GEORGE SPOLARICH, JR.,

Grievant,

v v.

DOCKET NO. 99-55-452

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by George Spolarich, Jr. (Grievant) against the Wyoming County Board of Education (WCBE), alleging that a violation of W. Va. Code § 18A-4-16 occurred when WCBE did not select him as head boys varsity basketball coach at Baileysville High School (BHS). Grievant believes he is more qualified than the successful candidate, Larry Hatfield (Hatfield). Grievant requests instatement into the position.

The grievance was denied at Level I by F. Steven Anderson, Assistant Principal of Oceana High School, on July 12, 1999. A Level II hearing was held on September 8, 1999. Grievant was represented at this hearing by Anita Maxwell of the West Virginia Education Association, and WCBE was represented by Gregory W. Bailey, Esq. The grievance was denied at Level II by Hearing Examiner James R. McGrady, on October 13, 1999. There is no record of any proceedings at Level III.

The parties agreed that this grievance could be submitted at Level IV based on the record developed at the lower levels. (See footnote 1) The parties were given until November 22, 1999,to submit proposed findings of fact and conclusions of law, and this matter became mature for decision on that date.

The following Findings of Fact have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by WCBE as an art teacher at Pineville Grade School.

2. On a date in 1999 not set forth in the record, WCBE posted the position of Head Boys Varsity Basketball Coach at BHS. (See footnote 2)

3. Grievant, Larry Hatfield, and one other applicant applied for the position.

4.

All candidates met the minimum qualifications for the position.

5. The selection process consisted of a review of the qualifications of the candidates, consideration of community support in the form of the BHS principal's recommendation, and an interview with four questions. Frank Mann, Assistant Superintendent for WCBE, interviewed the candidates. Superintendent Blackwell recommended to WCBE that Hatfield receive the position.

6. Applicants for the position of head boys varsity basketball coach at BHS were judged on their total, “overall,” coaching experience, and not on their head coaching experience or experience coaching basketball, because “coaching is coaching” and the same fundamental principles and teaching skills apply to all sports.

7. Grievant was a ninth-grade boys basketball coach for one year. He was anassistant boys basketball coach for 12 years, while simultaneously a head girls basketball coach at Pineville High School (Pineville) for six years. He held the boys head coaching position at Pineville for five years, and currently has been head baseball coach at Oceana High School for 12 years. He also coached some grade school basketball. He is also the current head girls basketball coach at Wyoming East High School (Wyoming East).

8. Grievant's head coaching experience consists of 12 years as head baseball coach at Oceana, five years as head boys basketball coach at Pineville High School, with six years as head girls basketball coach there. He was also head basketball coach at Wyoming East for one year, for a total of 24 years head coaching experience.

9. Hatfield coached elementary and secondary school sports for 19 years, including at least three years of basketball. He spent two years as a head football coach at BHS, and had a total length of time involved in athletic activities in general of some 30 years, although not all of this time was spent coaching. (See footnote 3) He has never been a head basketball coach. Hatfield also had community support in the form of the BHS principal's recommendation.

10. Grievant had 24 years head coaching experience, 12 years head basketball coaching experience, at least 24 years basketball coaching experience, and at least 36 years overall coaching experience. 11. Hatfield had 2 years head coaching experience, no head basketball coaching experience, at least three years of basketball coaching experience, and at least 19 years overall coaching experience. (See footnote 4)

12.

Head coaches have more responsibility than assistant coaches, and are

more accountable to the community than assistant coaches.

13. In 1998, WCBE posted the coaching positions, for all sports, for the new Wyoming East High School. In filling those positions, WCBE considered candidates' seniority in their coaching positions, coaching experience in the particular sport, and head coaching experience for head coaching positions, selecting candidates with the most experience in the sport they would be coaching, at the level they would be coaching.

14.

These criteria are normally applied by WCBE in the selection of coaches.

15. Using these criteria, Grievant was the most qualified applicant for the position of head boys varsity basketball coach at BHS.

16. WCBE selected Hatfield for the position.

DISCUSSION

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell CountyBd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. 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 alleges he was the most qualified applicant for the position of head boys varsity basketball coach at BHS, and seeks instatement into the position. WCBE responds that its selection process was legally sufficient, in that it was not arbitrary and capricious or an abuse of discretion.

In Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991), this Grievance Board determined that "W. Va. Code § 18A-4-7a does not apply to the filling of extracurricular coaching positions," and that W. Va. Code § 18A-4-16 controls the selection process for these positions. See Ross v. Raleigh County Bd. Of Educ., Docket No. 99-41- 091 (June 2, 1999); McCoy v. Kanawha County Bd. of Educ., Docket No. 94-20-141 (Oct. 13, 1994); Ramey v. Mingo County Bd. of Educ., Docket No. 90-29-538 (July 17, 1991). Moreover, it is established that the appropriate standard of review for decisions concerning selection of professional personnel to fill coaching assignments is whether the board acted in an arbitrary and capricious manner or otherwise abused its broad discretion. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Ross v. Raleigh County Bd. of Educ., Docket No. 99-41-091 (June 2, 1999); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993).

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). 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 an agency 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).

Grievant's argument amounts to a plea for consistency and transparency by WCBE in its selection process for coaches. The record in the grievance clearly shows that WCBE, as recently as last year, applied a different set of criteria in selecting coaches than the criteria used in the instant selection process. On April 28, 1998, Blackwell testified under oath, in a Level II grievance hearing of a grievance submitted by David L. Price, concerning the selection of coaches, for all sports, for the new Wyoming East High School. He testified that, in filling those positions, WCBE considered candidates' seniority in their coaching positions, coaching experience in the particular sport, and head coaching experience for head coaching positions, selecting candidates with the most experience in the sport they would be coaching, at the level they would be coaching. Blackwell gave as an example the fact that the candidate selected as head varsity basketball coach at Wyoming East was the most senior and most experienced head varsity basketball coach applying for that position. Blackwell further testified that all of the new coaching positions at Wyoming East, some 40 positions, were selected in that manner. (See footnote 5) A county policy, which has been consistently applied, carries great weight in the selection process. Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995); Prichard v. Lincoln County Bd. of Educ., Docket No. 93-22-522 (Oct. 21, 1994).

However, during the Level II hearing in this grievance, Blackwell testified that applicants for the position of head boys varsity basketball coach at BHS were judged on their total, “overall,” coaching experience, and not on their head coaching experience or experience coaching in the particular sport of basketball, because “coaching is coaching” and the same fundamental principles and teaching skills apply to all sports; and that it came down to “overall experience, the individual I thought would be the best selection.” Clearly, WCBE “moved the goal posts” between 1998 and 1999.

Blackwell also testified that all three candidates were excellent coaches who performed well in their interviews; that Hatfield had the recommendation of BHS's Principal, which signified community support for his selection; that people could have a difference of opinion concerning which candidate should be selected; and that head coaches have more responsibility than assistant coaches, and are more accountable to the community than assistant coaches.

Grievant testified that the normal selection process used by WCBE for coaching positions in previous years was to select “the most qualified and senior applicant, and senior I mean by, the person that has fulfilled that head coaching position for the most years[;]” that the 1998 criteria were

normally used to fill coaching positions in Wyoming County; that he was not aware of any uniform set of criteria that is applied to every single coach selection; and that, if there was a uniform set of criteria, he would like a copy.

WCBE member Don Nuckols testified that Hatfield was not the most qualified applicant; that the past practice of WCBE was to consider past coaching experience in filling coaching positions, which did not happen in this selection process; and that Grievant was more qualified for the position due to his superior experience as a basketball coach. The applicants' experience and training are relevant matters properly considered when filling a coaching position. Rosenau v. Tucker County Bd. of Educ., Docket No. 94-47- 591, 1104 (May 31, 1995).

It is clear to the undersigned administrative law judge that Grievant was the superior candidate in terms of head coaching experience (24 years), basketball coachingexperience (at least 24 years), and overall coaching experience (at least 36 years). It is reasonable for a county board of education to select a high school head basketball coach who has the greatest head varsity basketball coaching experience and the greatest varsity basketball coaching experience. Morrone v. Wayne County Bd. of Educ., Docket No. 92- 50-389 (Aug. 31, 1993). Using WCBE's 1998 criteria, Grievant clearly was the most qualified applicant for the position of head boys varsity basketball coach at BHS.

Hatfield was the superior candidate in terms of community support, (See footnote 6) had a total length of time spent in athletic activities in general of some 30 years, and two years as a head football coach at BHS. He has never been a head basketball coach. He coached elementary school sports for 19 years, including some basketball. Even using WCBE's 1999 criteria, reasonable people could question whether Hatfield was the most qualified applicant for the position. This is because the record, although not well developed at Level II, seems to indicate that Grievant has more “overall” coaching experience than Hatfield.

The undersigned is persuaded that WCBE's selection process was arbitrary and capricious and an abuse of discretion. It is reasonable for a candidate for a coaching position with WCBE to rely on the sworn testimony of the person who will make the recommendation to the county board of education, Superintendent Blackwell, as to what the criteria for selection to the position are. Certainly, the 1998 posting did not inform a potential applicant, stating only that an applicant must meet the requirements of a West Virginia teacher, or have a coaching certificate, and no evidence was presented to showthat any written set of criteria existed. Absent evidence to the contrary,

Blackwell, testifying under oath in 1998, must be presumed to have truthfully described the selection criteria used by WCBE for coaching positions, and the record contains no such evidence.

WCBE presented no evidence, and called no witnesses, to show that WCBE ever acted to change those criteria. The record contains no evidence that the criteria were, in fact, ever changed; the record contains no evidence that the criteria were changed before this selection decision was made; and the record contains no rationale as to why the criteria needed to be changed. Absent such evidence, Blackwell's description of the instant selection criteria represents nothing more than a post-hoc justification of his decision to recommend Hatfield rather than Grievant.

When a board of education establishes hiring procedures, it is bound by these practices. State ex rel. Hawkins v. Tyler County Bd. of Educ.,166 W. Va. 363, 275 S.E.2d 908 (1981); Tallman v. Wetzel County Bd. of Educ., Docket No. 52-86-270-3 (Mar. 20, 1987). It is likewise well established that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993).

Accordingly, the undersigned finds that WCBE, by failing to employ the coaching selection criteria it had in place at the time this decision was made, did not rely on factors that were intended to be considered, and, with its post-hoc justification of its action, explained its decision in a manner contrary to the evidence before it. Bedford CountyMemorial Hosp., supra. WCBE's failure to employ the coaching selection criteria it had in place at the time this decision was made resulted in a decision that was not legally sufficient, Thibault, supra, one that was arbitrary and capricious and indicates an abuse of discretion. Pockl, supra.

Grievant proved, by a preponderance of the evidence, that he was more qualified than the successful applicant for the position of head boys varsity basketball coach at Baileysville High School. Therefore, he will be instated to the position of head boys varsity basketball coach at Baileysville High School effective the beginning of the 1999 - 2000 school year.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, Grievant has the burden of proving his 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); 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). See W. Va. Code § 18-29-6.

2. The appropriate standard for reviewing the selection of professional personnel for extracurricular coaching positions is whether the board acted in an arbitrary and capricious manner or otherwise abused its broad discretion in matters relating to the hiring of school personnel. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Foley v.Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993).

3. 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). 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).

4. Generally, an action is arbitrary and capricious if an agency 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).

5. Grievant proved, by a preponderance of the evidence, that WCBE, by failing to employ the coaching selection criteria it had in place at the time the instant decision was made, did not rely on factors that were intended to be considered, and, with its post-hoc justification of its action, explained its decision in a manner contrary to the evidence beforeit. Id.

6. WCBE's failure to employ the coaching selection criteria it had in place at the time the instant decision was made resulted in a decision that was not legally sufficient, Thibault, supra; one that was arbitrary and capricious and indicates an abuse of discretion. Pockl, supra.

7. Grievant proved, by a preponderance of the evidence, that he was more qualified than the successful applicant for the position of head boys varsity basketball coach at Baileysville High School.

Accordingly, this grievance is **GRANTED**. Grievant is **ORDERED** instated to the position of head boys varsity basketball coach at Baileysville High School, effective the beginning of the 1999 - 2000 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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 December 23, 1999

Footnote: 1

This grievance was assigned, for administrative purposes, to the undersigned administrative law judge, on November 9, 1999.

Footnote: 2

The record in this grievance does not contain a copy of the posting for this position.

Footnote: 3 *Where the record indicated that a candidate coached two teams simultaneously during one school year, the undersigned credited that candidate with two years coaching experience, as that candidate would have coached*

twice as many students, in twice as many games, than a candidate who coached one team during one school year.

Footnote: 4 *The coaching experience of Grievant and Hatfield is summarized from the testimony at Level II. The record contains no written documentation of Grievant's and Hatfield's coaching experience.*

Footnote: 5 *Blackwell's 1998 testimony does not indicate whether interviews were part of the selection process.*

Footnote: 6 *It is noted that community support is not one of the criteria listed by Blackwell in his 1998 testimony.*