GRANT DEGARMO,

Grievant,

v. **Docket No. 04-54-062**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grant DeGarmo ("Grievant") challenges his non-selection for the position of Head Girls' Basketball Coach at Parkersburg South High School ("PSHS"). He seeks instatement to the position with back pay. The grievance was initiated at level one on November 3, 2003, and denied by Grievant's immediate supervisor on November 21, 2003. A level two hearing was conducted on January 9, 2004, but a level two decision was not included in the record. (See footnote 1) Grievant appealed to level four on February 12, 2004. In lieu of a level four hearing, the parties agreed to submit this matter for a decision based upon the lower level record, accompanied by fact/law proposals, submitted by February 27, 2004. (See footnote 2) Grievant was represented by WVEA representative Bruce W. Boston, and Respondent was represented by counsel, Dean A. Furner.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Wood County Board of Education ("WCBOE") as a classroom teacher for 25 years.

2. Grievant has 23 years of experience coaching basketball, 15 of which were at the ninth grade level, which is junior high school level in Wood County.

3. Scott Stephens was employed as a "citizen coach" by WCBOE for at least four years, serving as assistant coach for the PSHS girls' basketball team. Also during that time, he had served as head coach for the junior varsity girls' basketball team. Because he was not employed by the Board in any other capacity, he obtained a permit from the State Board of Education to serve as a

coach. Mr. Stephens had played basketball both in high school and college (on an athletic scholarship), and he had coached in youth leagues for approximately fifteen years, along with seven years coaching at Mineral Wells School. All of Mr. Stephens' teams won titles and championships.

4. In June of 2003, Scott Stephens was the assistant girls' coach at PSHS, and he was not employed by WCBOE in any other capacity.

5. In May of 2003, Respondent posted a vacancy for the position of head girls' basketball coach at PSHS.

6. Grievant, Mr. Stephens, Joe Crislip, and Larry Edwards applied for the position in the spring of 2003. (See footnote 3) All of these individuals, except Mr. Stephens, were employed as full-time professional educators by WCBOE at that time. John Flint, Assistant Principal at PSHS, requested that the other applicants withdraw their applications, so that Mr. Stephens could be selected. All but Grievant agreed to do so. Grievant was alsoinformed at this time that Mr. Edwards and Mr. Crislip were more qualified for the position than he was.

7. Mr. Stephens was approved for placement in the position by Board action on May 20, 2003. Subsequently, when it was determined that professional educators are entitled to a coaching position over non-employees, Mr. Stephens' appointment was rescinded on June 10, 2003.

8. Pursuant to an agreement reached between Grievant's representative and the principal of PSHS, it was agreed that the position should be reposted at the beginning of the 2003-2004 school year, in order to get a wider pool of applicants.

9. The coaching position was posted again on October 3, 2003. There were six applicants for the position, including Grievant, Mr. Stephens, Mr. Crislip, Larry Edwards, and two other individuals who were employed as full-time professional personnel by WCBOE.

10. Mr. Stephens received a long-term substitute permit as a classroom teacher, effective October 15, 2003.

11. After interviews with the applicants, Mr. Stephens was recommended and hired by the Board for the coaching position. Mr. Stephens was the only applicant who had prepared issues he wanted to discuss during the interviews, and he provided several written recommendations for the position. Also during the interviews, Mr. Stephens displayed the greatest working knowledge of basketball, through answers to questions and diagrams on a chalkboard. Grievant was ranked as the fifth choice of the six applicants.

Discussion

In a non-selection grievance, Grievant bears the burden of proving, by apreponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code § 18-29-6. "The grievance procedure . . . allows for an analysis of legal sufficiency of the selection process at the time it occurred." Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

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).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and an administrative law judge may not substitute her

judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). An action is arbitrary or capricious if it does not rely on factors intended to be considered, entirely ignores important aspects of the problem, is explained in a manner contrary to the evidence before the board of education, or is a decision 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).

Clearly, as to Respondent's decision to not fill the position in June of 2003, Grievant has no valid claim to contest that decision. First, his representative agreed that no grievance would be filed, if the position were reposted at the beginning of the following school year, an agreement which is binding upon Grievant. Second, it has been previously held by this Grievance Board that county boards of education are permitted to repost position vacancies. See Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-009 (Mar. 24, 1998); Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990); Fulk v. Monongalia County Bd.of Educ., Docket No. 94-30-616 (Mar. 30, 1995). Grievant's further contends that the Board erred in hiring Mr. Stephens in October, because at that time he held only a substitute permit, while the other applicants held valid teaching certificates. This issue has been addressed at least twice by this Grievance Board, and it has been concluded that substitutes can, indeed, by hired over full-time teachers for coaching positions. Halley v. Boone County Bd. of Educ., Docket No. 00-03- 329 (Apr. 4, 2001); Pettry v. Boone County Bd. of Educ., Docket No. 96-03-150 (Sept. 30, 1996). Although W. Va. Code § 18A-3-2a requires that a currently employed, certified professional educator be hired for coaching positions over other individuals, no violation of this statute occurs when a substitute is hired over a full-time teacher. Halley, supra; Pettry, supra. While Grievant argues that Mr. Stephens' “permit” is not equivalent to a valid “teaching certificate,” in Petry, supra, it was determined that a substitute is a “certified professional educator,” because one cannot hold a substitute permit without being a “duly certified teacher,” pursuant to W. Va. Code § 18A-2-3. Therefore, Grievant's allegation that he had any preference in hiring over Mr. Stephens in October of 2003, based upon the provisions of W. Va. Code § 18A-3-2a, is incorrect.

Grievant also believes that, pursuant to W. Va. Code § 18A-4-7a, Respondent was required to post the position within 20 days of it becoming “vacant” in June of 2003, pursuant to the posting provisions of W. Va. Code § 18A-4-7a. Although extracurricular coaching positions need not be filled pursuant to the requirements of that statute, they have been found by this Grievance Board to be

subject to the posting requirements of W. Va. Code § 18A-4-7a. Jarrell v. Raleigh County Bd. of Educ., Docket No. 90-45-155 (Aug. 22, 1990); Friend v. Nicholas County Bd. of Educ., Docket No. 34-87-286-4 (Jan. 19, 1988). See also Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11,1995). However, of importance in the instant case is that the chief reason that the position was not posted upon rescission of Mr. Stephens' hiring was an agreement between Grievant's representative and the school principal, who agreed that a wider pool of applicants could be obtained if the position were posted in the fall. While Grievant contends that the position should have been posted as soon as school began in August of 2003, and that the Board thus violated the requirement that positions be posted “within twenty working days of the position opening,” pursuant to W. Va. Code § 18A-4-7a, this alleged “violation” occurred well before October of 2003. In fact, it occurred in June of 2003 when the position was “vacated by Board action,” in Grievant's words, and the position was not posted within twenty days. However, the reason the position was not posted at that time was due in part to an agreement with Grievant. A party simply cannot acquiesce to, or be the source of, an error or misunderstanding during proceedings before a tribunal, and then complain of that error at a later date. Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). See, e.g., State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996).

Moreover, since the undisputed evidence was that Grievant was the fifth choice of the six candidates in October of 2003, even if he had prevailed upon his claims, he would not be entitled to placement in the position. It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon, supra. Here, it is clear that Respondent acted in the best interest of the students, hiring an extraordinarily qualified coach who had fours of successful experience with thisparticular team, and there has been no abuse of the Board's broad discretion in this matter.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another

applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code § 18-29-6.

2. There is no statutory or case law which prohibits a county board from reposting a vacancy. See Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-009 (Mar. 24, 1998);Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990); Fulk v. Monongalia County Bd. of Educ., Docket No. 94-30-616 (Mar. 30, 1995).

3. 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).

4. A board of education does not violate W. Va. Code § 18A-3-2a when it hires a substitute teacher over a regularly employed teacher to fill a coaching position. Halley v. Boone County Bd. of Educ., Docket No. 00-03-329 (Apr. 4, 2001); Pettry v. Boone County Bd. of Educ., Docket No. 96-03-150 (Sept. 30, 1996). 5. Extracurricular coaching positions are subject to the posting requirements of W. Va. Code § 18A-4-7a. Jarrell v. Raleigh County Bd. of Educ., Docket No. 90-45-155 (Aug. 22, 1990); Friend v. Nicholas County Bd. of Educ., Docket No. 34-87-286-4 (Jan. 19, 1988). See also Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995).

6. A party simply cannot acquiesce to, or be the source of, an error or misunderstanding during proceedings before a tribunal, and then complain of that error at a later date. Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). See, e.g., State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996).

7. Grievant has failed to prove by a preponderance of the evidence that the hiring of Scott Stephens for the coaching position at issue was arbitrary and capricious, an abuse of discretion, or a violation of any statute.

Accordingly, this grievance is **DENIED**.

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

Date: March 19, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Obviously, the grievance was denied at that level.

Footnote: 2

This grievance was assigned to the undersigned administrative law judge for decision on March 10, 2004.

Footnote: 3

The record does not reflect if there were other applicants at that time.