THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CHESTER SPRANKLE,
Grievant,

v. **Docket No. 2021-2420-CONS**

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

and

ISABELLA LORETTA and DEBORAH EDELEN,
Intervenors.

DECISION

Grievant, Chester Sprankle, is employed by the Department of Health and Human Resources/Bureau of Children and Families. On April 24, 2021, Grievant filed two grievances against Respondent which have been consolidated into this matter. The first grievance alleges, "Non-selection of CPS Supervisor for Berkeley, Jefferson, & Morgan district." Grievant seeks, "To be made whole in every way to include back pay, interest, 5% special pay raise that all employees of Berkeley, Jefferson, & Morgan County received in October 2019, and to be placed in a CPS Supervisor position for this district." The second grievance alleges, "Retaliation for engaging in a protected activity under the WV Public Employees Grievance Procedure." Grievant seeks, "To be made whole in every way, including any and all current and future retaliatory actions to be ceased by Kathryn Bradley, and be afforded all opportunities that other co-workers are afforded." Ms. Edelen and Ms. Loretta were granted intervenor status in this grievance.

This grievance was waived to level three by agreement of the parties on or about April 26, 2021. A level three hearing was conducted on August 6, 2021 and August 20, 2021 before the undersigned by Zoom conference originating at the Grievance Board's Westover office. Grievant appeared and represented himself. Respondent appeared by Steven R. Compton, Deputy Attorney General. Intervenors Edelen and Loretta appeared and represented themselves.

Grievant withdrew his request for the 5% pay raise that employees in Berkeley, Jefferson and Morgan County received in October 2019 at the beginning of the hearing. At the conclusion of the level three hearing, Grievant modified his requested relief insofar as he was no longer seeking the position in Jefferson County where Ms. Edelen was selected. Accordingly, Ms. Edelen is dismissed as an intervenor in this case. This case became mature for decision on October 1, 2021, upon receipt of the parties' fact/law proposals.

Synopsis

Grievant is employed by Respondent as a Child Protective Service Worker. Grievant challenges Respondent's decision to seek approval from the Division of Personnel to promote another employee to the position of Child Protective Service Supervisor. Grievant failed to prove by a preponderance of the evidence that Respondent violated any law, rule, policy or regulation in selecting Ms. Loretta for the Child Protective Service Supervisor. Grievant failed to establish that he was more qualified for the Child Protective Service Supervisor position than the successful applicant. Grievant failed to establish a *prima facie* case of retaliation.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant has been employed by Respondent for about ten years. Grievant's most recent assignment was as a Child Protective Service Worker for the Bureau of Children and Families Crisis Team North. Grievant has been in this position for approximately five years.

2. The West Virginia Division of Personnel, at the request of Respondent, created a posting for a CPS Supervisor position for the Berkeley County Office located in Martinsburg, West Virginia.

3. Grievant applied for that position, along with another CPS Supervisor position located in Jefferson County, West Virginia. After the Division of Personnel provided a list of qualified candidates, interviews for both positions were held in April 2021. Deborah Edelen was chosen for the Jefferson County position and Isabelle Loretta was chosen for the Berkeley County position.

4. The Job Posting for the Berkeley County position had an error concerning the minimum qualifications for being promoted into the position. The posting listed the promotion only qualifications as "Four (4) years of full-time or equivalent part-time paid experience in the child protective service workers series, three (3) years of which must have been at the full-performance level." The Division of Personnel, who is responsible for creating this posting, failed to correct the mistake concerning years of experience before the posting was published.

5. The Job Specification for the position of Child Protective Service Supervisor requires that applicant for promotion have three (3) years of full-time or equivalent part-

time paid experience as a Social Service Worker 3 or in the Child Protective Service Worker or Adult Protective Service Worker series, two (2) year of experience must have been at the full-performance level.

6. Wendy Mays, Assistant Director of the Classification and Compensation section of the Division of Personnel, clarified that the Job Specification and not the Job Posting is used to determine if a candidate is qualified to be placed in a position. The qualifications for a job specification are approved by the State Personnel Board and cannot be modified without the Board's approval.

7. The Division of Personnel determined that Isabella Loretta was qualified for the Child Protective Service Supervisor position prior to being interviewed and again before being placed in the position. Ms. Mays indicated that Ms. Loretta met the qualifications of the Child Protective Service Supervisor job specification.

8. The Nature of Work Section provides, in part, that "Under limited supervision, these positions perform supervisory work in the provision of child protective services. These positions plan, assign, and review the work of employees performing child protective services. They coordinate the work of the unit with inter- and intra-governmental units, community organizations and advocacy groups."

9. Grievant's primary job duty is to investigate Child Protective Service referrals in county with a backlog to determine if further action needs to be taken. If further action is needed on a specific referral, it is customarily turned over to Child Protective Service workers permanently assigned to that district to complete the assessment and file a petition when required. Crisis workers seldom file Petitions. Grievant's current supervisor recalled that he had only filed three petitions during the last five years.

Grievant did not dispute this fact. Grievant has not had any Child Protective Service supervisory experience during his tenue with Respondent and only limited supervisory experience outside of Child Protective Service.

10. Isabella Loretta has worked for Respondent since September 2017. In 2019, Ms. Loretta was promoted to Child Protective Service Senior Worker. These employees serve as backup to the Child Protective Service Supervisor and assist in training, assigning and reviewing the work of other Child Protective Service Workers. During her time with Respondent, Ms. Loretta has completed over 100 petitions and has developed professional relationships with various stakeholders in the district including the courts, prosecuting attorneys, law enforcement and providers.

11. The interviews for the position were all conducted by the same interview team and all of the applicants were asked the same set of questions. The members of the interview team were all consistent about their reasoning for the selection of Ms. Loretta, and all scored her highest among all of the applicants.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *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).

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 Rehab. 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).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). "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 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);" *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

Grievant argues that Respondent violated Policy Memorandum 2106 in that Kathryn Bradley failed to follow the policy and ignored that policy so she could interview,

and promote the candidate of her choosing, the candidate that did not meet the minimum qualifications according to the job posting. Grievant did not cite to any other violation of Policy Memorandum 2106.[1]

Grievant submitted a Final Order from the Kanawha County Circuit Court arguing that it indicated that the minimum requirements in a job vacancy announcement are the minimum requirements that an applicant must possess at the time they apply to a posted job vacancy. As a result of not meeting minimum requirements Ms. Loretta should not have been permitted to interview, and she did not merit the promotion. This cited case is distinguished from the instant case. In the cited case, the Grievance Board and the Kanawha County Circuit Court found that the Division of Highways acted in an arbitrary and capricious manner by ignoring the statutory definition of the term "highway" in order to allow the selected candidate to meet the minimum requirements.[2] No such manipulation has occurred in the instant case.

There is no evidence in the record that Respondent or Ms. Bradley failed to follow Policy 2106 in selecting Ms. Loretta for the Child Protective Service Supervisor position. Based on the applicable job specifications for the position, Ms. Loretta met the minimum requirements to be interviewed and selected for the Child Protective Service Supervisor position. Albeit, the record does demonstrate some confusion due to an error in the job posting listing four years of experience as opposed to the correct three years of experience. However, the only candidate that would have been affected by the mistake would have been Ms. Loretta had the Division of Personnel incorrectly found that she did

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[1] Grievant's Exhibit No. 1. Policy Memorandum 2106, Employee Selection.
[2] *Blake v. Division of Highways*, 20-AA-68, January 19, 2021, Kanawha County Circuit Court.

not meet the minimum qualifications. The Division of Personnel clarified that the Job Specification and not the Job Posting is used to determine if a candidate is qualified to be placed in a position. The qualifications for a job specification are approved by the State Personnel Board and cannot be modified without the Board's approval.

Grievant argues that Respondent engaged in arbitrary and capricious activity by applying extra weight to a position that Ms. Loretta held, even though this position is not a prerequisite to be promoted. In addition, Respondent continued to engage in arbitrary and capricious activity by applying negative weight to the Grievant's rating by stating that Grievant has not filed a petition recently. The Child Protective Service Supervisor Job Specification provides in part that "under limited supervision, these positions perform supervisory work in the provision of child protective services. These positions plan, assign, and review the work of employees performing child protective services. They coordinate the work of the unit with inter- and intra- governmental units, community organizations and advocacy groups."

Gievant's primary job duty is to investigate Child Protective Service referrals in a county with a backlog to determine if further action need to be taken. Due to the volume of referrals, Crisis Workers usually complete reduced documentation Family Functioning Assessments, which seeks to determine if maltreatment has occurred, if there are safety issues, and what is the danger of harm to the child or children. If further action is needed on a specific referral, it is usually referred to a Child Protective Service Workers permanently assigned to hat district to continue working on the referral and file a petition of abuse and neglect when required. Crisis Workers rarely file petitions. Grievant did not dispute this fact. Grievant has not had any Child Protective Service supervisory

experience during his tenure with Respondent and only limited supervisory experience outside of Child Protective Service.

Isabella Loretta has worked for Respondent since September 2017. In 2019, Ms. Loretta was promoted to Child Protective Service Senior Worker. These employees serve as backup to the Child Protective Service Supervisor and assist in training, assigning and reviewing the Petitions and Family Functioning Assessments of other Child Protective Service Workers. During her time with Respondent, Ms. Loretta has completed over 100 petitions and has developed professional relationships with various stakeholders in the district including the courts, prosecuting attorneys, law enforcement and providers.

Policy 2106 provides that "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 candidates would best do the job." The factors that Grievant claims should not have been given weight are factors that are important, if not necessary, to be considered. The interviews for the position were all conducted by the same interview team and all of the applicants were asked the same set of questions. The members of the interview team were all consistent about their reasoning for the selection of Ms. Loretta, and all scored her highest among all of the applicants.

In addressing the allegation of retaliation, W. VA. CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in

violation of W. VA. CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g.*, filing a grievance);
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> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
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> (3) that, thereafter, an adverse employment action was taken by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley, supra*. *See Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (1989).

Grievant established that he had engaged in an activity protected by the statute. Grievant also established that his supervisor and other agents of Respondent had actual knowledge of the fact that he previously filed a grievance. The record does not support a finding that the employment action taken by Respondent was the result of a retaliatory motivation or a retaliatory motive can be inferred. The hiring of Ms. Loretta complied with Policy 2106 and the Division of Personnel approved her selection. The record lacks evidence that any action taken by Ms. Bradley or Respondent was in retaliation for

Grievant engaging In a protected activity. Grievant failed to establish a *prima facie* case of retaliation.

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. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. 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 Rehab. 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).

3. Grievant failed to prove by a preponderance of the evidence that Respondent violated any law, rule, policy or regulation in selecting Ms. Loretta for the Child Protective Service Supervisor.

4. Grievant failed to establish that he was more qualified for the Child Protective Service Supervisor position than the successful applicant.

5. W. VA. CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. VA. CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> {1) that he was engaged in activity protected by the statute (*e.g.*, filing a grievance);
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> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer

has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (1989).

6. Grievant failed to establish a *prima facie* case of retaliation.

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: November 8, 2021

Ronald L. Reece
Administrative Law Judge