WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RANDALL WRIGHT,
Grievant,

v. **Docket No. 07-33-318**

MCDOWELL COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant is a teacher employed by the McDowell County Board of Education ("MCBOE") at Mount View Middle/High School. Grievant filed this grievance on April 30, 2007. His statement of Grievance reads:

> Grievant claims that a non fully certified employee is the current Mt. View High School boys [sic] basketball coach and that the position should be reposted every year to allow fully certified employees an opportunity to apply for said position.
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> RELIEF SOUGHT: Grievant seeks the position in question to be reposted and filled before the next sport season.

The grievance was denied at Levels I and II, and Level III was bypassed. Grievant appealed to Level IV on June 11, 2007. The parties submitted the case for decision on the lower level record. Grievant was represented by Sidney Fragale from American Teachers Federation - West Virginia, and MCBOE was represented by Kathryn Reed Bayless, Esq. This case became mature for decision on July 20, 2007, the date the proposed findings of fact and conclusions of law were due. For administrative reasons, the matter was reassigned to the undersigned on October 26, 2007.

Synopsis

Grievant asserts that the position of Head Basketball Coach should be posted for the upcoming season because the position is currently held by an employee that is not a certified professional educator. Grievant seeks the opportunity to apply for the coaching position, and advocates the position be posted so a certified professional educator can apply for the position.

Respondent asserts that the current coach is licensed to teach and is currently teaching. Therefore, there is no legal basis to compel the MCBOE to post the coaching position held by the current coach. The undersigned disagrees.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is a professional educator currently employed as a teacher by the Respondent. The limited record of this case does not indicate how many years Grievant has been employed.

2. Kenneth W. Brown was hired as the boys' head basketball coach at Mount View Middle/High School on June 14, 2004.[1] Mr. Brown is a substitute for MCBOE, who works on a permit.

3. Mr. Brown does not hold a certification to teach.

4. MCBOE has not posted the coaching position since it was filled by Mr. Brown in 2004.

5. Grievant was not an applicant for the coaching position in 2004. Grievant did

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[1]The record of this case does not indicate if the job was posted prior to the hiring of Mr. Brown.

indicate at Level II that he seeks posting of the coaching position so that he may have an opportunity to apply for the position.

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't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).[2]

Within the context of the issue of posting the position in question, distinctions are made between a professional educator and an educator that is teaching pursuant to a permit. Therefore, the following definitions are relevant to this grievance and provide a framework to the issue. Pursuant to W. VA. CODE § 18A-1-1, a classroom teacher is a professional educator who has met the certification or licensing requirements of this State

[2]In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. VA. CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See* Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

and who has a "direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity."

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 and is not 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."

The only issue presented is whether or not the boys' head basketball coaching position at Mount View should be posted. This issue was presented to the State Superintendent and was answered by an Opinion letter dated June 2, 2003, which states, in pertinent part:

> [C]oaching positions held by individuals who are not currently employed certified professional educators should be posted every year. In implementing the provisions of West Virginia Code § 18A-3-2a(4), West Virginia Board of Education Policy 5202 . . . provides that a coaching authorization receives the recommendation of the county superintendent verifying that no currently employed certified professional educator has applied for the position. If the position were not posted on an annual basis, the coaching authorizations of individuals who do not hold teacher licensure could not be renewed because these renewal requirements set in Policy 5202 could not be met.

(Emphasis added).

It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Security Nat'l Bank v. W. Va. Bancorp*, 166 W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language

of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. *See Dyer, supra*; *Edwards v. W. Va. Parkways Dev. And Tourism Auth.*, Docket No. 97-PEDTA-420 (May 7, 1998). *See generally Blankenship, supra*; *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees*, Docket No. 94-MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD- 351 (Feb. 19, 1993).

Thus, Department of Education's ("DOE") interpretation of its policy is entitled to deference by this Grievance Board, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. *Dyer, supra*. In these circumstances, the undersigned must defer to DOE's interpretation of its policy, as Respondent has not demonstrated that such interpretation is clearly wrong. *See Blankenship, supra*. Accordingly, coaching positions held by individuals who are not currently employed certified professional educators should be posted every year.

The State Superintendent Opinion makes reference to West Virginia Code provisions that discuss the authority of a state superintendent to issue various certificates, and the relationship of professional teaching certificates to the filling and posting of coaching positions. Other certificates and permits are covered under 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:
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> (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;
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> (B) a currently employed certified professional educator has not applied for the position; and
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> (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.

(Emphasis added).

As clearly stated by the West Virginia Code, an individual employed on a teaching permit cannot be considered for a coaching position if a "certified professional educator has applied for the position." *Arrington v. Jackson County Bd. of Educ.*, Docket No. 04-18-365 (April 29, 2005).

Mr. Brown was hired to fill the position of head boys' basketball coach in June 2004. Thereafter, the MCBOE did not post the coaching position and effectively eliminated the application of a certified professional educator for the position. While Mr. Brown has held the coaching position since the 2004 school year, the position must now be posted. Of course,

Mr. Brown can apply, and if no certified professional educator applies for the position, he could be selected to fill the position for another school year.

Grievant cites this Board's ruling in *Webb v. Boone County Bd. of Educ.*, Docket No. 06-03-075 (June 30, 2006) as support for his grievance. Respondent asserts distinctions should be made in this case because Mr. Brown is licensed to teach and that license does not expire until June 30, 2009. In *Webb, supra*, the decision of this Board did emphasize that the coach in that case was a citizen coach due to his permit to teach as a substitute having expired prior to the time of the filing of the grievance. However, a citizen coach in comparison to a coach employed pursuant to a temporary permit is a distinction without a difference. While it may be correct that Mr. Brown is not a citizen coach, he is employed on a temporary teaching permit and cannot be considered for a coaching position in the event a certified professional educator applies for that position.[3]

The current boys' head basketball coach at Mount View is not a "certified professional educator" and Grievant is; therefore, MCBOE violated the statute by not posting the position on a yearly basis. The following conclusions of law support this decision:

Conclusions of Law

[3]It is curious to note that the Respondent concedes that while Grievant made no application for the position at the time it was filled; "had he done so, he likely would have been awarded the position because of the statutory preferences which affect the awarding of a coaching position." Respondent's Proposed Findings of Fact and Conclusions of Law, page 3.

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 § 18A-1-1, a classroom teacher is a professional educator who has met the certification or licensing requirements of this State and who has a "direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity."

3. 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 and is not 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. Pursuant to W. VA. CODE § 18A-3-2a(4) the West Virginia State Department of Education may issue teaching permits to those individuals who meet the requirements. These "certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation . . . "

5. Where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. *See Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996).

6. "[C]oaching positions held by individuals who are not currently employed certified professional educators should be posted every year." State Superintendent Opinion dated June 2, 2003.

7. An individual employed on a teaching permit cannot be considered for a coaching position if a "certified professional educator has applied for the position." *Arrington v. Jackson County Bd. of Educ.*, Docket No. 04-18-365 (April 29, 2005).

8. Grievant has met his burden of proof and demonstrated the coaching position at issue must be posted, as it is currently filled by an individual employed on a temporary permit.

Accordingly, this grievance is **GRANTED**. Respondent is directed to post the position at issue and fill it in accordance with the law.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 29-6A-7 (repealed) (*but see* Executive Order No. 2-07, May 8, 2007). 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: November 16, 2007

Ronald L. Reece
Administrative Law Judge