

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MATTHEW LEE BRADLEY,

Grievant,

v.

Docket No. 2018-0770-DHHR

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

Respondent,

and

MELISSA C. YOST,

Intervenor.

DECISION

Grievant, Matthew Lee Bradley, filed a grievance against his employer, Respondent, Department of Health and Human Resources (“DHHR”), Bureau for Children and Families (“BCF”), dated December 4, 2017, challenging his non-selection for the position of Economic Service Supervisor. As relief sought, Grievant seeks, “[t]o be made whole in every way including selection for posting with back pay and interest.”

A level one hearing was conducted on March 7, 2018. The grievance was denied by decision dated March 28, 2018. Grievant perfected his appeal to level two on March 31, 2018. A level two mediation was conducted on October 22, 2018. Following this mediation, by Order entered October 23, 2018, this matter was placed in abeyance until November 5, 2018. This abeyance was granted at the request of the parties. An Order of Unsuccessful Mediation was entered on November 2, 2018. It appears from the record that Melissa C. Yost was granted intervenor status at level one, thereby becoming a party to this action.

Grievant appealed to level three on November 9, 2018. The level three hearing in this matter was conducted by the undersigned administrative law judge on April 17, 2019, at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by counsel, Mindy M. Parsley, Esquire, Assistant Attorney General. Intervenor appeared in person, *pro se*. This matter became mature for decision on May 22, 2019, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law. It is noted that Intervenor did not avail herself of the opportunity to submit proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Family Support Specialist. Grievant was not selected for an Economic Service Supervisor position. Respondent selected for the position another employee who was an Economic Service Worker who had past supervisory experience. Grievant had no supervisory experience. Grievant argued that the Respondent's selection was arbitrary and capricious in that the selection panel failed to use required forms to evaluate applicants and that he was the most qualified candidate. Respondent denied Grievant's claims, asserting that it properly selected the most qualified candidate for the position. Grievant failed to prove his 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 Family Support Specialist in its Mercer County, West Virginia, office. Grievant has been employed in this position since July 2014. Before becoming a Family Support Specialist, Grievant was employed by Respondent as an Economic Services Worker from May 2006, until August, 2009.

2. On or about September 11, 2017, Respondent posted a vacancy for an Economic Service Supervisor position in the Mercer County office. The closing date for the posting was September 26, 2017.¹

3. Grievant applied for the Economic Service Supervisor position on September 12, 2017. Intervenor applied for the position on September 13, 2017. It is unclear from the record how many people applied for the position. The Candidate Comparison Sheet has been redacted to conceal the identities and number of the candidates. Grievant and Intervenor were the only two internal candidates interviewed.

4. Candidates for the Economic Service Supervisor position were interviewed by a selection panel consisting of Joe Bullington, then-Regional Director, Michelle Massaroni, Customer Service Manager for the Mercer District, and Steve Bragg, Regional Program Manager for Family Assistance.

5. DHHR has implemented policy that establishes “general guidelines” for its employee selection process. DHHR Policy Memorandum 2106, “Employee Selection,” states, in pertinent part, as follows:

4) Conducting the Interview:

Each applicant should be given an opportunity to answer similar questions. However, it is apparent that

¹ See, Posting contained in Joint Exhibit 2.

an applicant's answers might lead to different questions during the course of the interview. The interviewer should clearly communicate to the candidate the responsibilities associated with the position, the compensation and benefits offered, the hiring process, the probationary period if applicable, and their rights as a State employee if they are employed. Candidates should be given a true picture of disadvantages, responsibilities, advantages and opportunities for advancement that would allow them to make an informed decision of whether or not they should accept employment with the Agency if it were offered. . .

- 5) Efforts should be made to compare applicants' relative strengths and weaknesses, based upon similar factors. The Department of Health and Human Resources advocates a structured approach to evaluating interviews. The chart in the OPA-13, Applicant Interview Rating, provides some guidelines for ranking applicants based upon factors usually considered as important qualities in prospective employees. It should be utilized as a tool in the process of selecting a candidate; but it is not necessarily the deciding factor. Where appropriate, different factors can be weighed on the needs the job entails. Such facts and weights must be determined prior to the interview and applied consistently to all applicants. An applicant's demonstrated skills and abilities might make them the best candidate for the job, despite the fact that they did not have the best interview or the most education. **Significant factors in the employment decision should be documented.** The OPS-13A, Candidate Comparison Chart, provides a summary of factors considered for all candidates. It should be used as a tool in the selection process. The more thorough the documentation and the more objective the factors considered, the less likely it will be that an unselected candidate will be successful in challenging the selection. (Emphasis in original)

- 6) Selecting an Employee:

When considering applicants that are unfamiliar to the interviewer, references should be obtained from educational institutions attended and/or previous

employers. Applicants must sign a Verification of Reference form, OPS-14A, before references may be contacted. After an individual or applicant has been employed, the employer may verify any information contained on the applications and, in fact, has an obligation to do so. The Office Director/Administrator or designee should verify references within 60 calendar days of employment.

When selecting one employee from 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. . . .²

6. DHHR Policy Memorandum 2106 Appendix A-"Interview Procedures"

states, in part, as follows:

[t]his Appendix provides the interview(s) with four tools to utilize in the employee selection processes. . . . Interviewers are expected to familiarize themselves with the policy and utilize Appendix A. Interviewers should familiarize themselves with the list of what questions are inappropriate in Appendix A – Attachment 1, Pre-Employment Inquiries, avoid asking those questions. (. . . Interviewers should compose a list of relevant questions and provide each applicant with a similar interview utilizing those questions.) Further, all interviews should be evaluated utilizing the OPS-13, Applicant Interview Rating and OPS-13A, Candidate Comparison Chart. References are to be verified via the OPS-14B, Reference Request. This process will supply documentation to support your selection process should it be challenged in a legal forum and ensure that only qualified applicants are chosen through objective, no (sic) discriminating methods.³

² See, DHHR Policy Memorandum 2106, "Employee Selection," Joint Exhibit 1.

³ See, DHHR Policy Memorandum 2106, "Employee Selection," Appendix A, "Interview Procedures," Joint Exhibit 1.

7. The selection panel interviewed the candidates for the Economic Services Supervisor position on October 27, 2017. It is noted that selection panel member, Joe Bullington, has since passed away.

8. The selection panel asked each candidate the same set of ten questions during their interviews. Pursuant to the "Economic Service Supervisor Interview Questions," panel members were to evaluate the candidates' answers taking into consideration the following factors: "answer did not adequately address question;" "touched on some areas, but did not address all aspects;" "answer was good addressing nearly all aspects;" and, "answer covered all aspects of supervision. Solid understanding of questions."⁴ The panel members made notations on their individual question sheets during the candidate interviews. Each panel member independently scored the candidates' answers from one to five, with five being the highest, and recorded the score on the question sheet.

9. The panel members then totaled the scores each had assigned to the candidates' individual interview questions. Mr. Bullington gave Grievant a total score of 31 points based upon the interview. Mr. Bragg gave Grievant a total score of 36 points. Ms. Massaroni gave Grievant a total score of 34 points. They gave the Intervenor totals scores of 35 points, 39 points, and 35 points, respectively.⁵ After averaging the interview scores for each candidate, Grievant was assigned the total score of 34 points. Intervenor was assigned the averaged total score of 36 points.

⁴ These factors are printed next to each question on the interviewers' interview questions sheets.

⁵ See, "Economic Service Supervisor Interview Questions," contained in Joint Exhibit 2.

10. After the interviews, the panel discussed the candidates and completed one candidate comparison chart for the all candidates. However, it was not the Candidate Comparison Chart, Form OPS-13A, referenced in DHHR Policy Memorandum 2106. The form used appears to be a shorter version of Form OPS-13A. Ms. Massaroni completed the chart for the panel. This chart has columns for the candidates' names, interview score, education score, experience score, comments on concerns w/or limitations of candidate, and rank.

11. The panel noted the following on the Candidate Comparison Chart with respect to Grievant and Intervenor:

Candidate's Name	Interview Score	Education Score	Experience Score	Comments on Concerns w/or Limitations of Candidate	Rank
Melissa Yost	36 (1)	4 yr Degree (1)	3 yrs 3 mth DHHR/IM 2y Backup Sup 12 Sup Exp non- DHHR (1)	No concerns other than transitioning from private supervision to public supervision. (1)	1
Matthew Bradley	34 (2)	4 yr Degree (1)	3y 3m (DHHR) 3y 3m DHHR (IM) in Monroe Co. No supervisory experience (2)	Communication style is not conducive to a positive environment, Little to no eye contact, sounds somewhat harsh (2)	2

12. The information pertaining to the other unknown applicants was totally redacted from the candidate comparison chart presented as evidence in this matter. The only visible writing on this form was pertaining to Grievant and Intervenor.

13. The selection panel ranked Intervenor as number one in each of the categories considered which resulted in her receiving the overall ranking of number one. Grievant was ranked number two in all categories except for education. As he and

Intervenor both have four-year college degrees, they each received the number one ranking. Overall, Grievant was ranked number two.

14. At the bottom of the candidate comparison chart used by the panel the words “Lowest # is best ranking.” On the right side of sheet, just outside the table, someone wrote a “4” by Intervenor’s row, and a “7” by Grievant’s row. It is noted that if one adds the values of each category for Grievant, the total is 7, and for Intervenor, it is 4. The record is unclear as to what these numbers mean, as the panel members testimony indicates that the numbers in parentheses are Grievant and Intervenor’s rankings in each category, and are not points to be totaled in a numeric score.

15. There is no evidence to suggest that the panel used Form OPS-13, the Applicant Interview Rating form, referenced in DHHR Policy Memorandum 2106 to evaluate the applicants during their interviews. Form OPS-13 entered into evidence, as contained in Policy Memorandum 2106, provides a chart with eight columns on which to rate applicants and note comments regarding the “interview,” “education,” “past experience/demonstrated ability,” “references,” “leadership or growth potential,” “concerns w/or limitations of candidate,” and “rate in order of preference.” The following statement is written at the bottom of Form OPS-13 entered into evidence: “INSTRUCTIONS: This form may be used as a tool to summarize candidates’ attributes for quick reference.”⁶

16. It is undisputed that both Grievant and Intervenor were both meet the minimum qualifications for the Economic Service Supervisor position.

⁶ See, “Applicant Interview Rating,” Form OPS-13, contained in Joint Exhibit 2.

17. At the time Grievant and Intervenor were interviewed for the position, Grievant had worked for Respondent for about six years. Intervenor had worked for Respondent for a little over three years.⁷

18. It is undisputed that Grievant had no supervisory experience at the time of his application and interview for the Economic Service Supervisor position.

19. Intervenor had supervisory experience at the time of her application and interview for the Economic Service Supervisor position. Intervenor had served as a back-up supervisor at BCF for two years and had supervisory experience from previous private sector employment.

20. The selection panel selected Intervenor for the Economic Service Supervisor position.

21. Intervenor has served in the position of Economic Service Supervisor since her selection in 2017.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

⁷ See, “Candidate Comparison Chart,” Form OPS-13A, contained in Joint Exhibit 2.

Grievant argues that he was more qualified than Intervenor, and that Respondent's decision to select the Intervenor for the Economic Service Supervisor position was arbitrary and capricious as Respondent failed to follow its selection policy to fill the position at issue. Respondent denies Grievant's claims, and asserts that its selection of Intervenor for the position was proper as she was the most qualified candidate for the job given her supervisory experience.

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 candidate 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).

“It is a long-held principle in West Virginia Law that, ‘an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.’ Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep’t of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994); *Stewart v. Dep’t of Health & Human Res.*, Docket No. 2016-0970-DHHR (Aug. 10, 2017); *Kidd v. Dep’t of Health & Human Res.*, Docket No. 2017-1874-DHHR (Oct. 5, 2017).” *Smith v. Dep’t of Health & Human Res./Bur. for Child Support Enforcement and Anderson*, Docket No. 2017-0959-DHHR (Oct. 17, 2017).

The Grievant asserts that the selection panel violated DHHR Policy Memorandum 2106 by failing to use the Applicant Rating Form and the Candidate Comparison Chart as required by policy during the selection process, and that such alone renders the selection decision arbitrary and capricious. Grievant also argues that the panel's failure to check candidate's references also renders the selection arbitrary and capricious. Respondent does not specifically address the issues regarding the forms in its proposed Findings of Fact and Conclusions of Law. Instead, Respondent argues that the selection process was proper and that Intervenor was selected because she was the most qualified candidate, noting that Intervenor had prior supervisory experience while Grievant had none. "[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 candidate 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 candidate was, indeed, the best fit." *Spears v. Dep't of Health & Human Res.*, Docket No. 04-HHR-284 (July 27, 2005).

The issue becomes whether the interview panel followed Policy Memorandum 2106 in making its selection and whether it selected the most qualified candidate for the

position. DHHR Policy Memorandum 2106 sets forth the procedure Respondent must follow when making selection decisions. This policy addresses all phases of the selection process and how the process is to be conducted from start to finish. The policy sets out a structured approach for selecting employees that emphasizes documentation in order to withstand challenges to selection decisions. The policy states, in part, the following:

[a]pplicants must be afforded their interviews and be evaluated based upon similar standards. Therefore, the Department advocates a structured approach to interviews that includes asking similar questions, providing similar information and providing similar courtesies to applicants interviewed. To that end, an interviewer(s) should prepare one list of questions which are related to an applicant's ability to function in the position. It might be helpful to the applicant to be interviewed and evaluated by more than one person, either as a team or in separate interviews. While the use of multiple interviewers is discretionary, it might allay any allegations of impropriety at a later date. . . .⁸

The policy goes on to provide direction as to how interviewers should conduct interviews and compare applicants.

Efforts should be made to compare applicants' relative strengths and weaknesses, based upon similar factors. . .

The chart in the OPS-13, Applicant Interview Rating, provides some guidelines for ranking applicants based upon factors usually considered as important qualities in prospective employees. It should be utilized as a tool in the process of selecting a candidate; but it is not necessarily the deciding factor. Where appropriate, different factors can be weighed on the needs the job entails. Such facts and weights must be determined prior to the interview and applied consistently to all applicants. An applicant's demonstrated skills and abilities might make them the best candidate for the job, despite the fact that they did not have the best interview or the most education. **Significant factors in the employment decision**

⁸ See, Joint Exhibit 1, DHHR Policy Memorandum 2106, Article XI, Section B, paragraph 2, "Planning the Interview."

should be documented. The OPS-13A, Candidate Comparison Chart, provides a summary of factors considered for all candidates. It should be used a tool in the selection process. The more thorough the documentation and the more objective the factors considered, the less likely it will be that an unselected candidate will be successful in challenging the selection (Emphasis in original) . . .

When selecting one employee from among several applicants, demonstrated ability, work history, references, education and the interview should be considered. The ultimate selection 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 policy includes an appendix, "Appendix A-Interview Procedures," that contains forms to be used by those making selection decisions. The Appendix contains an Applicant Interview Rating form OPS-13, Employment Reference Information and Verification Form OPS-14A, Employment Reference Information Reference Request OPS-14B, Pre-Employment Inquiries Attachment 1, and a Candidate Comparison Chart-Example OPS-13A. The first page of Appendix A states, in part, that "[t]his Appendix provides the interviewer(s) with four tools to utilize in the employee selection process. . . ." and that "[i]nterviewers are expected to familiarize themselves with the policy and utilize Appendix A. . . ." Further, "[i]nterviewers should compose a list of relevant questions and provide each applicant with a similar interview utilizing the OPS-13, Applicant Interview Rating and OPS-13A, Candidate Comparison Chart. . . This process will supply documentation to support your selection should it be challenged in a legal forum and ensure that only qualified applicants are chosen through objective, no (sic) discriminating methods."

In the instant grievance, the evidence presented demonstrates that the selection panel compiled interview questions, and asked all candidates those same questions during their interviews. Each selection panel member scored candidates' interview performance separately, and their scores were then averaged to get an overall interview score for each candidate. Together, the panel then reviewed the candidates' education and experience, as stated on their respective applications, and considered their "concerns with or limitations of" the candidates. Ms. Massaroni recorded the information on a comparison chart for the panel. However, the panel did not use the Candidate Comparison Chart OPS-13A. The comparison chart the panel used was a scaled-down version of the OPS-13A. It lacked columns for "Comments on References" and "Comments on Leadership or Growth Potential" that are included on the OPS-13A. The column headings on the panel's chart are worded differently, but the subject matter addressed in each is substantially similar to those on the OPS-13A. Therefore, the panel compared and considered substantially similar information and factors to that on the real OPS-13A in making the selection. The source of the panel's form is unknown.

The panel's candidate comparison chart indicates that it ranked Intervenor number one on the interview, and Grievant ranked, number two. They were separated by only two points on the averaged overall interview score. The panel then compared Grievant and Intervenor in the rest of the categories. In this comparison, the panel assigned rankings in the categories, and not numeric scores. The panel ranked Grievant and Intervenor as being tied for ranking number one because they both had four-year college degrees. However, as Intervenor had supervisory experience and Grievant had none, the panel ranked Intervenor as number one and Grievant as number two. Also, as the

panel had concerns with Grievant's communication style and had no such concerns about Intervenor, they ranked him as number two and Intervenor, number one. Overall, Intervenor was ranked number one, and Grievant, number two. Based upon the results of their comparison, the panel selected Intervenor. It is unknown if the unidentified candidates were ranked or how they were scored in any categories.

There is no evidence to suggest that the selection panel used the Applicant Interview Rating form, OPS-13, required by the policy for any of the interviews in this selection. The parties have suggested that Joint Exhibit 2 is the complete selection packet for Grievant and Intervenor. It includes completed question sheets from each of the panel member for Grievant and Respondent, their applications, the posting for the position, and the candidate comparison chart used by the panel. No Applicant Interview Rating form OPS-13 is included for either Grievant or Intervenor. No witnesses testified that the panel used the OPS-13. Further, the OPS-13 presented as Joint Exhibit 1 is a chart, or table, with eight columns with the same headings as those on the OPS-13A Candidate Comparison Chart, "name," "comments on interview," "comments on education," "comments on past experience/demonstrated ability," "comments on leadership or growth potential," "comments on concerns w/or limitations of candidate," and "rate candidates in order of preference." The policy states that OPS-13 "provides some guidelines for ranking applicants based upon factors usually considered important qualities in prospective employees."⁹ However, there are no such factors listed on the OPS-13 form contained in Joint Exhibit 1. The copy of Policy Memorandum 2106 admitted as Joint Exhibit 1 states on page one that it became effective February 28, 1992,

⁹ See, Joint Exhibit 1, Policy Memorandum 2106, Article IX, Section B, Paragraph 5.

and that the last revision was in October 2015. This revision date is printed at the bottom of each page of the written policy. However, the pages in the Appendix lack this revision date. Some of the pages bear no date, the OPS-14A and B says “revised 12/20/05,” and the OPS-13 has the words “New 2-92” in parentheses at the bottom of the page where the other revision dates were listed. “2-92” would match with the effective date of the policy, February 1992. Further, taking notice of the Grievance Board’s Findings of Fact in *Smith v. Dep’t of Health & Human Res./Bur. for Child Support Enforcement and Anderson*, Docket No. 2017-0959-DHHR (Oct. 17, 2017), the OPS-13 form is said to have contained a list of factors such as oral expression, intelligence/reasoning, judgment/objectivity, tact/sensitivity, appearance, poise/confidence, and leadership potential. These factors sound more like what is described in the policy. See *Id.* at 6. Given all of this, it appears likely that the wrong version of OPS-13 was presented as evidence in this grievance. *Smith* was decided in 2017, and it is unknown whether the form has since been revised, and what it stated at the time at issue.

Grievant relies heavily on *Smith v. Dep’t of Health & Human Res./Bur. for Child Support Enforcement and Anderson*, Docket No. 2017-0959-DHHR (Oct. 17, 2017) for his argument that the selection panel’s failure to use the Applicant Interview Rating form OPS-13 and the correct Candidate Comparison Chart from Policy 2106 renders the selection decision arbitrary and capricious. In *Smith*, the selection panel failed to use the Form OPS-13A Candidate Comparison Chart in the selection process. However, the *Smith* panel also decided to select the successful candidate before they had tallied the candidate’s scores, and they based the selection decision on the interviewers’ impressions of the candidates, not on the numeric scores. The *Smith* panel had used the

OPS-13 Applicant Interview Rating in their selection. However, at the level three hearing, some of the panel members could not explain their reasoning for giving certain ratings to candidates. The evidence also showed that the scoring method was questionable. For instance, they appeared to give the grievant no credit for her past work experience outside state government without explanation, but gave past experience credit from within state government to the successful candidate. That panel also asserted at the level three hearing that the grievant's excessive socializing was a factor in their decision, but such was not documented anywhere in the selection documents. Given the problems with the evaluation of candidates and the scoring, the ALJ concluded that the decision of the panel was arbitrary and capricious, but grievant had not proved that she was the most qualified candidate for the position. The ALJ ordered the position reposted. In the decision, the ALJ acknowledged that the use of the OPS-13 and OPS-13A was mandatory under the policy.

In the instant grievance, the selection panel appears to have failed to use form OPS-13 and OPS-13A. The language of the policy indicates that the use of these forms is also mandatory. However, the facts in this matter are much different than those of *Smith*. No scoring irregularities have been noted in the instant selection, and Ms. Massaroni and Mr. Bradley clearly articulated that Intervenor's past supervisory experience was the deciding factor in this very close selection. The panel may not have utilized the correct candidate comparison chart in making their selection, but they completed a comparison chart evaluating substantially similar factors to those on the real OPS-13A such as experience, education, and concerns with or limitations of the candidates.

Ms. Massaroni and Mr. Bragg also sufficiently explained why the panel scored Intervenor higher on the interview than Grievant, and the scoring method. The scores were close, and they were a factor in deciding the selection, unlike what occurred in *Smith*. Grievant makes the argument that Intervenor was not a supervisor at her private sector employer, and that such should not have been considered in the selection. The only evidence Grievant presented on this issue was his own testimony. Grievant presented no evidence to support this allegation. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)). Nonetheless, even if Grievant’s private sector supervisory experience were not considered, it is undisputed that Intervenor had two years of experience working as a backup supervisor there at BCF. This is supervisory experience. It is also undisputed that Grievant was never a back-up supervisor, and that he had no supervisory experience and was not claiming any. Supervisory experience was the deciding factor in this selection. Further, as Intervenor and Grievant were already employees at the time of the selection process, the checking of references was not required by policy. The policy states that, “[w]hen considering applicants that are unfamiliar to the interviewer, references should be obtained from educational institutions attended and/or pervious employers. . . .” The panel was familiar with both Grievant and Intervenor.

The selection panel failed to use the correct forms in making the selection, and the parties apparently did not present the correct version of the OPS-13 form as evidence in this matter. The selection panel used a candidate comparison chart to compare and rank

Intervenor and Grievant, albeit not the chart in the policy appendix. Despite not using an Applicant Interview Rating form, the interviewers asked the same questions of each applicant and they each completed their question sheets with their notations and ratings for each candidate's interview performance. From these and the chart used, it appears that the interviewers considered Grievant and Intervenor's interview performance, education, experience, and work history. The panel ultimately concluded that Intervenor was the most qualified candidate for the Economic Service Supervisor position because she had prior supervisory experience. This was a close selection and using supervisory experience as the deciding factor is not unreasonable given it was a supervisor position being filled. The panel used a structured method to select the successful candidate, and there appears to be no irregularities in the selection process other than the failure to use the OPS forms. Even though the correct forms were not used, the selection process in this matter was not unreasonable or arbitrary, and was not made disregarding the facts. Further, the panel considered information and factors that were proper. Given the facts pertaining to the panel's candidate comparison chart and the factors being substantially similar to those on the OPS-13A form, the ALJ concludes that it substantially complied with policy. Further, as there appear to be no scoring irregularities and the panel used a standard set of questions and rating system to evaluate the candidates' interview, along with Ms. Massaroni and Mr. Bragg being able to sufficiently explain their reasoning for selecting Intervenor, the ALJ concludes that in this unique set of circumstances the panel's failure to use the Applicant Interview Rating form OPS-13 is harmless error.

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

Grievant has failed to prove that he was the most qualified candidate. Therefore, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

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 candidate 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 candidate 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 candidate was, indeed, the best fit.” *Spears v. Dep't of Health & Human Res.*, Docket No. 04-HHR-284 (July 27, 2005).

7. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

8. Grievant failed to prove by a preponderance of the evidence that the selection decision was arbitrary and capricious or that he was the most qualified candidate.

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: August 14, 2019.

Carrie H. LeFevre
Administrative Law Judge