

# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**TALAL FATHALLAH,**  
**Grievant,**

**v.**  
**DEPARTMENT OF ENVIRONMENTAL**  
**PROTECTION,**  
**Respondent.**

**Docket No. 2018-0433-DEP**

## **DECISION**

Talal Fathallah, Grievant, is employed by Respondent, Department of Environmental Protection (“DEP”) in the Division of Water and Waste Management (“DWWM”). Mr. Fathallah filed a level one grievance form dated September 19, 2017, alleging that the DEP failed to hire him for the position of Environmental Resources Manager 2, even though he was the most qualified candidate. As relief Grievant seeks to be placed in the posted position with any compensation he may be due.<sup>1</sup>

A level one hearing was held and a recommended decision denying the grievance was issued on January 10, 2017, and an Order Adopting the Recommended Decision was signed by the DEP Cabinet Secretary on January 22, 2018. Grievant made a timely appeal to level two and a mediation was held on May 4, 2018.

Grievant appealed to level three and following a continuance for discovery, a level three hearing was held on December 11, 2018, at the Charleston office of the West

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<sup>1</sup> At the time of the hearing, Mr. Fathallah’s salary was higher than the salary paid to the successful applicant in the position.

Virginia Public Employees Grievance Board. Grievant appeared *pro se*.<sup>2</sup> Respondent appeared through the DEP Director of Human Resources and was represented by Anthony D. Eates, II, Deputy Attorney General. This matter became mature for decision on January 28, 2019, upon receipt of the Proposed Findings of Fact and Conclusions of Law submitted by the parties.

### **Synopsis**

Grievant applied for a position in the Environmental Resources Program Manager 2 classification in the DWWM Program Support subdivision. Grievant is a valued employee and met the minimum qualifications for the position. Respondent picked a different applicant for the position. Grievant claims that he was the most qualified candidate and Respondent's selection decision was improper. Grievant also claims that he was subjected to discrimination and favoritism. Respondent demonstrated that the standard hiring procedure was followed, reasonably explained the committee's recommendation and selection of a different applicant. Grievant did not prove by a preponderance of the evidence that the actions of Respondent were unlawful or arbitrary and capricious. Grievant did not prove that he was treated any differently than other employees in the hiring process for this position.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

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<sup>2</sup> "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

## **Findings of Fact**

1. Grievant, Talal Fathallah, is employed by Respondent DEP in the Technical Analyst classification in the Hazardous Waste Management Program ("HWMP"). His primary responsibility is writing environmental permits for the DEP Hazardous Waste section of the Division of Water and Waste Management. He has been employed by the DEP since 1990. Most of Grievant's work relates to the Federal Resource Conservation and Recovery Act. Technical Analyst Classification is in pay grade 22.

2. Terrie Sangid had been employed in the position of Environmental Resources Program Manager 2 (ERPM2) in the Program Support subdivision of the Division of Water and Waste Management for several years until she retired on May 31, 2017.

3. Environmental Resource Specialist 3 (ERS3), Megan Browning, was temporarily upgraded to Ms. Sangid's prior management position on June 1, 2017, while steps were taken to post and fill it. Ms. Browning had worked closely with Ms. Sangid for eight years prior to Ms. Sangid's retirement. Because Ms. Browning had worked with Ms. Sangid, she had been assigned to perform or assist with many of the duties that make up the responsibilities of the ERPM2 position. (Respondent Exhibit 9).

4. On June 26, 2017, the position of Environmental Resources Program Manager 2 (ERPM2), in the Program Support subdivision of the Division of Water and Waste Management ("DWWM") was posted for applicants. This classification is in pay grade 21. (Respondent Exhibit 1).

5. Two managers within the DEP were appointed to serve as the interview committee for the DWWM, Program Support, ERPM2 vacancy: DWWM Deputy Director,

Patrick Campbell and DWWM Assistant Director Teresa Koon. Each of these managers have considerable experience and knowledge related to the DWWM. HR Director Bailey observed the interviews and the process to ensure compliance with DEP rules but did not contribute to the selection decision.

6. The committee members identified significant duties of the DWWM, Program Support, ERPM2 position and adopted specific interview questions to get insight into the relevant experience the candidates held within those duty areas. Among the duties identified were:

- Manage the Division's grant process with the USEPA;
- Manage the Division's IT<sup>3</sup> projects and represent the Divisions IT need to the committee who makes agency-wide decisions;
- Manage multiple data-collection and reporting functions required by the National Pollution Discharge Elimination System;
- Manage the budget and track grant expenditures for a large and diverse division;
- Make public presentations to the legislature, professional associations, and other entities; and,
- Provide support for program-specific sections within the Division.

7. The committee members developed ten standard questions to be asked each applicant related to their knowledge and experience in the following areas:

- General education and work experience;
- Management experience and style;
- Experience with budgeting;
- Experience working with federal and state grants;
- Experience working with other agencies and the legislature;
- Written and communication skills, and description of specific presentations and reports given;
- Experience working with IT projects including the applicant's role and any recommendations for IT improvements; and,
- Managing priorities and areas of concerns with the position.

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<sup>3</sup> "IT" is short for "Information Technology."

The questions were very open-ended giving the candidates opportunities to go into detail, and the final question gave each candidate the opportunity to explain why they were the best fit for the position. (Respondent Exhibits 2, 4, 6, and 7).

8. Each committee member had a form on which the questions were written with space for notes about the candidates' answers. Each member took their own notes and did not compare them until after the interviews were conducted. *Id.*

9. Following the interviews, the committee members jointly completed a DEP *Interview Evaluation Form* for each candidate scoring them on five preselected criteria related to the interview and the job functions. Those criteria were:

- Knowledge of State and Federal Grant processes;
- Knowledge of DWWM computer programming needs/processes;
- Written and public communication skills;
- Managerial and Budgeting Skills; and,
- Education.

A score of one to ten was assigned to each criterion, and the candidate with the highest total score was recommended to be hired.

10. Talal Fathallah, Megan Browning and three others applied and were interviewed for the DWWM Program Support ERPM2 position. Ms. Browning was selected for the position because she received the highest score on the interview evaluation criteria. Another applicant received the second highest score, and Grievant tied with another applicant for third.

11. The criterion scores and total score given to Megan Browning and Grievant were the following:

Criteria:	Megan Browning	Talal Fathallah
Knowledge of Grant Process	8	5
DWWM IT Programing Needs/Process	8	6
Written and Oral Public Communication	7	6
Management and Budget	6	6
Education	10	10
Total	39	33

12. Factors that affected Grievant's scores were: he did not have any management or budget experience within the agency<sup>4</sup> (4<sup>th</sup> criterion); he had little experience with grants and spending reports to the EPA (1<sup>st</sup> criterion); he had very little experience with IT projects (2<sup>nd</sup> criterion); and, the only public speaking experience Grievant mentioned was a talk given to the West Virginia Manufacturer Association in 1999, and individual training sessions for employees and industry personal (3<sup>rd</sup> criterion). Grievant was given the highest rating for "Education" in recognition of his master's degree.

13. Ms. Browning had been working closely with Ms. Sangid for seven years and had been assigned many of the duties necessary for the posted position. Factor's which lead to Ms. Browning's higher scores include: She has been a lead worker for two ERS worker's in the department and had limited exposure to the budget process (4<sup>th</sup>

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<sup>4</sup> Grievant started and sold a business before joining the DEP in 1990, but the budgetary experience related to that business was not of a scope which related to the posted position.

criterion)<sup>5</sup>; she had done trainings in classroom settings and had participated in presentations to the legislature (3<sup>rd</sup> criterion); she had worked closely on IT projects in the division (2<sup>nd</sup> criterion); and, had extensive experience working with grants in the specific program area (1<sup>st</sup> Criterion). Like Grievant, Ms. Browning received a “10” for “Education” in recognition of her master’s degree.

14. Ms. Browning’s greater experience in grant processing and IT projects resulted in her receiving the higher overall score of the interview evaluations and her selection for the posted position.

15. At least a decade prior to the posting of the present vacancy, a section for Corrective Action was moved from the Hazardous Waste Management Unit in which Grievant works. Grievant is adamant the decision was a mistake and spent significant time in the interview<sup>6</sup> expressing his belief that the move was a mistake and how the new position created an opportunity to rectify it. Grievant felt that the interview was too focused on water issues rather than waste.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human*

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<sup>5</sup> Ms. Browning and Mr. Fathallah both received a “6” on this criterion because neither technically had been a supervisor since Ms. Browning was a lead worker.

<sup>6</sup> . . .as well as the level three hearing.

*Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant argues that the selection process for filling the DWWM, Program Support, ERPM2 vacancy was unfair and improper. He argues that he was the most qualified candidate but was not selected. He also believes that the interview process did not give sufficient weight to waste management issues.

In a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *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. *Mihaliak v. Div. of Rehab. 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. *Thibault v. Div. of Rehab. 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. *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 agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision



that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

In this matter, Respondent followed their normal process for filling vacancies. Two well qualified managers were appointed to comprise the interview committee and the HR Director observed the process to ensure compliance with the agency rules and regulations. Grievant argues that too much weight was given to water regulation issues and not enough to waste management issues. This allegation seems to be based at least in part on Grievant's belief that there should not have been a separation of various functions a decade previously.

The separation of the sections Grievant complains about is not the issue in this matter. DWWM Deputy Director, Patrick Campbell and DWWM Assistant Director Teresa Koon have considerable experience and knowledge related to the DWWM and the responsibilities of the manager for the DWWM Program Support section. They identified the key duties of the position, developed interview questions related to those key duties, and developed an interview evaluation scoring system for assessing the applicants' responses. Deputy Director Campbell testified credibly that water related duties make up a significant part of the primary functions for the position. Both managers testified that the questions accurately reflected the primary duties of the position. Grievant generally disagreed but provided no testimony or exhibits to demonstrate that the managers were not correct. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-

359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)); *Turner v. Div. of Corrections*, Docket No. 2018-0860-MAPS (June 19, 2018).

The hiring process was well organized to comply with DEP rules and regulation. The selection committees established the primary functions for the position and rated the candidate based upon their relative experience in those areas. The managers found that Ms. Browning was the most qualified candidate based upon an independent review of the factors which were intended to be considered in the selection process. Grievant did not prove by a preponderance of the evidence that the selection of Ms. Browning as the most qualified candidate was arbitrary or capricious. See *Bedford County Memorial Hosp.*, 769 F.2d 1017 *supra*.

Grievant next argues that he has been subjected to discrimination in the hiring process. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

The evidence demonstrates that all participants in the hiring process were treated equally. They were all given the same interview questions, participated in the same interview process, and were rated based upon the same criteria. Grievant did not prove by a preponderance of the evidence that he was treated any differently from the similarly-situated employees which is a required element for proving discrimination as defined in the grievance statutes.

Finally, Grievant argues that he was denied the posted position through favoritism toward Ms. Browning. Grievant alleges that this was the regular practice in filling vacancies within the DOP.<sup>7</sup> For the purposes of the grievance, “‘Favoritism’ means 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 the case of *Frymier v. Higher Educ. Policy Comm’n*, 655 S.E.2d 52, 221 W. Va. 306 (2007), the West Virginia Supreme Court of Appeals wrote:

While our case law is replete with examples of discrimination cases, the issue of favoritism is not well distinguished. The analysis for the two types of cases has been commingled in many circumstances. Thus, we find it appropriate to look to the analysis available in discrimination cases for the guidance on the favoritism issue that is now before us.

*Id.* 655 S.E.2d 52 at 59. Accordingly, in order to establish a favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);

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<sup>7</sup> Once again, Grievant did not present a scintilla of evidence to prove these general allegations. See *Turner*, 2018-0860-MAPS *supra*.

(b) That the different treatment is not related to the actual job responsibilities of the employees; and,

(c) That the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007);  
*Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant argues that Ms. Browning was given an unfair advantage in applying for the job because she had been temporarily placed in the position and gained specific experience related to the job. Grievant also argues that the questions and factors in the selection process were improperly slanted toward the water issues, those being the areas where Ms. Browning had more experience. Grievant also states that he once heard the previous manager, Ms. Sangid, tell Ms. Browning that some day she would be doing the management job.

The evidence demonstrated that Ms. Browning was temporarily upgraded to the ERPM2 position on June 1, 2017, and the position was posted on June 26, 2017. Serving less than a month was not the source of Ms. Browning advantage in experience. Rather, she had been working directly with Manager Sangid and performing some of the duties for nearly eight years. Ms. Browning did gain a lot of experience related to the job during that time. However, there is no evidence of any nefarious actions by Respondent. Ms. Browning had been working in her ERS position since 2009 and there is no evidence that she was placed in the ERS position to prepare her to replace Manager Sangid. Additionally, any water related experience Ms. Browning received was gained by performing her duties in the section where the vacancy was located. Thus, it makes no sense that the water issues were stressed in the hiring process to give Ms. Browning an

advantage. As stated by DWWM Deputy Director, Patrick Campbell, the water issues were discussed because they were primary elements of the job. Any differences between Ms. Browning and Grievant in the selection process were specifically related to their respective job responsibilities and not any effort to give Ms. Browning preferential treatment.

Regarding the statement made to Ms. Browning by Ms. Sangid, Ms. Sangid had retired and been out of the management position for a month prior to the start of the selection process. She did not participate in the selection process and no evidence was provided that she attempted to surreptitiously influence the process. The comment had no bearing upon the selection of Ms. Browning as the successful candidate. Grievant did not prove by a preponderance of the evidence that he was denied the posted position through favoritism as that term is defined in the grievance statutes.

Accordingly, the grievance is **DENIED**.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. (2018).
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. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994).
3. 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. *Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998).

4. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

5. Grievant did not prove by a preponderance of the evidence that the selection of Ms. Browning as the most qualified candidate was arbitrary or capricious. See *Bedford County Memorial Hosp.*, 769 F.2d 1017, *supra*.

6. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2 (d).

7. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant did not prove by a preponderance of the evidence that he was treated any differently from the similarly-situated employees which is a required element for proving discrimination as defined in the grievance statutes.

9. For the purposes of the grievance procedure, "Favoritism" means 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).

10. It is appropriate to utilize the analysis available in discrimination cases for guidance on favoritism cases. *Frymier v. Higher Educ. Policy Comm'n*, 655 S.E.2d 52, 59, 221 W. Va. 306 (2007).

11. Grievant did not prove by a preponderance of the evidence that he was denied the posted position through favoritism as that term is defined in the grievance statutes.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

**DATE: April 30, 2019**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**