GUSTA ARRINGTON,

Grievant,

v. Docket No. 04-18-365

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

and

STEPHEN COGAR,

Intervenor.

D E C I S I O N

Grievant Gusta Arrington is employed as a teacher by the Jackson County Board of Education ("JCBOE"). Her Statement of Grievance alleges, "Violation of W. Va. Code § 18A-4-7a hiring of coaching position," and the relief sought is to be "[p]laced in the coaching position." (See footnote 1) The Statement of Grievance has changed over the course of the grievance without objection from Respondent. Intervenor Stephen Cogar, the successful applicant, asked to intervene, and this request was granted. Grievant now asserts Mr. Cogar was improperly considered and hired for the position, and JCBOE acted improperly at the board meeting that rejected Superintendent Ronald Ray's recommendation.

The grievance was denied at Levels I and II (See footnote 2), and Level III was bypassed. Grievant appealed to Level IV on October 6, 2004, and a Level IV hearing was held on January 11,2005. This case became mature for decision on February 8, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Grievant asserts Intervenor's obtaining a long-term substitute permit was a "scam" to allow him to obtain the soccer coaching position. To support her argument, Grievant notes

Intervenor has only substituted one day and does not intend to substitute again. Further, Grievant avers she is more qualified for the position. Additionally, Grievant asserts the actions of JCBOE were violative of her due process rights. This grievance was filed before the second posting for the position, and actions after that time are not the subject of this grievance.

Respondent avers Intervenor was the best qualified applicant for the position, and was selected through a proper process. Because of the outcome of the Decision, the qualifications of the applicants will not be discussed.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. The only issue that will be addressed is whether Intervenor was a certified, professional teacher meeting the requirements of W. Va. Code § 18A-3-2a, and whether he could be considered equal to Grievant during the selection process. (See footnote 4)

Findings of Fact

1. Grievant is a certified professional employee currently serving as a foreign language teacher at Ravenswood High School. She has been employed by JCBOE for seventeen years.

2. On April 20, 2004, Intervenor was employed as a long-term substitute teacher for the 2004-2005 school year. (See footnote 5) **(This fact is contrary to the testimony of both Intervenor and Assistant Superintendent Delores Ransom, who indicated Intervenor was hired as a substitute teacher in March.)**

3. Intervenor was employed as a long-term substitute teaching under a permit pursuant to W. Va. Code §§ 18A-3-2a and 126 C.S.R. 136 § 11.6.3. A "long-term substitute" does not have to meet the same standards and qualifications as a professional certified teacher, but is required to have a bachelor's degree and 18 hours of training, as well as a minimum GPA of 2.0 and a background check. See § 11.6.3. A long-term substitute is defined at § 4.39 as "[a] licensed educator who temporarily replaces, for more than 30 consecutive instructional days, the person assigned to an educator position."

4. Intervenor does not have certification to teach, he has a substitute permit that must be renewed every three years.

5. Intervenor is not and has never been employed in the type of long-term substitute

position described in Finding of Fact 3. 6. Intervenor is a lawyer and businessman. Intervenor substituted one day during the 2004-2005 school year, did not like it, and does not intend to serve another day as a substitute teacher.

7. Three days after Intervenor was hired as a long-term substitute, on April 23, 2005, the position of Head Boys Soccer Coach was posted for Ravenswood High School.

8. Grievant, Intervenor, and Rick Wolfe, a citizen coach applied. Mr. Wolfe was the Head Coach for the 2003-2004 school year. Intervenor served as his Assistant as a citizen coach. A citizen coach is an individual who is not a certified teacher, but has met the necessary requirements as outlined in W. Va. Code § 18A-3-2a.

9. It is the standard practice within the Jackson County school system for the principal of the school to give his recommendations for coaches to the superintendent after conducting interviews. No interviews were conducted, but Ravenswood High School Principal Kent Kennedy recommended Intervenor for the position. He did talk briefly to Grievant to tell her she was not selected for the position, and Intervenor was. When asked for reasons, Principal Kennedy did not give any.

10. Superintendent Ronald Ray discussed Principal Kennedy's recommendation with him, as he did not believe Intervenor was the most qualified applicant because of his limited experience at the high school/varsity level. Superintendent Ray also noted Intervenor was not a full-time employee, Grievant had coached for many years as a Head Coach at the varsity level, and Intervenor had only one year of experience at the varsity level, and that was as an assistant. 11. Grievant complained to Superintendent Ray about Principal Kennedy's recommendation and informed him she would file a grievance if she did not receive the position.

12. Grievant did not attend the board meeting where she was recommended, but several parents did and talked to JCBOE in "executive session." During this "executive session," JCBOE did not engage in an independent review of the applicants and did not ask Superintendent Ray why he had recommended Grievant.

13. Once out of this "executive session," JCBOE voted to reject Superintendent Ray's recommendation 5-0. JCBOE did not ask for another recommendation from Superintendent Ray.

14. Because the position was still to be filled, Superintendent Ray directed that the position be reposted and told Principal Kennedy to interview the applicants.

15. Principal Kennedy formed an Interview Committee which included some people with whom Grievant had had disagreements in the past. Grievant specifically asked Principal Kennedy to replace one member of the Interview Committee. He refused. This Interview Committee had people from the community as voting members.

16. The Interview Committee unanimously recommended Intervenor for the position, and when this recommendation was put before JCBOE, it was accepted 5-0.

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 § 4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowellCounty Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

The key issue to address is if Intervenor should have even been considered for the position. W. Va. Code §18A-3-2a discussed the authority of a state superintendent to issue various certificates. This Code Section discusses professional teaching certificates and the requirements for receiving them. Other certificates and permits are covered at W. Va. Code § 18A-3-2a(4), which states:

> **Other certificates and permits may be issued, subject to the approval of the state board, to persons who do not qualify for the professional or paraprofessional certificate. Such certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation, unless the state board declares certain of these certificates to be the equivalent of the professional certificate.**
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> **Within the category of other certificates and permits, the state superintendent may issue certificates for persons to serve in the public schools as athletic coaches or other extracurricular activities coaches whose duties may include the supervision of students, subject to the following limitations:**

> **(A) Such person shall be employed under a contract with the county board of education which specifies the duties to be performed, which specifies a rate of pay equivalent to the rate of pay for professional educators in the district who accept similar duties as extra duty assignments and which provides for liability insurance associated with the activity: Provided, That such persons shall not be considered employees of the board for salary and benefit purposes other than as specified in the contract;**
>
> **(B) a currently employed certified professional educator has not applied for the position; and**
>
> **(C) such person completes an orientation program designed and approved in accordance with state board rules which shall be adopted no later than the first day of January, one thousand nine hundred ninety-one.**

(All emphasis added).

As clearly stated by this Code Section, an individual employed on a teaching permit cannot be considered for a coaching position if a "certified professional educator has applied for the position." Because Intervenor is employed as a long-term substitute on a permit, and Grievant is a "certified professional educator," Intervenor cannot be hired to fill the position.

Respondent cites Pettry v. Boone County Board of Education, Docket No. 96-03- 150 (Sept. 30, 1996), as support for its position that a substitute can be hired over a full- time employee. Pettry did indeed allow the board of education to hire a substitute over a full-time employee, but there the similarity ends. The successful applicant in that case was a "certified professional educator" currently employed and functioning as a substitute teacher. (See footnote 6) **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.**

Respondent also cited to Halley v. Boone County Board of Education, Docket No. 00-03-329 (Apr. 4, 2001), which allowed a permitted teacher to receive a coaching position over a certified, professional teacher. As noted by the Respondent, this Decision was reversed by the Kanawha County Circuit Court, Civil Action No. 01-AA-58, on January 10, 2003, for the same reasoning identified here and discussed in Pettry. Accordingly, Halley and any cases dealing

with that outcome are specifically overruled. Since Intervenor was not a "certified professional educator" and Grievant was, JCBOE violated the statute by selecting him to fill this coaching position.

Further, the undersigned Administrative Law Judge would be remiss if she did not address, the so called "executive session." Pursuant to W. Va. Code § 6-9A-2, an executive session is defined as "any meeting or a part of a meeting of a governing body which is closed to the public." (Emphasis added). While it is certainty appropriate and within the confines of the statue to have a closed, executive session to discuss personnel matters and to conduct investigations, these discussions should not include parents whose apparent purpose is to influence JCBOE's decision, while Grievant does not know what is said and is given no opportunity to respond. It is clear there was no investigation done by JCBOE, as they did not review the applications or asked Superintendent Ray why he made his recommendation. W. Va. Code § 6-9A-4(b)(2)(A).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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 § 4.21 (2004); 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). 2. Pursuant to W. Va. Code § 18 A-3-2a(4) the West Virginia State Department of Education may issue teaching permits to those individual who meet the requirement. These "certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation. . . ."

3. An employee possessing a teaching permit cannot receive a coaching position over "a currently employed certified professional educator" who has applied for the position. W.

Va. Code § 18A-3-2a.

4. All executive sessions must be closed to the public. JCBOE violated W. Va. Code §§ 6-9A-2 & 4 when it allowed multiple parents to attend an executive session.

Accordingly, this grievance is GRANTED, and Respondent is ORDERED to place Grievant into the Boys Head Soccer Coach position immediately, and she is to receive back pay with any attendant interest. The undersigned Administrative Law Judge recognizes that it is typical to remand this type of issue for selection purposes, but because of the many errors on the part of JCBOE during this grievance and because there was only one qualified applicant, this will not be done in this case.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jackson 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 29, 2005

Footnote: 1

This Code Section does not apply to the selection of coaches.

Footnote: 2

After reading the Level II transcript, it appears JCBOE was unduly restrictive in allowing Grievant to present her case at Level II. Additionally, contrary to the opinions of the parties, discussions held in executive session may be examined at hearing, if they are pertinent to the grievance.

Footnote: 3

Grievant was represented by Anita Mitter from the West Virginia Education Association, Intervenor represented himself, and Respondent was represented by Howard Seufer, Esq., of Bowles Rice McDavid Graff and Love.

Footnote: 4

The issue of inappropriate community input will not be addressed, but the parties are referred to Milam v. Kanawha County Board of Education, Docket No. 20-87-270-1 (May 2, 1988)(Grievance Board's initial case on community input into board selections) and Cromley v. Mason County Board of Education, 94-26-573 (Apr. 14, 1995)(inappropriatecommunity input into coaching selection).

Footnote: 5

The Level IV testimony given by Assistant Superintendent Ransom concerning the dates when various actions occurred was incorrect, and it will be ignored.

Footnote: 6

The Decision issued in Shockey v. Preston County Board of Education, Docket No. 04-39-045 (July 26, 2004), discusses in detail a variety of the issues raised in this grievance.