ALLEN HALLEY,

Grievant,

v. **Docket No. 00-03-329**

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Allen Halley, filed this grievance against the Boone County Board of Education ("BBOE") when he was not selected for a posted coaching position. The statement of grievance reads:

> Violation of WV Code 18A-4-16. Board acted in an arbitrary and capricious manner when filling the assistant football coaches' [sic] position at Scott High School. Grievant is certified and clearly the most qualified.

As relief Grievant sought to be placed in the assistant football coach position at Scott High School, back pay, benefits, and interest. (See footnote 1)

Grievant argued a violation of W. Va. Code §§ 18A-4-16 and 18A-3-2, and Secondary School Activities Commission Rules occurred when he was not hired into a posted assistant football coaching position at Scott High School. He argued the circumstances surrounding the hiring were suspect in that his first application disappeared, and then BBOE should have made the hiring decision on May 30, rather than waiting until July 3, 2000, to fill the position. He argued it was unnecessary to interview him, as he was the only qualified applicant, based upon his teaching certification, and should have received the position for this reason. Finally, he argued BBOE acted in an arbitrary and capricious manner, filling the position with someone who did not hold the certification required by the posting.

BBOE denied that it acted in an arbitrary and capricious manner, pointing out that it conducted interviews, considered qualifications, and made its hiring decision based upon the results of the

interview and qualifications. It argued that, if Grievant's first application was lost, it had no effect on the hiring decision, and if there was a delay in filling the position, the remedy would have been a mandamus action to require that the position be filled, and any delay had no relevance to the selection process.

The following Findings of Fact are made from the evidence presented at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by BBOE as a physical education teacher at Madison Middle School. He has a Bachelor's degree in physical education, a Master's degree in leadership studies, and is certified in physical education, general science, and leadership studies. He has been teaching for 13 years. He was head freshman football coach at Scott High School for five years, served as a volunteer assistant football coach at Scott High School for two years, was head basketball coach at the middle school level for four years, and was an assistant basketball coach at Scott High School for five years. He has attended 10 sports training clinics.

2. On May 17, 2000, BBOE posted an assistant varsity football coach position at Scott High School. The deadline for applications was May 25, 2000. The posting listed the qualifications as "[m]ust hold a valid West Virginia Teaching Certificate." It then noted, "[i]f someone other than a certified teacher applies for this position and is awarded the position, the person must attend training session(s) at their own expense."

3. Grievant submitted a bid sheet for the assistant varsity football coach position, and for a head coach position at a middle school on the same day, handing them to Barbara Stone.

4. Grievant attended the May 30, 2000 BBOE meeting, expecting that the Board would fill the assistant varsity football coach position. He spoke with Board member Letha Dent, telling her he had applied for the position, and he felt there was pressure to hire a person who did not hold a teaching certificate.

5. At the May 30, 2000 BBOE meeting, Superintendent Gary Sumpter handed the Board members a written recommendation that Jason Kingery be placed in the assistant varsity football coach position at Scott High School. No one had been interviewed for the position prior to the May 30 meeting. Grievant was not listed as an applicant for the position, and Ms. Dent questioned this. BBOE did not fill the position at that meeting because Grievant's name was not among the

applicants. Grievant's bid sheet was not found, but he was allowed to complete another bid sheet and submit it. His bid sheet for the other position he had applied for was not lost.

6. BBOE met again on June 19, 2000. Filling the assistant varsity football coach position at Scott High School was not on the agenda. Ms. Dent ended her service as a BBOE member on June 30, 2000. Ms. Dent believed Grievant should have received the position based upon his teaching certificate and his experience.

7. Four persons other than Grievant applied for the assistant varsity football coach position, including Mr. Kingery.

8. An interview committee was appointed by BBOE Superintendent Gary Sumpter. The members of the committee were Jim Booth, the Scott High School Principal, and Shane Griffith, the Head Football Coach at Scott High School.

9. Grievant, Mr. Kingery, and a third applicant were interviewed. Grievant was interviewed on June 26, 2000. Grievant submitted a portfolio and resume at the interview which listed all his training and experience. Grievant was asked questions at the interview about his coaching philosophy, procedures, and why he felt he was the most qualified applicant.

10. The four criteria used by the committee were training and experience; interview; coach's recommendation; and principal's recommendation. Grievant had the most training and coaching experience, and both Mr. Griffith and Principal Booth felt that Mr. Kingery gave the best interview.

11. Mr. Griffith was looking for someone who had knowledge of defense to be the defensive line coach. Mr. Griffith had coached with Grievant and Mr. Kingery, and was aware of their abilities. Mr. Griffith felt Mr. Kingery's coaching beliefs were similar to his own, that he instilled discipline in his players, and that he developed tremendous relationships with his players. He believed Mr. Kingery had a more positive attitude than Grievant, and that he had the ability to work with student athletes and others in a more positive way than Grievant. Mr. Griffith told Principal Booth Mr. Kingery was his choice.

12. Mr. Kingery was also Principal Booth's choice. Principal Booth recommended to Richard Adkins, BBOE Personnel Director, that Mr. Kingery be placed in the position.

13. A matrix was completed by Mr. Adkins' secretary, Shirley Hill, using the criteria normally used by BBOE in filling coaching positions. The matrix factors were specialized training related to the position, coaching experience relevant to the position, previous extracurricular evaluations, interview,

and principal recommendation. Each factor was given equal weight. Ms. Hill did not give Grievant credit for specialized training, because Grievant did not submit this information with his application, Ms. Hill did not obtain Grievant's experience and training from his personnel file, and the interview committee did not give Mr. Adkins the portfolio and resume Grievant had provided to them at the interview.

14. Had Mr. Adkins been provided with Grievant's experience and training, Grievant would have received credit for coaching experience, specialized training, and evaluations. However, Mr. Kingery would also have received credit for evaluations, for specialized training, based upon his West Virginia Secondary School Activities Commission ("SSAC") training, for the best interview, and for the principal's recommendation. Mr. Kingery would have received four "checks" to Grievant's three.

15. BBOE filled the assistant varsity football coach position at the July 3, 2000 meeting, selecting Mr. Kingery for the position.

16. Mr. Kingery is a substitute teacher, and holds a first class permit for substitute teaching, option IV. He has a Bachelor of Science degree, which he obtained in May of 1998. He has been employed by BBOE as a substitute teacher since the fall of 1998. He has been the freshman basketball coach at Scott High School for two years, he was a volunteer football coach at Scott High School for two years, and he was a volunteer football coach at University High School one year. He completed SSAC training to become certified as a coach in the spring of 2000. He attended one coaching clinic in Pittsburgh in February 1999.

DISCUSSION

Grievant bears the burden of proving the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). Coaching positions are professional extracurricular assignments. In a grievance challenging the selection process used for a coaching position, the provisions of W. Va. Code § 18A-4-7a are not applicable. Hall v. Mingo County Bd. of Educ. Docket No. 95-29-529 (Mar. 28, 1996); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). The standard of review for filling coaching positions is whether the Board abused its discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Butta v. Wood County Bd. of

Educ., Docket No. 99-54-466 (Dec. 23, 1999); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Smith, supra.

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgement for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is arbitrary and capricious if the body taking the action did not rely on factors that were intended to be considered, 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 first issue is whether a substitute teacher can be hired for a coaching position if a full-time teacher employed by BBOE is an applicant. This question has already been answered in the affirmative by this Grievance Board. In Pettry v. Boone County Board of Education, Docket No. 96-03-150 (September 30, 1996), the Administrative Law Judge concluded:

> the selection of a substitute teacher to fill a coaching position does not violate either a statute or the rules and regulations of the Secondary Schools Activities Commission ("SSAC"). W. Va. Code §18A-3-2a requires that a currently employed, certified, professional educator be hired over another individual. Both Grievant and [the successful applicant] were employed, certified, professional educators. SSAC rules specifically identify a properly certified substitute teacher as an individual who can be selected as a coach. SSAC Rules; 09§127-3-6.

The undersigned finds no reason to revisit the issue of whether a substitute may be hired into a coaching position over a full-time teacher. The SSAC's rules state at 127 C.S.R. 3 § 6:

> 6.1
> A member of a school faculty, substitute teacher or student teacher within a public, private, or parochial school system shall be allowed to coach an athletic team. Also, an authorized certified individual may coach if he meets all of the requirements in 6.5 of this rule.
>
> 6.2
> A member of a faculty shall be considered one who is a full-time teacher as defined by the West Virginia Department of Education. A member of a faculty in one school may coach in another school provided that it meets with the approval of the said County Board of Education or two different Boards of Education.

6.3

A substitute teacher is defined as a person who has met the licensure requirements as specified by the West Virginia State Board of Education and has been approved as a substitute teacher of that county board of education, private, or parochial school.

. . .

6.5

An authorized certified individual must meet the following requirements:

(a) The coach is employed under a contract with a county board of education which specifies a rate of pay equivalent to the rate for professional educators who accept similar duties as extra duty assignments and which provided [sic] for liability insurance associated with the activity.

(b) The coach has completed approved training: NFICEP Sport Science and Sport First Aid (12 hours of instruction and test).

(c) The authorized certified coach may be contracted to coach only if an employed certified professional educator within the county has not applied for and accepted the coaching position.

(d) Coaching authorizations are for one year. They may be re-issued upon request if a certified professional educator within a county is not available.

The preference in § 6.5(c) is not applicable when a substitute teacher and a full-time teacher are the applicants. It is § 6.1 which is applicable to substitute teachers, and it provides that a substitute may be hired to fill a coaching position. There is no preference for a full-time teacher over a substitute in this regard.

The next issue relates to the language of the posting which required the successful applicant to

hold a “valid West Virginia teaching certificate.” BBOE argued there is no such term of art. W. Va. Code § 18A-3-2a authorizes the State Board of Education to issue “certificates valid in the public schools of the state,” to professional educators. Such certificates would be “valid West Virginia teaching certificates.” Grievant holds a “professional teaching certificate.” Mr. Kingery holds a temporary permit. W. Va. Code § 18A-3-2a also provides authority for the State Board of Education to issue “[o]ther certificates and permits,” in addition to those certificates specifically listed in the statute, “to persons who do not qualify for the professional or paraprofessional certificate.” The statute thus appears to make a distinction between a certificate and a permit. However, W. Va. Code § 18A-2-3, which addresses the employment of substitute teachers, states at the end of subpart (a), “[t]he substitute shall be a duly certified teacher,” thus indicating that one who holds a permit is considered “certified.” Pettry, as quoted above, correctly concluded, consistent with the statutory definitions, that a substitute is a certified, professional educator. The term “professional educator” is defined in Code § 18A-1-1 as “synonymous with and has the same meaning as 'teacher' as defined in [§ 18-1-1].”

It is possible that one could be “certified,” or “licensed,” but not hold a “certificate.” However, W. Va. Code § 18A-3-2 states, “[a]ny professional educator, as defined in article one [§§ 18A-1-1 et seq.] of this chapter, who is employed within the public school system of the state shall hold a valid teaching certificate . . ..” Thus, a substitute is a certified, professional educator, meaning a teacher who holds a valid teaching certificate. The undersigned concludes that inclusion of the requirement that the successful applicant have a valid West Virginia teaching certificate did not eliminate substitute teachers from consideration.

The next issue is whether Grievant has demonstrated that Mr. Kingery's selection was politically motivated, and he received the position as a result of a series of deliberate and well-timed acts. Grievant testified that Mr. Griffith told him he wanted his friend, Mr. Kingery, in the position, and that's who he was going to recommend, and he felt he had the political pull to accomplish this. Mr. Griffith denied making such a statement.

Grievant pointed to the fact that his first application was lost, and that there was no interview before the Superintendent recommended Mr. Kingery to BBOE on May 30, 2000. Neither party produced any evidence which would explain how Grievant's application could have become lost. Such things do become misplaced, regardless of how careful one is. Grievant was allowed to

resubmit his bid, and it was considered. As to there being no interview prior to the May 30 recommendation, again no explanation was offered. While this is curious, it did not harm Grievant, and it does not shed any light on the motivation of those involved.

The final point was that BBOE did not take action until after Ms. Dent had left the Board. Of course, Grievant's interview had not been conducted as of the last BBOE meeting during her tenure, and no recommendation had been made by the interview committee. No evidence was offered as to why the interview was not scheduled until June 26, and no conclusions can be drawn from this.

Regardless of whether Mr. Griffith made the statement attributed to him by Grievant or not, he was not the one who recommended Mr. Kingery to BBOE. Principal Booth recommended Mr. Kingery to Mr. Adkins, and he in turn reviewed the matrix and recommended Mr. Kingery to the Superintendent. Apparently, the Superintendent submitted Mr. Kingery's name to BBOE as his recommendation, and BBOE accepted that recommendation.

Principal Booth testified that he had coached for eight years, and he was familiar with Mr. Kingery's coaching abilities based upon his service as the basketball coach at Scott High School. What has impressed him about Mr. Kingery is that he energetic, enthusiastic, has a good relationship with the student athletes, and he does not wait to be told what to do, but rather comes up with things to be done on his own and then asks if he can do them. Grievant did not suggest that Principal Booth had any political motivation for his views of Mr. Kingery's talents, or that Mr. Griffith had affected Principal Booth's views in any way. Grievant has not proven that Mr. Griffith, or any other person, took any action to make sure that Mr. Kingery was selected.

Grievant did note a flaw in the matrix, in that he was not given credit for his specialized training. However, Mr. Adkins' testimony was that both Grievant and Mr. Kingery would receive credit in this category, which would still put Mr. Kingery ahead of Grievant on the matrix. Grievant presented no evidence that BBOE had in the past given more credit to an applicant with substantially more specialized training than the other applicants. Both Grievant and Mr. Kingery had received the training required by the SSAC. Certainly BBOE was not required to give additional weight to the other training Grievant had received, and the undersigned cannot conclude that it was unreasonable for BBOE to give both Mr. Kingery and Grievant credit for specialized training. Even were Grievant to receive credit in this category and Mr. Kingery's credit in this area removed, it would not entitle Grievant to the position. BBOE was not required to give each category of the matrix equal weight,

and Mr. Kingery could still be chosen over Grievant. See Elkins v. Boone County Bd. of Educ., Docket No. 00-03-209 (Sept. 7, 2000).

No one has suggested that Grievant would not have made a fine assistant football coach. While Grievant clearly had more experience and training than Mr. Kingery, these factors are not determinative in the selection process for a coaching position. Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997). Those responsible for the selection felt that Mr. Kingery was the better choice. Grievant has not demonstrated this decision was made in an arbitrary and capricious manner.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996).

2. "[BBOE] did not violate any statutes, rules, or regulations in filling a coaching position with a substitute teacher instead of a regularly employed teacher." Pettry v. Boone County Bd. of Educ., Docket No. 96-03-150 (Sept. 30, 1996).

3. The requirement of the posting that the successful applicant hold a valid West Virginia teaching certificate did not preclude BBOE from hiring a substitute teacher. A substitute teacher is a professional educator who holds a valid teaching certificate.

4. "The standard of review for filling coaching positions is to assess whether the Board abused its discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Hanlon v. Logan County Bd. of Educ., Docket No. 93-23-502 (Dec. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 95-AA-15 (July 8, 1996); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993)." Butta v. Wood County Bd. of Educ., Docket No. 99-54-466 (Dec. 23, 1999).

5. Generally, an action is considered arbitrary and capricious if the decision maker did not rely on criteria that were intended to be considered, explained or reached the 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 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). 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 board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

6. The selection of Mr. Kingery for the assistant varsity football coach position at Scott High School was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 4, 2001

Footnote: 1

The grievance was filed on August 2, 2000. Grievant's supervisor responded on August 9, 2000, that he had no hiring authority. The grievance proceeded to Level II, where a hearing was held on October 5, 2000. A Level II decision denying the grievance was issued on October 12, 2000. Grievant waived Level III, appealing to Level IV on October 17, 2000. A Level IV hearing was held on November 28, 2000. Grievant was represented by Anita Mitter, and Respondent was represented by Timothy Conaway, Esquire. This grievance became mature for decision on February 5, 2001, upon receipt of the last of the parties' written arguments.