WILLIAM SHOCKEY and

ALCINDA SHOCKEY,

Grievants,

v. **Docket No. 02-39-371**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent,

and

JAMES LIGGETT, Intervenor.

DECISION

___William and Alcinda Shockey ("Grievants") initiated this proceeding on September 26, 2002, challenging their non-selection for soccer coaching positions at Preston High School ("PHS"). The grievance was denied at level one on October 4, 2002. Upon appeal to level two, a hearing was held on October 16, 2002, followed by a decision denying the grievance dated October 22, 2002. Grievants appealed to level three on October 28, 2002, where consideration was waived by Respondent. Grievants appealed to level four on November 12, 2002, and James Liggett, the successful applicant for the positions in question, was granted permission to intervene at level four. A hearing was held in the Grievance Board's office in Westover, West Virginia, on March 17, 2002. Grievants were represented by counsel, Bader C. Giggenbach; Intervenor was represented by Don Craft, WVEA representative; and the Preston County Board of Education ("PCBOE") was represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 1, 2003. The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed by PCBOE as substitute teachers. They also held the extracurricular assignments for coaching boys' and girls' soccer at PHS from July 1999 through June of 2002. Grievants held these positions pursuant to one-year contracts for each school year.

2. On June 14, 2002, the head boys' and girls' soccer coaching positions at PHS were posted for the upcoming 2002-2003 school year.

3. Grievants timely applied for the coaching positions.

4. The position was not filled pursuant to the June posting for reasons not reflected in the record. It was reposted on July 10, 2002.

5. Pursuant to the second posting, Grievants again applied, along with Intervenor Liggett.

6. In addition to three years of coaching soccer at PHS, Grievants had previously coached soccer for various age levels for approximately 12 years in Ohio and Indiana. They had also coached high school aged youth in a Preston County soccer league for two years. Grievants have certificates from the West Virginia Soccer Association (State Course for Soccer Coaching) and the National Soccer Coaches Association of America. 7. Grievants' evaluations as coaches in 2001 were exemplary, the highest rating on the evaluation scale. However, it was noted on their evaluations that the program was “in the red” and that Grievants needed to follow a budget. (See footnote 1)

8. Intervenor has been employed by Respondent as a classroom teacher for approximately 27 years. He coached basketball in local leagues for fifteen years. He became a certified soccer official in 2001. Intervenor had never previously coached soccer and had no soccer coaching certificates.

9. Edna Rothwell became principal of PHS in November of 2001.

10. In a letter to Grievant Alcinda Shockey dated July 3, 2002, Ms. Rothwell requested that Grievants provide financial, fundraising, and booster records by July 12, 2002. Ms. Rothwell stated in this letter that she would be “unable to recommend [Grievant] as . . . Soccer Coach for the school term 2002-2003 unless all state, county and school financial and athletic procedures are being followed and the required documentation is submitted by July 12, 2002.”

11. The July 3, 2002, letter to Mrs. Shockey was postmarked July 10, 2002.

12. Upon receipt of the letter on July 11, 2002, Mrs. Shockey immediately phoned Ms. Rothwell and scheduled a meeting for the following day. She also submitted a letter to Ms. Rothwell (dated July 11, 2002), explaining that Grievants were not members of the booster organization and that the individual responsible for the financial records would be unavailable for the meeting on July

12, due to her father's funeral. 13. By July 18, 2002, the booster organization had taken care of the negative balance in its bank account, and the requested documentation had been provided to Ms. Rothwell. She assured Grievants that she would have no problem recommending them to be rehired as soccer coaches.

14. Ms. Rothwell did not interview the candidates for the coaching positions. She telephoned Intervenor and discussed his qualifications.

15. On August 6, 2002, Ms. Rothwell recommended to the superintendent that Intervenor be hired as the boys' and girls' soccer coach at PHS. (See footnote 2) This recommendation was approved by the Board on August 12, 2002.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

Coaching positions are considered to be extracurricular assignments, which are governed by the provisions of W. Va. Code § 18A-4-16, which sets forth the legal requirements for the employment of persons in these types of positions. In essence, under W. Va. Code § 18A-4-16, the terms and conditions of the extracurricular assignment must be mutually agreed upon by the employer and employee, and formalized by a contract separate from the worker's regular contract of employment. Spillers v. Brooke County Bd.of Educ. Docket No. 95-05-329 (Sept. 18, 1995). See Ramey v. Mingo County Bd. of Educ., Docket No. 93-29-470 (May 12, 1994). However, the statute does not designate how, or under what standard, extracurricular coaching assignments are to be made. Ramey v. Mingo County Bd. of Educ. Docket No. 95-29-483 (Apr. 30, 1996).

This Grievance Board has previously determined that the provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. 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 to assess whether the

Board abused its broad discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993).

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was 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). As a preliminary issue, Respondent contends that Grievants' allegations regarding “non-renewal” of their contracts and consequent violations of W. Va. Code § 18A-2-7 are untimely. (See footnote 3) Because the grievance was not filed until August, and Grievants' positions were initially posted in June, Respondent argues this is untimely, because a grievance must be filed within fifteen days of the occurrence of the event upon which it is based, pursuant to W. Va. Code § 18-29-4(a). However, regardless of whether W. Va. Code § 18A-2-7 was violated, Grievants' allegations that they were entitled to selection for the coaching positions, which were not filled until August 12, 2002, are clearly timely.

In the instant case, Grievants contend that, not only are their qualifications clearly superior to Intervenor's for the positions at issue, but that Principal Rothwell's decision- making process was unquestionably arbitrary and capricious. They point to inconsistencies in Ms. Rothwell's testimony at the level two and level four hearings, and contend that, contrary to her statements, her decision was motivated by improper factors, specifically concerns regarding the booster fund. Throughout this proceeding, Ms. Rothwell has insisted that she simply recommended the “most qualified applicant” for the positions and that the condition of the booster fund played no part in her decision.

Of serious concern is Grievants' contention that Ms. Rothwell's recommendation of Intervenor was based upon a mistake regarding his qualifications, as evidenced by her level two testimony. Grievants are correct in pointing out that Ms. Rothwell insisted--more than once--that Intervenor had “coached soccer” or had “assisted in coaching soccer,”although it is undisputed that he had not. See Level Two

Tr. at 18-23. At level four, however, Ms. Rothwell stated with total certainty that she always knew he was a soccer official with coaching experience, but not in soccer. When confronted by Grievant's counsel with the inconsistency in her level two testimony, Grievant merely reiterated that she always knew Intervenor was only a soccer official and contended that her level two responses were consistent with that statement. Even though she was questioned on this point repeatedly, Ms. Rothwell never explained why she had testified so unequivocally at level two about Intervenor's soccer coaching experience--in fact, she would not admit at level four that she stated, in no uncertain terms, at level two that Intervenor had soccer coaching experience. Only when Respondent's counsel asked some follow-up questions did Ms. Rothwell testify that she was “under pressure” and “having a hard time” answering Grievant's attorney's questions at the level two hearing. However, these were counsel's words, not Ms. Rothwell's.

In addition to the inconsistencies in her testimony regarding Intervenor's coaching experience, Grievants contend that Ms. Rothwell has been less than straightforward regarding whether or not the financial problems of the soccer organization played a part in her recommendation of Intervenor over Grievants. Grievants point to Ms. Rothwell's “threat” in her July letter to Grievant Alcinda Shockey, stating that, if financial records were not provided by a certain date, she would be unable to recommend her as girls' soccer coach. Nevertheless, Ms. Rothwell testified throughout this proceeding that, although she was concerned about the booster fund problems, that played no part in her decision not to recommend Grievants. The inconsistencies in Ms. Rothwell's testimony place her credibility in question. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; (4) attitude toward the action; and 5) admission of untruthfulness. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.; Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47- 192 (Nov. 1, 1999); Jarvis v. W. Va. Dept. of Health and Human Services, Docket No. 97- HHR-318 (July 22, 1999); Burchell v. Bd. of Trustees, Marshall Univ., Docket No. 97-BOT- 011 (Aug. 29, 1997).

Ms. Rothwell was not a credible witness. Her level two testimony was unequivocal, clear, and the

same statement was repeated several times. She stated quite clearly that Intervenor had coached soccer. When confronted with these statements at level four, however, Ms. Rothwell insisted that she knew he had never coached soccer, but that he was a soccer official, and she believed her level two testimony was consistent with that belief. These statements are simply incredible, and it is obvious that Ms. Rothwell did not want to admit that she had either made a mistake at the level two hearing or that she had mistakenly believed Intervenor had soccer coaching experience at the time she recommended him. If Ms. Rothwell had simply admitted to making a mistake in her level two testimony, she could have rehabilitated herself as a credible witness. However, herinsistence that her level two statements, which were totally unequivocal, were consistent with her level four testimony, is simply untrue.

It is apparent that Ms. Rothwell's recommendation of Intervenor for the coaching positions was either based upon mistaken information regarding his qualifications or was motivated by Ms. Rothwell's bias against Grievants, which would likely be due to the booster fund problems. There is no evidence in this case that Grievants were unsuccessful as soccer coaches at PHS during the three years that they held those positions, and their evaluations were outstanding. Therefore, it is impossible for Respondent to justify the selection of a person with basketball coaching experience who had never coached soccer over two individuals who had 15 years of successful soccer coaching experience.

Respondent's contention that Intervenor was the most qualified applicant is not supported by the evidence of record. Moreover, it is clear that Respondent's selection of Intervenor, which was based upon Ms. Rothwell's recommendation, was motivated by factors unrelated to qualifications, was accomplished in an arbitrary and capricious manner, and constituted an abuse of its discretion. Therefore, Grievants should have been selected for the coaching positions for the 2002-2003 school year. Although Grievants are entitled to all applicable back pay and related benefits for that school year, they are not entitled to permanent placement in the positions, since Intervenor was only issued a one- year contract.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their grievance by a

preponderance of the evidence. Procedural Rules of the W. Va. Educ. &State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. A grievance must be filed within fifteen days of the occurrence of the event upon which it is based, pursuant to W. Va. Code § 18-29-4(a).

3. Grievants' claim regarding non-selection for coaching positions at PHS in August of 2002 was timely filed.

4. The standard of review for filling coaching positions is to assess whether the Board abused its broad discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993).

5. A preponderance of the evidence in this case establishes that Respondent's selection of Intervenor for the positions at issue was arbitrary and capricious and constituted an abuse of discretion.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to compensate Grievants for all applicable back pay and associated benefits for the soccer coaching positions at PHS for the 2002-2003 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Preston 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 andState 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.

Date: June 9, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

No other evaluations for Grievants were available.

Footnote: 2

Although it was not explained in any detail during this grievance proceeding, Ms. Rothwell stated that it was decided that Intervenor could coach both teams.

Footnote: 3

Along with the non-renewal issue, Grievants have asserted violations of several other statutes in addition to W. Va. Code § 18A-4-16. Due to the outcome of this grievance, based solely upon the qualifications of the applicants under the arbitrary and capricious standard, it is not necessary to address the applicability of these other statutes.