

JULIE HALE,

Grievant,

v. Docket No. 00-HHR-018

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WELCH EMERGENCY HOSPITAL,**

Respondent.

DECISION

Julie Hale (Grievant) is employed by the Department of Health and Human Resources at Welch Emergency Hospital (WEH) as an Office Assistant I/Ward Clerk. She filed this grievance on April 30, 1999, alleging that she was more qualified than the successful applicant for a Supervisor I position. This grievance was denied at Level I, on May 10, 1999, and at Level II, on June 2, 1999. A Level III hearing was held on September 21, 1999, and November 4, 1999, before M. Paul Marteney, Esq. Grievant was represented at this hearing by Hobert F. Muncey, Jr., Esq., and WEH was represented by Tiffany Bost, Esq., and Dennise Smith, Esq. This grievance was denied at Level III, on December 21, 1999, by Commissioner Jonathan Boggs.

At Level IV, Grievant was again represented by Hobert F. Muncey, Jr., Esq., and WEH was represented by Assistant Attorney General Anthony Eates, II. The parties agreed that this grievance could be decided upon the record developed at the lower levels, and were given until July 31, 2000, to submit proposed findings of fact and conclusions of law. WEH did so, and this grievance became mature for decision on that date. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed at WEH as an Office Assistant I/Ward Clerk.
2. On January 26, 1999, WEH posted a Supervisor I/Nursing Department Office Coordinator position.
3. Grievant and seven others applied for the position.
4. The selection process consisted of three interviewers using a prepared list of ten questions and assigning scores of one to five to each applicant for each of seven factors on a standard rating form promulgated by the West Virginia Department of Health and Human Resources. Accordingly, a perfect score would have been 35 for each interviewer.
5. The seven factors were oral expression, intelligence and reasoning process, judgment and objectivity, tact and sensitivity, appearance, poise and confidence, and leadership potential.
6. One interviewer scored successful applicant Fred L. Odum, Jr. (Odum) 30 points and Grievant 19. The second interviewer scored Odum 29 points and Grievant 20. [\(See footnote 1\)](#)
7. Grievant had the lowest scores of the six applicants interviewed.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Steadman v. Securities and Exchange Comm'n, 450 U.S. 91 (1981); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant contends that she was the most qualified applicant for the position of Supervisor I, and that the outcome of the selection process was pre-determined. Grievant seeks reinstatement into the position and back pay. WEH responds that the successful applicant, Odum, was ranked as the best candidate after a fair interview process; that Grievant ranked

last of the six candidates interviewed for the position; and that there is no evidence that the outcome of the selection process was pre-determined.

Unless proven arbitrary or capricious, or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

In applying the "arbitrary and capricious" standard, a reviewing body applies anarrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, *supra* at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997). Furthermore, in matters of non-selection, the grievance process is not that of a "super-interview," but rather serves as a review of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994).

Generally, an 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).

The credible evidence of record supports WEH's position in every respect. [\(See footnote 2\)](#) Grievant failed to adduce any evidence whatsoever at Level III to show that she was more qualified than Odum, or that the selection process was arbitrary and capricious, choosing instead to question Odum's performance in the Supervisor I position long after he wasselected. In fact, Grievant was hard-pressed to show that she possessed the minimum qualifications to apply for the position. [\(See footnote 3\)](#) Grievant also presented completely valueless hearsay and double-hearsay testimony about a rumor at WEH that the outcome of the selection process was pre-determined.

A preponderance of the evidence in this grievance shows that Odum was properly ranked as the best candidate after a fair selection process. Grievant was ranked sixth of the six candidates interviewed for the position. It cannot be said that relevant factors were not considered by WEH in reaching its decision, or that there was a clear error of judgment.

Bowman, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Steadman v. Securities and Exchange Comm'n, 450 U.S. 91 (1981); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

3. Unless proven arbitrary or capricious, or clearly wrong, an agency decision made by appropriate personnel as to which candidate is most qualified for selection or promotion will be upheld. Shull v. Dep't of Health & Human Resources, Docket No. 97-HHR-417 (Jan. 26, 1998); Ashley v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-070 (June 2, 1995).

4. In applying the "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra

at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997).

5. Grievant failed to establish, by a preponderance of the evidence, either that she was the most qualified candidate for the position of Supervisor I, or that WEH's selection of the successful candidate was arbitrary and capricious or clearly wrong.

Accordingly, the grievance is DENIED.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER
ADMINISTRATIVE LAW JUDGE

Dated August 8, 2000

Footnote: 1

The scores assigned by the third interviewer are not in the record.

Footnote: 2

It is noted that the Level III transcript in this grievance contains numerous gaps, inaudibles, persons talking simultaneously, and little discussion of the selection process at issue.

Footnote: 3

The West Virginia Division of Personnel reversed its previous decision and found Grievant minimally qualified after she submitted a letter claiming to be a lead worker. This claim was not supported by the evidence in this grievance.