

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LISA J. SNODGRASS,  
Grievant,**

**v.**

**Docket No. 2019-1691-DHHR**

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

## **DECISION**

Lisa Snodgrass, Grievant, is employed by Respondent, Department of Health and Human Resources (“DHHR”), in the Bureau for Children and Families. Her position is in the Family Support Specialist classification and she works in the Charleston office. Ms. Snodgrass filed a grievance form<sup>1</sup> dated June 4, 2019, alleging “Non Selection Grievance, Violation of Equal Opportunity Act due to Age and Gender.” As relief sought, Grievant wrote “Discipline and education.” A level one hearing was held on October 21, 2019, and a decision denying the grievance was issued on November 7, 2019. The grievance appealed to level two on November 13, 2019. A mediation was conducted on June 12, 2020. Thereafter, Grievant perfected her appeal to level three on June 25, 2020.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board via the Zoom video platform. Grievant personally appeared and was represented by Nona Ringler. Respondent appeared in the person of Regional Director, Lance Whaley, and was represented by James “Jake” Wegman,

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<sup>1</sup> Grievant originally filed a level three form but the matter was properly transferred to level one.

Assistant Attorney General. This matter became mature for decision on March 26, 2021, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Grievant was not selected for a vacant supervisory position she applied. She argues that Respondent discriminated against her on the basis of sex and age when a young male applicant was selected who had less experience and whose degree was not relevant to the job. She also argued that she was the most qualified candidate, and the process was flawed. Grievant proved that there were flaws in the hiring process, but the outcome would not have changed had those flaws not occurred. Respondent articulated job related reasons for selecting the successful applicant.

Grievant did not prove by a preponderance of the evidence that she was subjected to discrimination as that term is defined in the grievance procedure. Grievant did not prove by a preponderance of the evidence that the hiring process was arbitrary and capricious as a whole.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance.

### **Findings of Fact**

1. Lisa Snodgrass, Grievant, is employed by Respondent, Department of Health and Human Resources ("DHHR"), in the Bureau for Children and Families. Her position is in the Family Support Specialist classification and she works in the Charleston office.

2. Grievant is female and fifty years old.

3.. Grievant applied for a vacant position in the Economic Service Supervisor classification. Other DHHR employees and an external candidate applied for the position as well.

4. Respondent formed an interview committee of three managers to review the applications of all the applicants as well as conduct and evaluate the interviews. The committee members were: Lance Whaley, Regional Director for Region 2 (“Reg. Dir.”); Michael Hale, Community Services Manager (“CSM”); and, Mary Harris, Family Assistance Coordinator.

5. Prior to the interviews, the committee agreed upon criteria for judging the experience and education for each candidate as follows:

EDUCATION	POINTS	EXPERIANCE	POINTS
Bachelor’s Degree	1	Less than 2 years	1
Bachelor’s Degree Human Ser, field	2	2 years human services	2
Bachelor’s Degree Social Work	3	More than 2 years – Less than 5 years	3
Master’s Degree	4	More than 5 years – Less than 8 years	4
Master’s Degree Social Work	5	8 years or more	5

6. The successful applicant was Tyler Coleman. He holds a bachelor’s degree in Spanish with a minor in Political Science and receive one point for “education.” At the time of his application, Mr. Coleman had worked for the DHHR for two and a half years. His “experience” score was three.

7. Grievant Holds two bachelor’s degrees: one in Public Service Administration with minor in Social Work, and one in Industrial Relations with a minor in

Economics. The degree in Public Services Administration is in the Human Services field. Consequently, Grievant received a score of two in “education.” Grievant had worked for DHHR for seven years and nine months when she applied for the vacancy which resulted in a score of four in “experience.”

8. There were two other candidates who were considered who will be referred to as candidates B and C herein.<sup>2</sup> Neither of these applicants held a bachelor’s degree so they both scored zero for “education” Candidate B had sufficient experience to get a rating of two in experience.” Candidate C was an external applicant who had less than two years of experience as an economic service worker and should have received one point in “experience.”<sup>3</sup>

9. The four candidates were interviewed on April 25, 2019. The committee asked each applicant the same nine questions. Each committee member filled out an interview score sheet for each question as the interview was conducted. The evaluators did not share their scores for each candidate until the interviews were concluded.

10. Each of the answers was assigned a point value from one to five resulting in a possible maximum forty-five points that could be awarded by each evaluator and a possible minimum of nine points. The points from each of the three evaluators were added together to determine each candidate’s score on the interview. The maximum possible

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<sup>2</sup> Respondent redacted the names of these candidate from their application and score sheet to protect their privacy. Grievant did not object. Since their specific identity has no bearing on the outcome of this matter their identity was not required to be revealed by the undersigned.

<sup>3</sup> At the level three hearing, Michael Hale testified without contradiction that Candidate C had less than two years of experience as an economic service worker. The comparison score sheet gave C four points in the experience area. Since C was an external applicant it is more likely her score for experience was wrong and she should have received a one rather than a four for the experience criterion.

score was 135 points, and the minimum possible score was 18 points. The points for each answer were awarded as follows:

Unsatisfactory 1 point	Fair 2 points	Satisfactory 3 points	Very Good 4 points	Excellent 5 points
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11. When all the scores were for the interview questions were tabulated the scores give by each interviewer for each candidate are reflected in the following table:

<b>Interviewer:</b>	T. Coleman	L. Snodgrass	Candidate B	Candidate C
Michael Hale	31	29	30	31
Lance Whaley	30	27	29	33
Mary Harris	36	27	30	33
<b>Total Score:</b>	97	83	89	97

12. Mr. Coleman and Candidate C tied for the highest interview score and Grievant finished fourth. No answer received a rating of five or one. The scores of all the evaluators were within two points of each other for each applicant except for Mr. Coleman whom Mary Harris scored five points higher than the nearest evaluator.<sup>4</sup>

13. All committee members believed that Mr. Coleman's interview answers were more detailed and reflected a better understanding of the issues. Grievant's answers tended to be shorter, with less depth which did not reflect as much knowledge as the other applicants.

14. Mary Harris testified that Grievant's demeanor at the interview appeared to be indignant, and her answers were short without much detail. Ms. Harris speculated that

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<sup>4</sup> No questions were asked concerning this anomaly and no reason was given for its occurrence.

Grievant's poor demeanor was related to her not being a successful applicant for prior supervisory positions. Ms. Harris also testified that she judged the candidates on whether they were highly esteemed and respected by their colleagues. She could not articulate how that could be judged in an interview or concerning external applicants.

15. Neither Mr. Hale nor Mr. Whaley mentioned any problem with Grievant's demeanor in the interview. Mr. Whaley specifically testified that while Grievant's answers were short and lacked detail her demeanor was appropriate throughout the interview. He encouraged Grievant to continue applying for supervisory positions.

16. Mr. Whaley and Mr. Hale testified that the interviews are crucial because it allow them to judge the applicants' skills in communication, their ideas regarding management, their overall knowledge and preparation.

17. If Ms. Harris' ratings are removed from the candidate scores Grievant's standing as a candidate would not change. In the final analysis the overall scores for the applicants are reflected by the following table:

<b>Candidate</b>	<b>Interview Score</b>	<b>Education Score</b>	<b>Experience Score</b>	<b>TOTAL</b>	<b>Overall Ranking</b>
T. Coleman	97	1	2	100	1
Candidate B	89	0	3	92	3
Candidate C	97	0	1 <sup>5</sup>	98	2
L Snodgrass	83	2	4	89	4

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<sup>5</sup> The Score sheet rated Candidate C with a 4 for experience. However, Michael Hake credibly testified that score was a mistake and the proper rating for experience was 1.

18. There are eleven supervisors in the DHHR Charleston office. Nine of the supervisors are women and most the supervisors are at least forty years old.

### **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.*

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).

In this matter, two of the interview committee members articulated valid reasons for selecting Mr. Coleman. Both CSM Hale and Reg. Dir. Whaley found Grievant’s demeanor to be appropriate for the interview. They placed the most emphasis on the interviews because it gave them a chance to judge the applicants’ skills in communication, their ideas regarding management, their overall knowledge and preparation. They both believe that other factors such as education and experience are important, but the skills they watch for in the interview are a greater indicator of success as a supervisor. Based upon those factors they found that Mr. Coleman’s answers were more complete and more



detailed than Grievant's and demonstrated a greater knowledge of the relevant issues. One might disagree with that assessment, but these are certainly factors that are reasonable to consider and are not arbitrary and capricious.

On the other hand, Ms. Harris found Grievant's demeanor to be indignant and short. She ascribed this indignation to Grievant's anger over not being selected for prior supervisory positions. The other interviewers did not find this to be the case. It is more likely that not that Ms. Harris' preconceived notion of Grievant's anger contributed as much to her perception of Grievant's attitude as her actual demeanor. Additionally, Ms. Harris testified that she judged the candidates on whether they were highly esteemed and respected by their colleagues. She could not articulate how that could be judged in an interview or from a review of the candidates' applications. She also did not identify how she would ascertain this knowledge for all applicants, especially the one who did not work for the DHHR. Finally, while not conclusive, the fact that she scored Mr. Coleman significantly higher than the other two committee members is suspicious since the scores were much closer on all other applicants.<sup>6</sup>

Ms. Harris clearly did make her decision upon at least one factor that was not intended to be considered in the selection of the successful applicant, respect from their peers.<sup>7</sup> She also appeared to be predisposed to poorly evaluating Grievant based upon motives she ascribed to Grievant. Her assessment of the candidates was arbitrary and capricious.

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<sup>6</sup> Standing alone such an anomaly would not cause concern, but in the context of Ms. Harris' testimony it is significant.

<sup>7</sup> That is not to say that this factor could never be considered. However, it must be identified prior to the interviews and the interviewers must be able to articulate how all applicants could be fairly judged on that criterion.

Having found that one committee members ratings were tainted, it is necessary to determine the impact of that error on the process. “In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as ‘harmless error.’ *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PleED (Jan. 31, 2008).” *Delauder v. Dep’t of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

But for the actions of Ms. Harris, the selection process was not flawed. When the scores given by Ms. Harris are removed from consideration, Grievant still does not prevail as the most qualified candidate. In this particular situation, Ms. Harris’ actions resulted in harmless error.<sup>8</sup> Grievant did not prove the process was fatally flawed or that she was the most qualified candidate.

The reason for challenging the hiring process set out in the grievance was “Violation of Equal Opportunity Act due to Age and Gender.” The Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. Va. Code §§ 5-11-1, et seq.), including claims of age and sex discrimination. The fact that a grievance may also state a claim under the West Virginia Human Rights Act does not deprive the Grievance Board of jurisdiction. See, *Vest v. Bd. of Educ. of County of Nicholas*, 193 W.Va. 222, S.E.2d 781 (1995). For the Grievance

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<sup>8</sup> It is not difficult to imagine a future situation which could lead to a different outcome.

Board to possess jurisdiction, however, the grievance must prove a discrimination claim under the grievance statutes.

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).

Grievant argues that she is similarly situated to the successful applicant because they are both DHHR employees and applicants for a posted vacant position. She argues that the different treatment received by Mr. Coleman was not based upon job related responsibilities but rather that he was a young male. The evidence she offers is that she has more relevant education and experience than Mr. Coleman yet he was selected for the position.

As set out above Respondent demonstrated job related reasons for selecting Mr. Coleman over than Grievant. Additionally, Respondent demonstrated that it has a history of hiring middle-aged women for supervisor positions in the Charleston office. Grievant

did not prove that she was subjected to discrimination in the hiring process as that term is defined by W. VA. CODE § 6C-2-2 (d). 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). 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).

3. 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).

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. “In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as ‘harmless error.’ *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). See generally *Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd of Educ.*, Docket No. 2008-0197-PleED (Jan. 31, 2008).” *Delauder v. Dep’t of Health & Human Res.*, Docket No. 07-HHR-326 (Jan. 28, 2009).

6. The arbitrary and capricious action of one of the committee members did not change the result of the selection process and was therefore harmless error.

7. Grievant did not prove by a preponderance of the evidence that the selection process was fatally flawed, or she was the most qualified candidate.

8. The Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. Va. Code §§ 5-11-1, et seq.), including claims of age and sex discrimination.

9. The fact that a grievance may also state a claim under the West Virginia Human Rights Act does not deprive the Grievance Board of jurisdiction. See, *Vest v. Bd. of Educ. of County of Nicholas*, 193 W.Va. 222, S.E.2d 781 (1995). For the Grievance Board to possess jurisdiction, however, the grievance must state a claim under the grievance statutes.

10. 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).

11. 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);

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*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).

12. Grievant did not prove that she was subjected to discrimination in the hiring process as that term is defined by W. VA. CODE § 6C-2-2 (d).

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 19, 2021**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**