

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DEBRA PERSINGER,
Grievant,**

v.

Docket No. 2019-1218-DHHR

**DEPARTMENT OF HEALTH
AND HUMAN RESOURCES/
BUREAU FOR CHILD SUPPORT
ENFORCEMENT,
Respondent.**

DECISION

Grievant, Debra Persinger, is employed by Respondent, Department of Health and Human Resources ("DHHR") as an Office Assistant 3 ("OA 3"). Ms. Persinger filed a level one grievance form dated March 8, 2019, alleging that she was not selected for a paralegal vacancy which she should have received and that she was not properly notified of the nonselection. As relief, Grievant seeks to be placed in the position with backpay and interest.

A level one conference was held on April 16, 2019, and a decision denying the grievance was issued on May 7, 2019. Grievant made a timely appeal to level two and a mediation was conducted on August 30, 2019, Grievant filed a level three appeal dated the same day.

After a number of continuances for good cause shown, a level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on December 1, 2020. Grievant personally appeared and was represented by Gary DeLuke, UE Local 170. Respondent appeared in the person of David Alter, Esquire and was

represented by Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on February 26, 2021, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argues that Respondent improperly hired another employee for a paralegal position when Grievant was the most qualified applicant. She specifically argued that Respondent placed too much emphasis on the interview, did not give her enough credit for prior experience, and the decision was arbitrary and capricious. Respondent demonstrated that it followed a structured interview procedure encouraged in its policy and considered factors which were appropriately related to the vacant position and the qualifications of the candidates. Grievant did not prove that the selection decision was arbitrary and capricious.

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.

Findings of Fact

1. Grievant, Debra Persinger, is employed by Respondent, Department of Health and Human Resources ("DHHR") as an Office Assistant 3 ("OA 3"). She has been assigned to the Bureau for Child Support Enforcement for eight years.
2. Prior to taking her present position, Grievant worked for about nine months as an OA 2 with DHHR in different bureau. Grievant worked in other West Virginia State Agencies for approximately nine months before she began working at DHHR.
3. Respondent posted a vacancy for a position in the paralegal classification assigned to the Bureau for Child Support Enforcement ("BCSE") Fayette County office.

The position became vacant when the person holding the job left employment with the BCSE.

4. Grievant and several other people applied for the job.

5. Grievant sometimes worked with the previous paralegal and when the paralegal was absent, Grievant would do parts of her job that were consistent with the office assistant classification. She did not exercise independent judgement concerning this work, maintain a caseload, nor do any research or writing, which are the more advanced duties of a paralegal.¹

6. The following are tasks Grievant would do to assist the paralegal:

- Go to the family court to get certified orders;
- Go to the magistrate clerk to pick up payments for child support;
- Attend hearings with the paralegal and take notes so the paralegal could prepare the order or other pleadings;
- Make copies of documents to take to the courthouse;
- Sent notice letters to parties when the paralegal was absent;
- Scan documents for the paralegal.

7. Specialized duties performed only by the paralegal in the Fayette County office included:²

- Drafting case summaries and court orders;
- Researching relevant law and information related to the parties;
- Scheduling for the attorney;
- Prepare and print the Family Court dockets;
- Enter information and documents into a specialized database.

¹ Testimony of Sandy Boley, Grievant's supervisor.

² Testimony of Kevin Andersen.

8. Kevin Andersen is the BCSE Attorney from the Fayette County Office.³ He is the direct supervisor for the paralegal in the Fayette County BCSE office.

9. When the paralegal left, Mr. Andersen had to perform the paralegal work as well as his own duties for over a month. This was very difficult given the workload for the office and small staff. He desired to find an applicant with paralegal skills so they could take over those duties as quickly as possible.

10. When the paralegal position was first posted, another staff person told Mr. Andersen that she was going to apply. Near the end of the posting period, Mr. Andersen had not seen her application and asked if she intended to apply or had decided not to. The staff member then suggested that Amanda Green would be good for the job. Mr. Andersen did not comment on the suggestion.

11. Grievant overheard this conversation which hurt her feelings. She felt that it was unfair that a coworker recommended another employee who had less time with the agency when the coworker knew Grievant had applied.

12. Respondent assembled a selection committee consisting of Kevin Andersen; Melinda Cooper, BCSE Attorney from the Raleigh County Office; and Joe Sellaro, Supervising BCSE Attorney from the Marion County Office. All of them have extensive experience in serving on selection committees and working with BCSE paralegals.

13. There were twenty applicants for the position. Twelve applicants met the minimum qualifications for the position and were scheduled to be interviewed. Of those twelve applicants, two dropped out and three did not appear for their interviews.

³ Mr. Andersen has served in that position for more than eighteen years.

Consequently, seven applicants, including Grievant, were interviewed for the vacancy on January 23, 2019.

14. The committee compiled a list of sixteen questions which they asked each applicant. All applicants were asked only these questions. The interviewers independently made notes concerning each applicant's answers and rated the applicants after the interview. The ratings were not shared by the committee members until all the interviews were completed.

15. Each committee member independently completed a DHHR *Applicant Interview Rating* document for each applicant who was interviewed. Each applicant receives a score rating of 1 to 5 on each of the following criteria based upon standards set out on the form: 1) Oral; 2) Intelligence, Reasoning Process; 3) Judgement, Objectivity; 4) Tact, Sensitivity; 5) Appearance; 6) Poise, Confidence; Leadership Potential. The highest score possible is thirty-five and the lowest is five.

16. After all the interviews, the committee members added together the points from their score sheets for each applicant to determine the applicant's total score. The committee members also took into consideration each applicant's education and experience as shown on their applications to determine their final rankings.

17. The scores and ranking of each committee member are set out in the following table:⁴

⁴ Respondent Exhibit 1

	Mr. Andersen	Ms. Cooper	Mr. Sellaro	Total
L. McAllister	33 (1 st)	33 (1 st)	30 (1 st)	96 (1 st)
A. Greene	31 (2 nd)	32 (2 nd)	25 (3 rd)	88 (2 nd)
K. Amick	29 (3 rd)	27 (3 rd)	27 (2 nd)	83 (3 rd)
D. Persinger	22 (4 th)	23 (4 th)	23 (4 th)	68 (4 th)
J. Franklin	22 (4 th)	20 (5 th)	18 (5 th)	60 (5 th)
T. Kerns	21 (5 th)	19 (6 th)	17 (6 th)	57 (6 th)
K. Kerr	15 (6 th)	23 (4 th)	17 (6 th)	55 (7 th)

18. The Committee unanimously selected Leah McAllister as the most qualified applicant. The things that the committee felt set Ms. McAllister apart was that she drafted some correspondence and proofread all correspondence for her office; had extensive experience scheduling events such as interviews, appointments, training and travel. She had to follow specific policies related to purchasing duties and compiling records; and supported a law clerk clerically and by performing research. (Respondent Exhibit 1)

19. Ms. McAllister did not accept the offer of employment because the offered pay was not adequate.

20. Mr. Andersen and Ms. Cooper rated Amanda Greene second and Mr. Sellaro rated her third (two points below of Ms. Amick). With the combined scores Amanda Greene ranked second and was offered the position after Ms. McAllister turned it down. Ms. Greene accepted the position and was the successful applicant. *Id.*

21. The committee noted that Ms. Greene held a bachelor's degree in Business Management. She successfully managed a large caseload as an economic service

worker while following strict timeline requirements and she had to work within defined policies and procedures. These were all qualities the committee felt would help Ms. Greene assume all the paralegal duties quickly and effectively. *Id.*

22. The committee did not have any negative things to say about Grievant. By all accounts she is a competent and effective Office Assistant. The committee noted that Grievant had worked with the previous paralegal. However, her activity had been limited to scanning and distributing documents, picking up documents and checks from the courthouse, and processing payments. She had not done any of the duties such as managing a caseload, scheduling, or research and drafting of pleadings which were specific to the paralegal position. The top three applicants had experience or training in some of those areas.⁵ *Id.*

23. Grievant had been working for the BCSE for eight years to the time of Ms. Greene's selection. Ms. Greene had only been working for BCSE two years at that time.

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 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.*

⁵ The third ranked candidate, Katlyn Amick, has an associate degree as a paralegal and a bachelor's degree in legal studies.

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); *Underwood v. Dep't of Health & Human Res.*, Docket No. 2012-0237-DHHR (Dec. 6, 2013).

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). Therefore, in a selection case, such as this, the Grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005); *Delauder v. Dep't of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (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]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Grievant argues that Respondent placed too much weight on the interviews and did not give enough credit to Grievant's experience working with the prior paralegal. Grievant also notes that the interview team did not contact Grievant's prior supervisors or the previous paralegals regarding Grievant's ability to perform the paralegal job.

As noted above, the grievance procedure is not intended to be a "super interview." The issue is whether Respondent acted appropriately in the selection process given the information that was before it. If Grievant wanted the committee to consider the opinions of her prior supervisors or the prior paralegals, it was her obligation to bring that information before the interview committee. She did not. The interview committee was not

obligated to consider such information if it was not brought before them or determined to be an important factor prior to the interview.

Regarding Grievant's contention that Respondent relied too heavily upon the interview, DHHR Policy Memorandum 2106 *Employee Selection* provides in part the following:

The chart in OPS-13 , Applicant Interview Grading, provide some guidance 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 as the needs the job entails. Such facts weights must be determined prior to the interview and applied consistently with the applicants the applicants 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.

Id. p. 4 of 13.

This policy provides that the interview “is not necessarily the deciding factor” but it does not prohibit the interview from being conclusive. The interview committee members decided prior to the interviews that they were seeking an applicant with skills and abilities that would allow them to learn the position quickly and take over the paralegal duties as soon as possible. They noted that Grievant had worked with the prior paralegals for some time. However, all the duties Grievant performed in assisting the prior paralegal were typical office assistant duties and not the specific skills required to successfully perform the predominate paralegal duties, such as: drafting case summaries and court orders; researching relevant law and information related to the parties; scheduling for the attorney; and preparing the Family Court dockets. The committee found that the ultimately selected candidate had more experience and skills indicating that she would be able to

master these specific duties more quickly. These are certainly factors which are based upon the duties for vacant job and the applicants' skills and abilities.

Grievant did not prove by a preponderance of the evidence that Respondent's selection decision "did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, reached a decision that is so implausible that it cannot be ascribed to a difference of view,"⁶ or was otherwise arbitrary and capricious. 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*. "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, the party bearing the burden has not met its burden. *Id.*

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 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);

⁶ *Bedford County Memorial Hosp. v. Health and Human Serv.*, *supra*.

Underwood v. Dep't of Health & Human Res., Docket No. 2012-0237-DHHR (Dec. 6, 2013).

4. 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).

5. In a selection case, such as this, the Grievant "must prove by a preponderance of the evidence that the employer violated the rules and regulations governing hiring, acted in an arbitrary and capricious manner, or was clearly wrong in its decision." *Workman v. Div. of Corr.*, Docket No. 04-CORR-384 (Feb. 28, 2005); *Delauder v. Dep't of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

6. 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).

7. Grievant did not prove by a preponderance of the evidence that Respondent's selection decision "did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, or reached a decision that is so implausible that it cannot be ascribed to a difference of view" or was otherwise arbitrary and capricious.

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: MARCH 17, 2021

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE