MICHAEL ORLANDO,

Grievant,

v. Docket No. 05-15-154

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Michael Orlando ("Grievant"), employed by the Hancock County Board of Education ("HCBE") as a teacher, filed a level one grievance on February 28, 2005, challenging his nonselection for a coaching position. For relief, Grievant requests placement as head football coach at Weir High School, lost wages and benefits. The grievance was denied at levels one and two. Grievant waived consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and the grievance was appealed to level four on May 10, 2005. An evidentiary hearing was scheduled in the Grievance Board's Wheeling office on August 11, 2005; however, prior to going on the record, the parties agreed to submit the grievance for decision based on the lower-level record. Proposed findings of fact were submitted by Grievant's WVEA representative, Owens Brown, on September 21, 2005, and by letter dated September 26, 2005, HCBE counsel, William Fahey, advised that it would stand on the proposals filed at level two.

The following facts essential to this case are undisputed, and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by HCBE as a teacher for six years, and has been assigned to Weirton Middle School ("WMS") at all times pertinent to this grievance.

2. In December 2004, HCBE posted a vacancy notice for the position of Head Football Coach and Physical Fitness I, at Weir High School ("WHS") for the 2005-2006 school year. (See footnote 1) **A West Virginia teaching certificate or coaching authorization was required.**

3. A search committee reviewed the seven applicants' resumes and qualifications,

conducted interviews, and checked references.

4. Grievant was the only HCBE employee to apply for the position. Grievant served as Assistant Football Coach at Weir High School during the 2004-2005 school year. His next most recent coaching assignment was as an assistant at WHS, from 1974-1979. Grievant indicated on his application that he had played football in college and professionally. No additional information was provided as to the years he played, or for which professional team he was affiliated.

5. The successful applicant, Eric Meek, has been employed as a teacher and head high school football coach in Ohio for ten years. Mr. Meek has also served as graduate assistant coach at Youngstown State University (1990-1992), and Assistant Coach at Robert Morris University (2003-2004). His references included the head football coaches at Ohio State University, Youngstown State University, Robert Morris University,and the University of Cincinnati. Mr. Meeks' application for a West Virginia teaching certification, filed on January 20, 2005, was approved.

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 § 4.21 (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'tof Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

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. 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). 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 CountyBd. 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 theDeaf 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). Each coaching position will be discussed separately. In this case, Grievant argues that because Mr. Meeks did not have West Virginia certification, and was not an employee, he was entitled to the position under the provisions of HCBE Policy GCA, which states in part:

All Coaching positions will be approved in the following order:

a. Professional employees (including substitutes) with valid West Virginia Teaching Certificates

b. Non-board employee with valid West Virginia Teaching Certificate

c. All other applicants based on qualifications.

HCBE asserts that it hired the most qualified applicant, and relied upon advice of counsel that only certification, not West Virginia certification, was all that was required by statute. That statute, W. Va. Code § 18A-3-2a(4) states, in part: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: . . . (B) a currently

employed certified professional educator has not applied for the position . . . .

While it is accurate that the above-cited provision requires only certification, and not West Virginia certification in particular, HCBE's reliance on that particular fact is erroneous. In Hanlon v. Logan County Board of Education, 201 W. Va. 304, 496 S.E.2d 447 (1997), the West Virginia Supreme Court of Appeals noted that this statute, which is often utilized to issue certificates to so-called "citizen coaches," only applies to individuals who do not possess valid teaching certificates, regardless of whether or not they are currently employed by a county board of education. See Shockey and Shockey v. Preston County Bd. of Educ., Docket No. 04-39-045 (July 26,2004). Because Mr. Meeks was a certified professional in Ohio, and subsequently applied for and received West Virginia certification, the portion of W. Va. Code § 18A-3-2a which provides for the issuance of a special coaching certificate did not apply.

The appointment of Mr. Meeks was improper under both HCBE Policy and W. Va. Code § 18A-3-2a, because a current employee applied for the position. Mr. Meeks was never employed by HCBE as a teacher. Although Mr. Meeks appears to have been the more qualified applicant, as a currently-employed, full-time educator, Grievant was entitled to the position. HCBE acted in an arbitrary and capricious manner when it failed to fill the position of head coach with a currently employed professional applicant.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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. 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. 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).

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. Grievant has proven that HCBE acted in an arbitrary and capricious manner when it failed to fill the position of head football coach with a currently employed professional employee. Accordingly, the grievance is GRANTED, and HCBE Ordered to instate Grievant into the position, effective the 2005-2006 school year, and to compensate him for all lost wages and benefits.

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

DATE: OCTOBER 31, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.The Physical Fitness I position was described by Principal Martin Hudek as a conditioning instructor for the team. The effective date for this portion of the position was January 2005.