WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

NONA G. RINGLER,

Grievant,

v. **DOCKET NO. 2018-0645-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent,

and

TINA LYNN GOOD,

Intervenor.

DECISION

Nona G. Ringler ("Grievant") filed this grievance on October 25, 2017, against her employer, the Department of Health and Human Resources, Bureau for Child Support Enforcement ("Respondent" or "DHHR"), challenging her employer's decision to select another applicant, Tina Lynn Good ("Intervenor Good") for a Child Support Supervisor 2 position. Grievant's statement of grievance reads: "I feel I was a better qualified person for the Child Support Supervisor 2 position than the person who was selected. I also feel that the person who was selected has friends on the selection committee." For relief sought, Grievant stated: "I expect to get the position of the Child Support Supervisor 2. The Management that did the selection to go through proper training for as to (*sic*.) what is the civil service process on selection of employees." The

successful applicant, Tina Good, sought and obtained Intervenor status on November 7, 2017, as authorized by W. Va. Code § 6C-2-3(f). *See* 156 C.S.R. 1 § 4.5 (2018).

Following a Level One grievance hearing conducted on February 7, 2018, Respondent DHHR denied the grievance on February 28, 2018. Grievant appealed to Level Two of the grievance procedure. Mediation was completed at Level Two on June 5, 2018, and Grievant appealed to Level Three on July 5, 2018. After a Level Three hearing was set for October 30, 2018, the parties agreed to submit this grievance for decision on the lower level record. This matter became mature for decision on December 3, 2018, upon receipt of the last of the parties' post-hearing arguments. Grievant's brief was submitted by her representative, Gordon Simmons, with UE Local 170 of the West Virginia Public Workers Union. DHHR's written argument was submitted by its counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. No written argument was received from Tina Good, the Intervenor.

Synopsis

Grievant is challenging her employer's failure to select her for promotion to a Child Support Supervisor 2 position. Grievant asserts that she was better qualified than the successful applicant, Tina L. Good, who is an Intervenor in this grievance. Grievant failed to establish that she was the victim of prohibited favoritism. Further, Grievant failed to demonstrate that she was better qualified to fill the position than Intervenor Good, the successful applicant. Likewise, Grievant failed to establish that Respondent DHHR failed to comply with Policy Memorandum 2106 by failing to employ the specific forms recommended to record applicant qualifications. However, Grievant established

by a preponderance of the evidence that the interview process was flawed by requiring the applicants to answer a question which had no bearing on the candidate's abilities to perform the essential duties of the position, instead interfering with a public employee's right to participate in the statutory grievance procedure. Grievant did not prove by a preponderance of the evidence that she would have been selected had the proper process been followed.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level One hearing:

Findings of Fact

1. Grievant is employed by Respondent Department of Health and Human Resources ("DHHR") in its Bureau for Child Support Enforcement ("BCSE").

2. Grievant has been employed by DHHR for over seventeen (17) years. Tr. at 6. *See* J Ex 1.

3. Grievant began working for BCSE in the Auditing Unit, later transferring to Customer Service, where she performed multiple tasks for nearly four (4) years. Tr. at 6. *See* J Ex 1.

4. Grievant moved to the Enforcement Unit when it was created and has held multiple positions within that unit, including working in the "locate" function, which involves tracking down parents, non-custodial parents and their employers. Tr. at 6.

5. Since April 2012, Grievant has been assigned to the Central Registry Unit as a Child Support Specialist 3. *See* J Ex 1.

6. Prior to coming to work for DHHR, Grievant was employed as an Office Manager by A-One Protection in Charleston, West Virginia, from September 1996 to January 2000. *See* J Ex 1.

7. Grievant also worked as a District Manager for Capital Development, Inc. from May 1992 to June 1993. In that position, her supervisory duties involved training and managing three people engaged in insurance sales. *See* J Ex 1.

8. From June 1991 to April 1992, Grievant was employed as an Assistant Manager for Wendy's International, supervising three crew members. *See* J Ex 1.

9. Grievant has a bachelor's degree in music from the West Virginia Institute of Technology in Montgomery, West Virginia. *See* J Ex 1.

10. Grievant was one of ten current DHHR employees who applied to fill a posted vacancy for a Child Support Supervisor 2 in July 2017.

11. The successful applicant, Intervenor Good, has a Board of Governors degree in criminal justice from West Virginia University – Parkersburg. *See* J Ex 1.

12. Intervenor Good previously worked as a Paralegal for the West Virginia Attorney General's Office from 1996 to 2008. During that time, Ms. Good supervised a single individual employed as a Clerk. *See* J Ex 1.

13. Intervenor Good also worked as a Paralegal for Spilman Thomas and Battle, PLLC, from 2008 to 2010. In that position, Ms. Good supervised a Secretary and a Clerk. *See* J Ex 1.

14. Intervenor Good began working as a paralegal for the Bureau for Child Support Enforcement in 2013. She moved to another DHHR agency, WV CARES, in

2016, and worked there as an HHR Specialist/Fitness Determination Specialist for approximately nine (9) months. *See* J Ex 1.

15. Intervenor Good returned to the Bureau for Child Support Enforcement as a Child Support Specialist 2 in November 2016. *See* J Ex 1.

16. Neither Grievant nor Intervenor Good had worked in a supervisory position in DHHR. *See* J Ex 1.

17. On or about August 29 and 30, 2017, all applicants, including Grievant, were interviewed by a five-person selection panel which included Larry LeFevre, Tammy Allred, Donald Eric Thomas, Barb Baxter and Debbie Casto. Tr. at 7. *See* J Ex 1.

18. The selection panel asked the same fifteen (15) previously-prepared questions of each applicant, and each panel member independently summarized the applicant's verbal responses on a separate form, assigning a score for each question on a one to five-point scale. *See* J Ex 1.

19. The five-point scale employed by the interview panel assigned one (1) point to an "unsatisfactory" answer, two (2) points to a "satisfactory" answer, three (3) points to an "average" answer, four (4) points to an "above average" answer, and five (5) points to an "exceptional" answer. *See* J Ex 1.

20. One of the fifteen questions the panel asked of each applicant was Question No. 11: "What reaction can we expect from you if you are not chosen?" J Ex 1.

21. Ms. Allred recorded Grievant's answer to Question No. 11 as: "I don't know. My last one, I was very upset but I don't know yet." J Ex 1.

22. Ms. Allred rated Grievant's response to Question No. 11 as a "1." Ms. Allred rated Intervenor Good's response to Question No. 11 as a "4." J Ex 1.

23. Mr. LeFevre rated Grievant's response to Question No. 11 as a "2." Mr. LeFevre rated Intervenor Good's response to Question No. 11 as a "3." J Ex 1.

24. Ms. Casto rated Grievant's answer to Question No. 11 as a "1." Ms. Casto noted after Grievant's response to Question No. 11: "Seemed almost a warning." Ms. Casto rated Intervenor Good's response to Question No. 11 as a "3." J Ex 1.

25. Ms. Baxter rated Grievant's response to Question No. 11 as a "0." Ms. Baxter rated Intervenor Good's response to Question No. 11 as a "4." J Ex 1.

26. Mr. Thomas rated Grievant's response to Question No. 11 as a "3." Mr. Thomas also rated Intervenor Good's answer to Question No. 11 as a "3." J Ex 1.

27. Ms. Allred recalled that Ms. Baxter expressed unspecified concerns about question No. 11, but the panel decided to go ahead and ask the question despite those concerns. Tr. At 16.

28. The interview scores were totaled after all interviews were completed and Grievant received a total score of 196 points while Intervenor Good received a total of 238 points. *See* J Ex 1.

29. Each panel member also completed a separate Candidate Evaluation Form for each applicant, based upon a review of each applicant's paper application, as well as the applicant's performance during the interview, rating such factors as

educational background, prior work experience, technical qualifications/experience, verbal communications, candidate enthusiasm, knowledge of BCSE, teambuilding/ interpersonal skills, initiative, time management, customer service, appearance/attire, and overall impression, assigning a rating on a one to five scale. Tr. at 16. *See* J Ex 1.

30. The panel members completed their Candidate Evaluation Forms after completing the applicant interviews. Tr. at 20.

31. The maximum possible score an applicant could receive was 60 points from each panel member, or a total of 300 points. *See* J Ex 1.

32. During this phase of the process, Grievant was awarded a total score of 200 while Intervenor Good's score was 225. *See* J Ex 1.

33. DHHR policy for considering applicants for posted positions is contained in Policy Memorandum 2106 entitled "Employee Selection," dated February 28, 1992. *See* J Ex 2. Policy 2106 includes an "Applicant Interview Rating" form at Appendix A. The form's instructions state: "This form may be used as a tool to summarize candidates' attributes for quick reference." J Ex 2 at 7.

34. Policy Memorandum 2106 states its "purpose" as follows:

> This policy provides general guidance for considering applicants for posted positions, conducting employment interviews and making a selection from the candidates in a manner consistent with Department policies, Division of Personnel Administrative Regulations and applicable Federal and State Civil Rights Laws.

J Ex 2 at 1.

35. The panel which interviewed Grievant and the other applicants used an Excel spreadsheet to incorporate the results documented on the interview sheets and

candidate evaluation forms, and which substantially included the same categories as Appendix A to Policy 2106, albeit in a modified format. Tr. at 20. *See* J Ex 1.

36. When the process was completed by the interview panel, Intervenor Good and another applicant, Tiara Woods, were tied for the top candidate position. The panel submitted these two applicants to Commissioner Garrett Jacobs, who broke the tie by selecting Intervenor Good for the position at issue.

37. Ms. Allred is the employee who would directly supervise the successful applicant for the position at issue. She indicated that she believed Intervenor Good was the best candidate because of her observed work performance in Customer Service and her greater supervisory experience. Tr. at 18.

Discussion

Because the subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3.1 (2018); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "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), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

This Grievance Board recognizes that promotion decisions are largely the prerogative of management. *Ashley v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-070 (June 2, 1995). *See Riffle v. W. Va. Dep't of Health*, Docket No. 89-H-053 (July 21, 1989). Accordingly, where Grievant is challenging her non-selection for a promotion, Grievant has the burden of demonstrating that her employer violated the rules and regulations governing hiring and promotions, acted in an arbitrary and capricious manner, or was clearly wrong in its decision. *Vance v. Dep't of Transp*., Docket No. 06-DOH-418 (Jan. 24, 2007). *See Lusher v. W. Va. Dep't of Transp*., Docket No. 97-DOH-033 (July 28, 1997); *Flint v. W. Va. Dep't of Transp*., Docket No. 92-DOH-119 (Sept. 23, 1992); *Miller v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-328 (Nov. 27, 1990). In regard to such matters, the grievance process is not intended to be a "super interview," but rather, serves as a review of the legal sufficiency of the selection process. *Mowery v. W. Va. Dep't of Natural Res*., Docket No. 96-DNR-218 (May 30, 1997); *Thibault v. Div. of Rehab. Serv*., Docket No. 93-RS-489 (July 29, 1994). When a supervisory position is at stake, it is appropriate for an employer to consider factors such as the appropriate 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).

Grievant indicated in her original grievance statement that she believed the successful applicant (Intervenor Good) had "friends on the selection committee." This statement may reasonably be interpreted to represent an allegation of prohibited favoritism. Favoritism is defined as "unfair treatment of an employee as demonstrated

by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee. W. Va. Code § 6C-2-2(h). In order to establish a *prima facie* case of favoritism under the grievance statute an employee must prove:

a. that she is similarly situated, in a pertinent way, to one or more other employee(s);

b. that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her;

and

c. that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

Powers v. Div. of Highways, Docket No. 2013-0569-CONS (May 22, 2014); *Board v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-329 (Feb. 2, 2000); *Frantz v. W. Va. Dep't of Health & Human Res*., Docket No. 99-HHR-096 (Nov. 18, 1999).

If a grievant is able to establish a *prima facie* case of favoritism, the employer may rebut this showing by articulating a legitimate basis for its actions. Thereafter, the grievant may show that the offered reasons are pretextual. *Powers*, *supra*. *See Board*, *supra*. *See generally*, *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Grievant's proof in this matter necessarily involved demonstrating that the event wherein she suffered unfavorable treatment involved a competition for promotion to a posted supervisor vacancy. In such circumstances, it is inevitable that one employee, the successful applicant, will receive an advantage over the other. Therefore, other

than establishing that she did not receive the promotion, Grievant has failed to demonstrate how she was treated differently in the process to the particular advantage of Intervenor Good. *See VanDervort v. W. Va. Public Serv. Comm'n*, No. 18-0037, 2018 WL 6016720 (W. Va. Nov. 16, 2018). Moreover, even if, for sake of argument, Grievant established a *prima facie* case of favoritism, Respondent established that the five panel members who made this decision were focused on identifying the best person for the job, and that Intervenor Good was ultimately selected by Commissioner Jacobs after she tied with another applicant.[1]

It is well established that an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977). Although Powell involved county school personnel, this Grievance Board has determined that the rule applies equally to state agencies. *See Edwards v. Div. of Corrections*, Docket No. 2015-0844-MAPS (Nov. 25, 2015), *rev'd on other grounds,* Cir. Ct. of Kanawha County, No. 15-AA-133 (Apr. 22, 2016); *Bennett v. W. Va. Dep't of Health & Human Res*., Docket No. 98-HHR-378 (Apr. 27, 1999), *aff'd*, Cir. Ct. of Kanawha County, No. 99-C-431 (Nov. 30, 2000); *Della Mae v. W. Va. Div. of Natural Res*., Docket No. 98-DNR-204 (Feb. 26, 1999). Grievant contends that Respondent did not comply with the requirements of Policy Memorandum 2106 by failing to document the interview process in accordance with the format contained in Appendix A, and sometimes referred to as "OPS-13," citing *Smith v.*

[1] Grievant's complaint that Respondent erred by failing to apply seniority in breaking the tie between Intervenor Good and another applicant will not be considered because it has no bearing on whether Grievant was wrongly denied this promotion, and Grievant is without standing to complain about an injury to another employee.

Department of Health and Human Resources, Docket No. 2017-0959-DHHR (Oct. 17, 2017), *appeal pending*, Cir. Ct. of Kanawha County.

This Grievance Board generally adheres to the doctrine of *stare decisis*[2] in adjudicating matters that come before it. *Belcher v. W. Va. Dep't of Transp*., Docket No. 94-DOH-341 (Apr. 27, 1995); *Chafin v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-132 (July 24, 1992), *citing Dailey v. Bechtel Corp*., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. However, rulings by a circuit court are not considered precedential and are followed in subsequent cases only to the extent that their logic and reasoning are compelling. *Hensley v. W. Va. Parkways Auth*., Docket No. 2016-0897-DOT (June 15, 2016); *Belcher*, *supra*.

Grievant posits that the outcome of this grievance is controlled by this Grievance Board's decision in *Smith*, *supra*, wherein it was determined that "Respondent did not abide by Policy Memorandum 2106 which is the procedure it established to make hiring

[2] Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1414 (Revised 7th Ed. 1999).

decisions, and that Respondent's decision was arbitrary and capricious." *Id*. Although Respondent notes that *Smith* is presently on appeal to the Circuit Court of Kanawha County, Respondent did not present a cogent argument demonstrating that *Smith* was wrongly decided. Therefore, the undersigned Administrative Law Judge is obligated to follow the holding in *Smith* in accordance with the previously discussed principle of *stare decisis* unless, or until it has been determined that this Grievance Board's decision in *Smith* was clearly wrong.

In regard to failure to employ form OPS-13 in Appendix A to DHHR Policy Memorandum 2106, the undersigned Administrative Law Judge finds that the forms and spreadsheets employed by the interviewing panel in this promotion action incorporated the essential elements of the sample form in the policy. Further, use of the form to document consideration of relevant factors in a selection decision is only recommended by the language in Policy Memorandum 2106. The term "may be used," which is employed in reference to the form, is clearly permissive in nature, and does not constitute a mandate to interviewing panels to use the form provided. Therefore, consistent with the decision of the Hearing Examiner at Level One, the undersigned Administrative Law Judge finds that the modified comparison chart employed by the interview panel to summarize the attributes of the candidates gleaned from their individual interviews substantially complies with the requirements set forth in DHHR Policy Memorandum 2106 dated February 28, 1992.

However, the issue of compliance with Policy Memorandum 2106 does not end here. As established by this Grievance Board's holding in *Smith*, *supra*, DHHR's

established policy requires consideration of an individual applicant's "qualifications for the essential duties of the position." J Ex 2 at 5. In this regard, the record at Level One documents that one of the questions asked of Grievant and all applicants was Question No. 11: "What reaction can we expect from you if you are not chosen?" Grievant's response, as documented on at least one interview sheet, was: "I don't know. My last one, I was very upset but I don't know yet." The witness testimony and the record demonstrated that the panel was not enamored with this response, and gave Grievant one of the lowest ratings of any applicant in regard to this question.

Unfortunately, the issue regarding the propriety of Question No. 11 was not well developed in the record at Level One. Ms. Baxter, who was quoted in hearsay testimony by one of the panel members as expressing "concerns" about Question No. 11, was not called as a witness by either party. Whatever concerns Ms. Baxter expressed to the panel, the proper action would have been to submit this question to the Human Resources staff for evaluation.[3]

In any event, Question No. 11 is inherently problematic because it interferes with a public employee's right to grieve an adverse personnel decision by her employer. This is a right which the Legislature has clearly established in W. Va. Code § 6C-2-1, *et seq*., the West Virginia Public Employees Grievance Procedure. Asking this question of an applicant for promotion, particularly an employee who has previously filed a

[3] The record does not indicate that this question, or one substantially like it, had been approved by Human Resources, or was routinely asked of applicants seeking supervisory positions.

grievance challenging a promotion action[4], has an obvious chilling effect on the ability of an employee to exercise her statutory right to grieve an employment decision with which she disagrees. In so many words, it confronts the employee with: "Are you going to file a grievance if we don't give you this promotion?" This is just as offensive as asking a question that is targeted at a person's race, religion, age or gender, all of which are explicitly prohibited in Policy Memorandum 2106.

Question No. 11 had absolutely no bearing on the applicant's "qualifications for the essential duties of the position, the guiding principle for the selection process mandated in Policy Memorandum 2106. *See Farley v. Dep't of Health & Human Res*., Docket No. 2012-1161-CONS (Jan. 7, 2014), *appeal pending*, Cir. Ct. of Kanawha County. The question is indistinguishable from asking, "Are you a dues-paying member of a public employees union?" Ultimately, this question involves a purely private and personal matter, asking the applicant whether they will "suck it up" if they are not promoted, or might elect to pursue their legal rights and remedies to correct a perceived injustice. Such questions are categorically "off limits" under the job-related criteria established in Policy Memorandum 2106.

The record indicates that Grievant's interview scores were adversely affected by her response to Question No. 11. Given the subjective nature of the interview process, the taint from asking Question No. 11 could reasonably be expected to carry over into other scores assigned by the interview panel, even if the Intervenor and others might

[4] Administrative notice is taken that Grievant previously filed a grievance with her employer on December 23, 2015, challenging her non-selection for a separate Child Support Supervisor 2 position. *Ringler v. Dep't of Health & Human Res*., Docket No. 2016-1061-DHHR (Feb. 20, 2018). However, Grievant has not alleged that she was a victim of reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o).

have still attained higher total scores than Grievant if Question No. 11, standing alone, were disregarded, or if all applicants were awarded the same score for their answers to this question. No matter how you assess the issue, Question No. 11 violated the guidance in Policy Memorandum 2106 and generated a fatal flaw in the selection process.

Based upon this record, the undersigned Administrative Law Judge is unable to find that Grievant was better qualified than Intervenor, nor did Intervenor establish that she was clearly better qualified than Grievant, nor did Grievant establish that Intervenor was not minimally qualified to fill the supervisory position at issue. Respondent's assertion that Intervenor Good had clearly superior supervisory experience is not supported by her documented experience as a Paralegal, supervising a single Clerk in one position, and a Secretary and Clerk in another position. See J Ex 1. Therefore, it was not established that Grievant would not have been selected even if the panel's questioning had not been flawed. *See Miller v. W. Va. Div. of Human Serv*., Docket No. 90-DHS-328 (Nov. 27, 1990). Likewise, Grievant failed to establish by a preponderance of the evidence that she would have received the promotion at issue, if Question No. 11 had not been considered. Accordingly, the proper remedy in these circumstances is to have the position reposted and a new selection process undertaken. *See Smith*, *supra*; *Forsythe v. W. Va. Dep't of Admin.*, Docket No. 2009-0144-DOA (May 20, 2009); *Neely v. Dep't of Transp*., Docket No. 2008-0632-DOT (Apr. 23, 2009), *appeal pending*, Cir. Ct of Kanawha County.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3.1 (2018); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "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), *aff'd*, Cir. Ct. of Pleasants County, No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, Grievant has not met her burden. *Id*.

2. Promotion decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will not generally be overturned. *Tucker v. Div. of Rehab. Serv*., Docket No. 2013-1046-DEA (Oct. 31, 2013).

3. When a supervisory position is at stake, it is appropriate for an employer to consider factors such as the appropriate 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).

4. Grievant failed to establish by a preponderance of the evidence that she was better qualified for the position of Child Support Supervisor 2 in the Bureau for

Children and Families than the successful applicant, Tina Good. *See Ashley v. W. Va. Dep't of Health & Human Res*., Docket No. 94-HHR-070 (June 2, 1995); *Flint v. W. Va. Dep't of Transp*., Docket No. 92-DOH-119 (Sept. 23, 1992).

5. Grievant established by a preponderance of the evidence that Respondent DHHR violated its Policy Memorandum 2106 in regard to improper questioning of the applicants, thereby demonstrating a flaw in the selection process which was prejudicial to Grievant's right to fair consideration of her application. *See Smith v. Dep't of Health and Human Res.*, Docket No. 2017-0959-DHHR (Oct. 17, 2017), *appeal pending*, Cir. Ct. of Kanawha County; *Della Mae v. W. Va. Div. of Natural Res*., Docket No. 98-DNR-204 (Feb. 26, 1999).

6. Where the selection process is proven to be improper, but the Grievant failed to prove that she should be selected for the position, the position should be reposted and a new selection process undertaken. *Smith*, *supra*; *Forsythe v. W. Va. Dep't of Admin*., Docket No. 2009-0144-DOA (May 20, 2009); *Neely v. Dep't of Transp*., Docket No. 2008-0632-DOT (Apr. 23, 2009), *appeal pending*, Cir. Ct. of Kanawha County

Accordingly, this grievance is **GRANTED in part and DENIED in part.** Respondent is **ORDERED** to repost the Child Support Supervisor 2 position in the Bureau for Child Support Enforcement within thirty (30) days of receipt of this Decision, and, employing a selection panel that, where feasible, should not include any person who participated in the interview process involved in the instant grievance, select the

most qualified applicant for the position, pursuant to the procedure set forth in Policy Memorandum 2106.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2018).

DATE: December 27, 2018

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LEWIS G. BREWER
Administrative Law Judge