intervenor's total score was 104 points. After adding six points to Grievant's interview score for education and experience, her total score was 101.33. Therefore, Intervenor received the highest score of the applicants.[20]

[19] *See*, Respondent's Exhibit 7.
[20] *See*, Respondent's Exhibit 8, "Child Protective Service Supervisor, corrected numbers.

22. When the selection panel ranked the applicants, Intervenor was ranked number one, and Grievant was ranked number two. The difference in their overall scores was just under three points.

23. The selection panel chose Intervenor to fill the Child Protective Services Supervisor position, based upon his higher scores and explaining that he was "the best fit" for the position. Cheryl Salamacha and Janice McCoy found that Intervenor performed best in the interview as he gave better answers, answered questions like a supervisor, and showed more leadership potential.

24. The selection panel gave more weight to the interview than education and experience in rating the applicants for the position.[21] This benefited Intervenor because he had significantly less experience with CPS, social services, and supervision than Grievant. It is noted that the panel recognized Grievant's greater experience as it scored Grievant the maximum score of 4 for experience, and Intervenor was scored a 2.

25. Interview performance was the deciding factor in selecting the new Child Protective Services Supervisor.

26. Intervenor has served in the position of Child Protective Services Supervisor since in or about June 2016.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving her 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

[21] *See*, Respondent's Exhibit 7; testimony of Cheryl Salamacha.

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 she should have been selected for the position as she was the most qualified candidate, and that Respondent's decision to select the Intervenor was arbitrary and capricious in that it was based on the "disproportionate weight assigned to the interview." Respondent asserts that its selection of Intervenor for the position was proper as he was the most qualified candidate for the job of CPS Supervisor and was the best fit for the position.

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).

The evidence presented demonstrates that the selection panel asked the candidates the same set of questions during their interviews. The selection panel

members scored each candidate's interview performance individually, and those scores were then averaged to get an overall interview score for each. The selection panel also scored each candidate's experience and education. Those scores were then added to candidates' averaged interview scores to reach an overall score for each candidate. It is noted that a number of mathematical errors and mistakes were made by the selection panel in calculating Intervenor's and Grievant's scores. It is unknown if such mistakes were made for any other candidates. After all the mathematical errors were corrected, Grievant received an averaged score of 95.33 points on her interview performance, 2 points for education, and 4 points for experience. It is noted that Grievant received the maximum score for experience. Therefore, her overall score was 101.33. Intervenor received an averaged score of 100 points on his interview performance, 2 points for education, and 2 points for experience. Therefore, his overall score was 104. Because Intervenor received the highest score, he was selected for the position. The evidence demonstrates that Intervenor's higher interview score made him the successful candidate.

Grievant takes issue with the weight assigned to the interview, asserting that assigning so much weight to the interview, as opposed to more objective criteria, made the selection panel's decision arbitrary and capricious. The interview was worth a total of 135 possible points. Experience was worth up to 4 possible points, and education was worth up to 6 points. So, the education and experience criteria were worth a maximum of 10 points, while the interview portion was worth up to 135 points. The Grievant cited no authority suggesting that assigning more weight to the interview portion of the selection process than all other criteria is improper or prohibited. Grievant argues that she had more CPS experience and supervisory experience than Intervenor, and that she was

simply more qualified. It is undisputed that both Grievant and Intervenor were minimally qualified for the position. The issue is who was the most qualified.

Respondent asserts that it properly selected Intervenor for the position, and that while both Intervenor and Grievant were qualified, Intervenor showed more leadership potential in the interview, which is important in a supervisory position such as CPS Supervisor. Ms. Salamacha and Ms. McCoy testified that in his interview, Intervenor demonstrated more leadership potential in his responses to their questions. They testified that Intervenor's answers to the questions were better than Grievant's, and that he showed better organizational skills. Ms. Salamacha explained that Grievant answered the interview questions like a very good CPS worker, but Intervenor answered the questions like a manager. Ms. Salamacha testified that given all of this, Intervenor was a better fit for the CPS supervisor position. Ms. Seay scored Grievant one point higher on the interview answers than she scored Intervenor. She scored Grievant seven points higher than Intervenor on the Applicant Rating Form criteria. However, during her testimony, Ms. Seay would not say that Grievant was more qualified for the position than Intervenor, explaining that there were two other people on the selection panel and it was ultimately not her decision. "[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep't of Health and Human Res*., Docket No. 2008-0225-DHHR (Dec. 23, 2008)." *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009). "There is no doubt that it is

permissible to base a selection decision on a determination that a particular applicant would be the 'best fit' for the position in question. However, the individuals making such a determination should be able to explain how they came to the conclusion that the successful applicant was, indeed, the best fit." *Spears v. Dep't of Health & Human Res.,* Docket No. 04-HHR-284 (July 27, 2005). The undersigned ALJ cannot find it unreasonable for leadership potential, or ability, to be a consideration for a supervisory position. Additionally, Ms. Salamacha and Ms. McCoy have sufficiently explained why they found Intervenor to be the best fit for the position.

Grievant testified at length at the level three hearing about her experience, including supervisory experience. At the time of the interview, Grievant certainly had more experience working with CPS and more CPS training. She had also worked for Respondent and the State longer than Intervenor. Grievant was a licensed social worker, while Intervenor only had a provisional license. Grievant received twice the points for experience than Intervenor received. However, experience was only one of the criteria considered for the selection. Grievant and Intervenor both received 2 points for education.[22] Intervenor performed better in the interview portion of the selection process, and based upon the testimony of Ms. Salamacha and Ms. McCoy, he demonstrated more leadership and management potential. However, again, Intervenor's score was less than three points higher than Grievant's. This was a close selection.

Grievant has admitted that her application was "light on" her supervisory experience, and that it was not as "detail-oriented" as it should have been. She explained

[22] It is noted that there were other applicants who received as many as 6 points for education.

that she used the version of the application she had used for another position in the past, and did not pay attention. Grievant also testified that in her interview she told the selection panel that her organizational skills could be better. A review of Grievant's application shows that she did not provide an answer to the question "[d]id you supervise employees" on two of her employment history entries. Grievant testified at the level three hearing that when she was employed at the Clarksburg Casket Company, she supervised employees and went into detail about the aspects of her positions there. However, in the Clarksburg Casket Company entry on her application, she did not answer whether she supervised employees, and she did not mention supervision in the "detailed description of your duties" section. It does not appear that Grievant went into much detail about the duties of her current position, or past positions, on her application. For her current position, she appears to have cut and pasted a portion of her formal job description into the description section, and did not provide specific details about what she has done for the last eight years. At level three, Grievant testified about all of her jobs in much more detail. This is problematic. The grievance procedure is not to be a super-interview. Apparently, Grievant did not provide the selection panel with all the information they requested for consideration. Further, the selection panel was looking for a supervisor. Grievant presented them with an incomplete application, demonstrating that she was not very detail-oriented, and admitted that her organizational skills could be better. Ms. Salamacha noted during her testimony that one of the things that stood out about Intervenor was his organizational skills. Given this, it is reasonable that the panel would not view Grievant as having the most leadership potential, or being the best fit.

Ms. Salamacha and Ms. McCoy have sufficiently explained why they scored Intervenor higher on the interview than Grievant. It is noted, however, that the selection panel's decision was not unanimous. Ms. Salamacha and Ms. McCoy scored Interviewer higher on the interview than Ms. Seay. Ms. Seay scored Grievant higher than Intervenor. When the interviewers' scores for each candidate were averaged, Intervenor's score was about three points higher than Grievant's. The selection panel averaged each candidate's scores. Grievant was treated no differently than the others. While it may be unusual for the selection panel to have chosen someone to be the CPS Supervisor who had not been a CPS worker, that alone does not defeat the selection. Intervenor worked for DHHR, had DHHR training, had worked in Youth Services in the private sector, was familiar with CPS and its functions, and had supervisory experience.[23] Given this was a supervisory position, the law is clear that it is appropriate to consider personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees, as well as the best fit for the position. Such is why Intervenor was selected.

While it is not entirely clear, it appears that Grievant may be arguing the Respondent failed to comply with DHHR Policy Memorandum 2106 "Employee Selection" in making the selection in this matter. In her proposed Findings of Fact and Conclusions of Law, Grievant states the following as her first proposed Conclusion of Law: "DHHR Policy Memorandum 2106 states that '[t]he ultimate decision should be based upon the

[23] Ms. Salamacha testified that Grievant and Intervenor received training specific to their different positions. Grievant had CPS training at the time of the interviews, as she was a CPS worker, and Intervenor had Youth Services training, but not CPS training. Nonetheless, Grievant and Intervenor had received much of the same DHHR training.

interviewer's judgment as to which candidate would do the best job.'"[24] Grievant makes no other references to Policy Memorandum 2106 in her proposals. That statement is included in the Policy Memorandum. However, that is only one sentence from the policy memorandum. The full paragraph from which that sentence is pulled states as follows:

> [w]hen selecting one employee among several applicants, demonstrated ability, work history, references, education and the interview should be considered. The ultimate decision should be based upon the interviewer's judgment as to which candidate would best do the job. Hiring decisions should be based on an individual's qualifications for the essential duties of the position. The need for reasonable accommodations for disabilities or employees or applicants is not an excuse not to hire an individual who meets those qualifications. However, it is still permissible to hire the more qualified applicant. . . .[25]

The evidence presented demonstrates that the selection panel complied with this policy. The selection panel considered not only the interview, but also the applicants' experience, education, work histories, and abilities. Such has been discussed at length herein. Grievant and Intervenor were scored less than three points apart overall. This was a close selection. The panel ultimately concluded that Intervenor would do the best job as the CPS Supervisor because he demonstrated more management and leadership potential. Such is permitted by law, as well as this policy. Respondent complied with this policy.

For the reasons set forth herein, Grievant has failed to prove by a preponderance of the evidence her claim that the selection decision was arbitrary and capricious. Further,

[24] *See*, Grievant's proposed Findings of Fact and Conclusions of Law; Respondent's Exhibit 11, Policy Memorandum 2106, pg. 5 of 15.
[25] *See*, Respondent's Exhibit 11, Policy Memorandum 2106, pg. 5 of 15.

Grievant has failed to prove any violation of law or policy in the selection of the CPS Supervisor. Therefore, this grievance is denied.

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 her 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. "[W]hen a supervisory position is at stake, it is appropriate for an employer to consider factors such as the pertinent personality traits and abilities which are necessary to successfully motivate and supervise subordinate employees. *Pullen v. Dep't of Transp*., Docket No. 06-DOH-121 (Aug. 2, 2006); *See Ball v. Dep't of Transp*., Docket No. 04-DOH-423 (May 9, 2005); *Freeland v. Dep't of Health and Human Res*., Docket No. 2008-0225-DHHR (Dec. 23, 2008)." *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009).

6. "There is no doubt that it is permissible to base a selection decision on a determination that a particular applicant would be the 'best fit' for the position in question.

However, the individuals making such a determination should be able to explain how they came to the conclusion that the successful applicant was, indeed, the best fit." *Spears v. Dep't of Health & Human Res.,* Docket No. 04-HHR-284 (July 27, 2005).

7. Grievant failed to prove by a preponderance of the evidence that the selection decision was arbitrary and capricious as the decision was supported by substantial evidence and was reasonable.

Accordingly, this 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 (eff. July 7, 2008).

DATE: March 16, 2018.

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Carrie H. LeFevre
Administrative Law Judge