

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JONATHAN A. COSBY,  
Grievant,**

**v.**

**Docket No. 2020-1030-MAPS**

**DIVISION OF CORRECTIONS AND REHABILITATION/  
BUREAU OF COMMUNITY CORRECTIONS/  
ANTHONY CORRECTIONAL CENTER,  
Respondent.**

## **DECISION**

Grievant, Jonathan A. Cosby, filed this grievance against Division of Corrections and Rehabilitation ("DCR"), Respondent, protesting his non-selection for the posted position of Correctional Officer IV ("Sargent"). The original grievance was filed on March 10, 2020. The grievance statement has undergone some adjustment throughout the grievance process, a reliable representative of the grievance currently at issue is represented by the statement of grievance as presented at level two and three which provides:

The reason for my grievance, I went for a Sergeant position with the Antony Correctional, I feel the interview was bias, after receiving the scores after being told I could not have them by human resource. The superviso[rs'] scores was not scored correctly, if done so fairly it would have put me ahead of the other applicants.

The relief sought:

Unbiased interviews by a promotion board outside of Anthony Correctional Center, appointed Sergeant along with pay grade of Sergeant.

A hearing was held at level one on June 20, 2020, and the grievance was denied at that level on June 22, 2020. Grievant appealed to level two on July 1, 2020. A mediation session was held on August 26, 2020. Grievant appealed to level three on September 5, 2020. A level three hearing was held before the undersigned

Administrative Law Judge on April 2, 2021, via Zoom conference held at the Grievance Board's Charleston office. Grievant appeared in person and with a representative Jason Taylor. Respondent was represented by counsel, Mark S. Weiler, Assistant Attorney General. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. This matter became mature for decision on May 10, 2021, the mailing postmark deadline for the submission of the parties' proposed findings of fact and conclusions of law. Respondent submitted written proposed fact/law proposals, no fact/law proposal was received on behalf of Grievant.

### **Synopsis**

Grievant filed this action challenging his non-selection for the posted position of Correctional Officer IV ("Sargent"). Grievant alleges bias. Respondent maintains the selection was in accordance with applicable procedure, rules, and regulations. The successful applicant had the higher test score, and the higher total in-person interview score. The successful applicant was ranked higher in performance by his supervisor, the Associate Superintendent, and Superintendent. Grievant did not prove that unlawful bias or favoritism played a significant part in the selection process. It is not established that the selection process was biased and therefore arbitrary or capricious. Grievant did not meet his burden of proof to establish that he should have been selected for the position. Accordingly, this grievance is **DENIED**.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Grievant is employed by the Division of Corrections and Rehabilitation at the Anthony Correctional Center near White Sulphur Springs, West Virginia, as a Correctional Officer III (Corporal). Grievant has been employed by Respondent as a correctional officer since May 2012.

2. Anthony Correctional Center (ACC) is a minimum security correctional facility that houses young adult offenders.<sup>1</sup>

3. In May 2018, mold was discovered at ACC. Male offenders were transferred to Denmark Correctional Center and Jail ("Denmar") in Pocahontas County and housed separately. Female offenders were transferred to Lakin Correctional Center and Jail near Point Pleasant, West Virginia.

4. For the most part, Grievant, Corporal Daniel Gwinn and other ACC correctional officers have been assigned shifts at Denmar until the mold issue at ACC is addressed.

5. On January 2, 2020, Respondent posted a Correctional Officer IV position. (Respondent's Exhibit 2 – Job Posting) Grievant submitted an application for the position, as did several other individuals, including the successful applicant Corporal Daniel Gwinn. See R Exs 3-12, Test Scores, Applications, Tally Sheets, and Interview Documents.

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<sup>1</sup> Anthony Correctional Center (ACC) is a small facility where staff and supervisors know each other. See testimonies of Superintendent Robert Neal; Associate Superintendent Marcus Wegman; Sargent Anthony Viney and Grievant .

6. When filling the Correctional Officer IV position, Respondent followed DCR Policy Directive 132.02, Correctional Officer Selection Process. R Ex 1 – Correctional Officer Selection Process dated November 1, 2014. See L3 testimony; Superintendent Neal, Grievant and HR Manager Shelby Hinz.

7. The applicants were rated on a point system as set forth in the Corrections Officer Selection Process, in the categories; years of service, college education, promotional test score, supervisor ratings, interview score, interviewers' assessment, and written exercise. R Ex 1; Also see L3 testimony Superintendent Neal, Grievant, and HR Manager.

8. At the end of the interview process, HR totaled the scores of the applicants and it was revealed that the successful applicant Corporal Gwinn had the highest number of points, 259. See R Exs 4-9 Correctional Officer Promotion Tally Sheets. Superintendent Neal recommended Corporal Gwinn for the promotion. Also see Superintendent Neal Testimony.

9. Grievant's point total was 249.33, which was the second highest among the applicants interviewed and considered for the promotion. See Superintendent Neal Testimony; also see R Ex 4 – Grievant's Tally Sheet, R Ex 5 – Gwinn Tally Sheet and R Exs 6-9, Other Applicant Tally Sheets.

10. Grievant and Corporal Gwinn were both credited with seven 7 years of service; however, the tiebreaker went to Corporal Gwinn as his original employment date is April 2, 2012, compared to Grievant's original employment date of May 16, 2012.

11. Corporal Gwinn's promotional test score was 82%. Grievant's score was 80%. See R Ex 3 – Applicant Test Scores; R Ex 5 – Gwinn Tally Sheet; R Ex 4 – Grievant's Tally Sheet.

12. During the application process, Superintendent Robert Neal, Associate Superintendent Marcus Wegman, and immediate supervisor Sargent Anthony Viney individually and independently completed performance rankings sheets for Grievant, Corporal Gwinn, and other qualified applicants. The applicants were ranked in the following categories: *Dependability, Interpersonal Skills, Leadership Ability, and Promotion Recommendation*. These rankings were completed prior to the in-person interviews that were conducted by a separate interview panel.

13. Superintendent Neal completed a score sheet for both Grievant and Corporal Gwinn. Superintendent Neal has 27 years of corrections experience, including both uniform and administration experience. He has completed such score sheets many times in the past when promotions became available. Superintendent Neal based his rankings on his own knowledge and his continual communications with supervisors, department heads, and shift commanders. See Superintendent Neal Testimony.

14. Superintendent Neal ranked Grievant's dependability at 4, which is an average score. He ranked successful applicant Gwinn a 6, which is an above average score. Superintendent Neal considered attendance, call offs, tardiness, and whether an employee provided supporting documentation for absences. Superintendent Neal testified that Corporal Gwinn was better at communicating about absences and providing supporting documentation. He indicated that ACC can reschedule when it has advance

notice of an absence. Superintendent noted that tardiness is also a consideration when ranking dependability. Superintendent Neal L3 Testimony. With regard to *Promotion Recommendation*, Superintendent Neal ranked Grievant a 5, which is a neutral ranking. He ranked Corporal Gwinn an 8, which is a recommendation for promotion. Superintendent's neutral recommendation of Grievant was based on his experience that a supervisor needs to be dependable and a trendsetter. Id.

15. Sargent Anthony Viney, completed score sheets for Grievant, the successful applicant, and the other applicants. Sargent Viney has been employed with Respondent for 11 years. He has been Grievant's supervisor the entire time Grievant has been a correctional officer. Sargent Viney based his scores on his own observation, knowledge and communications with Grievant's night shift supervisors. Sargent Viney considers attendance, tardiness, job performance, and other skills that may be applicable to the job. Sargent Viney considers his rankings of Grievant, Corporal Gwinn, and the other applicants to be fair and without bias or favoritism. Viney L3 Testimony.

16. Sargent Viney rated Grievant's dependability at 4, which is an average score. He rated Corporal Gwinn at 8, which is a very good score. Sargent Viney testified Grievant had a lot of call-ins. He noted Grievant was often late to begin his shift. Sargent Viney noted that "dependability" is more than just attendance. Because of Grievant's tardiness Sargent Viney questions Grievant's motivation. Sargent Viney testified that Corporate Gwinn completes his work in a timely manner and he does not have to stay on top of him like has to do with Grievant. Viney L3 Testimony

17. Corporal Gwinn, the successful applicant, was better when communicating with the facility about his absences and providing supporting documentation, and he did not have a problem with tardiness. Id.

18. Sargent Viney's testimony reveals there was no specific time period relied upon by him or others when ranking the applicants.

19. Sargent Viney rated Grievant as having average leadership ability, which is a score of 5. He noted Grievant did not show leadership ability when completing staff employee performance appraisals. He had to keep following up with Grievant to get the job done. Sargent Viney rated Corporal Gwinn as having very good leadership ability, which is a score of 8. He noted that when he asked Corporal Gwinn to do something, it would be done in a timely manner. Viney Testimony; also see R Ex 5 – Corporal Gwinn's Tally Sheet. Sargent Viney ranked Grievant as having good interpersonal skills with inmates and staff, which is a score of at 6. He ranked Corporal Gwinn a little better, a 7, finding Corporal Gwinn to be good with employees and exceptional with inmates. See R Ex 4 and 5.

20. Associate Superintendent Marcus Wegman completed score sheets for Grievant, Corporal Gwinn, and other applicants. He has been Associate Superintendent of Programs at ACC and Denmar for more than 10 years. He oversees unit management and security. Associate Superintendent Wegman is familiar with what it takes to be a Correctional Officer IV.

21. Relevant to the instant grievant, in determining "Dependability," Associate Superintendent Wegman considered the follow factors: 1) absences, 2) tardiness, 3)

performing extra duties, and 4) use of time while on duty. Associate Superintendent Wegman knew Corporal Gwinn had missed more work than Grievant, he ranked him higher with a score of 6 to Grievant's 4. Associate Superintendent Wegman made a distinction in the circumstances of the absences or call offs. Corporate Gwinn was sick and getting treatment at the VA Medical Center. He had medical excuses. Associate Superintendent Wegman also took into consideration "tardiness" when scoring the applicants. Wegman L3 Testimony

22. Associate Superintendent Wegman testified there was nothing wrong with Grievant's work, he just need to come to work more.

23. Grievant acknowledges that several of the qualified applicants scored higher than him on the promotional exam. See Grievant's Testimony.

24. Grievant scored the lowest out of all the applicants for "dependability."

<u>Applicant</u>	<u>Dependability Total Score</u>
Jonathan Cosby	12
Daniel Gwinn	20
Jason Jenkins	24
Lonnie Fogus	24
Devon Fitzwater	30
Eric Slaven	30

See R Ex 4-9, Applicant Tally Score Sheet.

25. The Interview Panel was made up of Chairperson Captain Jeffrey Brown of ACC, Corrections Academy Training Officer Robert Boarders, and Commissioner's Representative Sargent Brandon Shoemaker of Denmar. The applicants were asked the same questions during the interviews. At the end of each interview, the Interview Panel deliberated, reached a consensus, and scored each response.

26. The Interview Panel scored Corporal Gwinn higher than Grievant. Gwinn scored an 88. Grievant scored an 85. See Interview Score Sheets R Exs 10 & 11.

27. Grievant alleges the "whole interview process" was biased. Grievant acknowledges that Mr. Borders does not hold any biases against him. Grievant acknowledges he is Facebook friends with Sargent Shoemaker. Grievant acknowledges he does not have evidence of Captain Brown being biased and he does not allege bias against Sargent Viney. Grievant's L3 testimony

28. Grievant does not agree with Sargent Viney's "dependability" ranking. However, he acknowledges he missed a significant amount of work. Grievant acknowledges that even if he and Corporal Gwinn had the same total "dependability" score, Corporal Gwinn would still have the highest overall point total of the applicants. *Id.*

### **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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party bearing the burden has not met its burden. *Id.*

The Grievance Board has recognized that 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. the Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). 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 is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 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).

Grievant applied for a Correctional Officer IV position with Respondent and was not chosen. Grievant alleges the "whole interview process" was biased. Grievant essentially argues that the selection process was flawed. Grievant's main argument regarding the supervisor scoring is that Corporal Gwinn missed more work than Grievant. Thus, Grievant should have scored higher in the "dependability" category. However, Grievant overlooks the fact the supervisors considered Grievant's tardiness as well as absences. Also, the Associate Superintendent testified he considered the nature of the call-offs and absences. Corporal Gwinn was sick and getting treatment, he had medical excuses. These absences were taken into consideration as the Associate

Superintendent scored Corporal Gwinn a 6 out of 10. Applicants other than Grievant and Corporal Gwinn were rated 10 out of 10. (See Respondent DCR's Exhibit 6 – Eric Slaven Tally Sheet); (See Respondent DCR's Exhibit 8 – Devon Fitzwater Tally Sheet). Supervisors also considered whether Grievant was being cooperative in submitting requested documentation for his absences. The time period of absences relied upon by Grievant (March 2019 – January 2020) was not the same time period relied upon by Sargent Viney when ranking “dependability.”

Sargent Viney testified that “dependability” is more than just attendance. Sargent Viney testified he had to keep following up with Grievant to get his work done. Sargent Viney testified that Corporal Gwinn completes his work timely and he does not have to stay on top of Gwinn like Grievant. Grievant was the lowest ranked of all the applicants when it came to “dependability.” Grievant acknowledged he has missed a significant amount of work and if he would have been ranked the same as Corporal Gwinn concerning “dependability,” he still would not have been the applicant with the highest overall point total.

Grievant has failed to prove by a preponderance of the evidence that his “dependability” ranking was arbitrary and capricious. Grievant failed to prove by a preponderance of the evidence that he is better qualified than Corporal Gwinn. The record demonstrates that the successful applicant Corporal Gwinn scored higher on the promotion test. Applicant Gwinn was ranked higher than Grievant by Superintendent Neal, Sargent Viney, and Associate Superintendent Wegman. Further, Corporal Gwinn was scored higher by a separate Interview Panel. Although Grievant hinted that the

Interview Panel was biased against him, he did not put forth any persuasive evidence to establish such allegation. Captain Brown serving on a prior Interview Panel where Grievant was not selected for the position does not establish the existence of a bias. Grievant's interview score was established by consensus involving Captain Brown and two other panelist. Grievant does not allege bias involving the other panelist.

The record does not establish that bias or favoritism played a part in the instant selection process. Grievant failed to demonstrate by a preponderance of the evidence that the selection process and his non-selection was arbitrary and capricious. Specifically, the record demonstrates that Respondent followed the Correctional Officer Selection Process. There was a proper job posting. Grievant and others submitted applications for the position. The applicants were rated on a point system as set forth in the Correctional Officer Selection Process in the following areas:

- Years of service;
- College education;
- Promotion test score;
- Independent Supervisor Recommendations;
- Review Panel's scoring of applicant's response to interview questions;
- Review Panel assessment of an applicant's manner, appearance, etc.; and
- Written exercise.

The points were totaled and Corporal Gwinn received the highest point total and was recommended for the promotion. Further applicant Corporal Gwinn received a higher point total from the supervisor(s) recommendations. Superintendent Neal, Associate Superintendent Wegman, and Sargent Viney based their rankings on personal observations and communications with the applicants' supervisors, department hearings, and shift commanders. Scoring independently, they each ranked Corporal Gwinn higher

than Grievant. The record demonstrates that Grievant was interviewed and given due consideration for the position, but a candidate with a higher point total was selected. Grievant failed to meet his burden of proof and demonstrate that Respondent selection process was significantly flawed or that he should have been selected for the position.

### **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); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993) Where the evidence equally supports both sides, a party bearing the burden has not met its burden. *Id.*

2. In a selection case, a grievant must prove, by a preponderance of the evidence, that he was the most qualified applicant for the position in question. See *Terry S. Bradley v. Division of Corrections/Pruntytown Correctional Center*, Docket No. 2015-0867-MAPS (May 3, 2016). 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 *Angela Booth v. Division of Corrections/Huttonsville*, Docket No. 2016-0539-MAPS

(December 30, 2017) (*quoting Thibault v. Division of Rehabilitation Services*, 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). 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, supra*.

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 *Everson v. Division of Highways*, Docket No. 2014-0150-DOT (April 17, 2015) citing *Bedford County Memorial Hospital v. Health and Human Services*, 769 F.2d 1017 (4<sup>th</sup> Cir. 1985); *Yokum v. W. Va. School for the Deaf and Blind*, Docket No. 96-DOE-081 (October 1996); *Trimboli v. DHHR*, Docket No. 93-HHR-322 (June 27, 1997). 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 Hospital v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “While 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 his judgment for that of [the employer].

See generally, *Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982).” *Trimboli, supra*.

5. The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presumes 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. Department of Education*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

6. Grievant did not meet his burden of establishing the selection process was significantly biased, or fatally flawed.

7. Grievant failed to demonstrate that the selection decision was unlawful, unreasonable, or arbitrary and capricious.

8. Grievant failed to establish by a preponderance of the evidence that he should have been selected for the promotion at issue.

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 (2018).

**Date:** June 17, 2021



Landon R. Brown  
Administrative Law Judge