THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAUL MICHAEL JULIO,
Grievant,

v. **Docket No. 2009-0120-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent,

and

MICHAEL WAGNER,
Intervenor.

DECISION

Grievant Paul Michael Julio is employed by the Brooke County Board of Education as a teacher. He filed this grievance on or about July 23, 2008, challenging his non-selection for the position of Assistant Football Coach at Brooke High School. His Statement of Grievance and Relief Sought reads as follows:

> The most qualified applicant for the posted position - Assistant Football Coach at Brooke High School not hired. This applicant was not properly informed of new hiring procedures for this vacant coaching position at Brooke High School.
>
> I, as the most qualified applicant for posted position be hired for this position or be given the opportunity to complete the new hiring procedures and have a new interview.

This grievance was denied at level one on August 14, 2008, by Kathy Kidder, Hearing Examiner, Brooke County Schools. An unsuccessful mediation session was conducted on November 5, 2008. Grievant appealed to level three on November 21, 2008. In the interim, this grievance was consolidated with 2009-0254-BroED and assigned a consolidated docket number. The level three hearing was conducted before the undersigned Administrative Law Judge on March 18, 2009, at the Grievance Board's

Westover office. The parties requested that the grievances be severed, and separate decisions be authored. This request was granted by the undersigned and is reflected in an Order entered April 7, 2009. The level three hearing conducted on March 18, 2009, included the introduction of evidence and submission of the lower level record for both grievances. Grievant appeared in person and by his representative, Owens L. Brown, West Virginia Education Association. Respondent appeared by its counsel, David B. Cross, Brooke County Prosecuting Attorney. Intervenor appeared in person and by his representative, Frank Caputo, AFT-WV. This matter became mature for consideration upon receipt of the parties' proposed Findings of Fact and Conclusions of Law on May 1, 2009.

Synopsis

Grievant was not selected for a coaching position although he had greater experience than the person who was selected; however, he failed to show Respondent abused its discretion by placing weight in the selection decision on other factors such as demeanor, interview performance and related education and training. Grievant did not follow the Brooke County Board of Education policy which required him to present a letter of application for the position. Despite his failure to comply with Board policy, the interview committee still considered him for the position and determined that he was not the most qualified candidate for the position. Evidence established that Respondent did not act arbitrarily or capriciously or abuse its broad discretion in hiring Mr. Wagner for the position. This grievance is denied.

After a detailed review of the level one and level three record in this matter, the undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant has been employed as a teacher by the Brooke County Board of Education ("Respondent") for 13 years, and he has served as football coach for 16 years.

2. On May 16, 2008, the Respondent posted a position for an assistant football coach at Brooke High School, for which Grievant and three other employees applied.

3. On June 10, 2008, Grievant and the other applicants were interviewed by a selection committee composed of Tony Shute, School Principal; George Brindley, Assistant Principal, designated to be in charge of athletics; David Cucarese, Athletic Director; Rob Robinson, Assistant Athletic Director; and Dave Reitter, Head Football Coach. These individuals were charged with the responsibility of interviewing applicants for coaching positions during 2008 and making their recommendations to Respondent concerning who should be selected.

4. On January 28, 2008, the Respondent adopted a written policy pertaining to the employment of coaches and assistant coaches. Under the new policy, "Coach selection recommendation shall be based upon information related to the categories covered in the letter of application and other information relevant to the applicant's coaching ability learned about the applicant during interviews with the applicant. Longevity and winning are not the only important considerations in selecting a coach. While a wholly objective selection would result in the selection of the 'winningest' coaches or most 'experienced' coaches, these attributes have been determined by the Board not to be the only important considerations." Other information determined by the Board to be important in selection of the best coaches include:

• Past coach evaluations
• Knowledge of SSAC[1] rules that apply to the sport and student eligibility
• Demonstrated history of compliance with SSAC rules
• Technical knowledge of the sport
• Demonstrated ability to teach fundamental and advanced skills to athletes
• Completion of a college course in coaching theory and techniques
• Demonstrated successful teaching experience, curricular instruction methodology knowledge (necessary for a teaching position)
• Demonstrated successful experience promoting high school athletic programs to the media
• Demonstrated ability to effectively communicate and interact with students, parents, other teachers, athletic and school administrative staff, and booster organizations
• Demonstrated ability to be a positive role model for students and parents
• Evidence of a professional demeanor on and off the field, court, campus, and in the community
• Evidence of emotional stability and self control, with the ability to concentrate when highly emotional conditions prevail
• Evidence of honesty, integrity, and sportsmanship
• Demonstrated ability to motivate and inspire student-athletes and coaches
• Demonstrated skill in working with students and parents in a positive way
• Evidence of attending sports clinics and coaches' conferences and participation in workshops and professional meetings
• Demonstrated commitment to high emphasis on student academic development in addition to physical development

The policy further requires all candidates to submit a timely letter of application that shall

includes:

• Description of any college courses in coaching theory and techniques that were successfully completed by the applicant;

• Description of any sports clinics, coaches' conferences, workshops or professional meetings attended by the applicant;

• Description of any prior service as a student coach or assistant athletic coach in the sport or game to be coached;

• Description of any prior coaching in community youth athletic programs in the sport to be coached;

• Descriptions of all coaching experience at any level and in any sport.

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[1]West Virginia Secondary Schools Activities Commission.

5. Intervenor Michael Wagner timely submitted a letter of application. Grievant did not.

6. Grievant was interviewed by the selection committee in June of 2008. The committee failed to follow the policy established by the Board of Education and followed its former policy of focusing on prior experience as the most significant factor in the selection of an assistant football coach. Grievant was chosen by a four to one margin as the most qualified applicant.

7. Principal Shute advised the members of the interview committee in July of 2008 that it was necessary to follow the policy which had been adopted by the Board of Education in the selection process. She provided a matrix to the committee using the criteria from the policy for employment of coaches and assistants. A subsequent interview process was undertaken, utilizing the criteria required by the Board of Education policy, and Grievant was not selected to be recommended for the assistant football coach position.

8. According to the interviewers, Mr. Wagner out performed Grievant in demonstrated experience working with and fund raising with boosters and athletic groups; ability to be a positive role model; professional demeanor on and off the field and in the community; emotional stability and self-control; honesty, integrity, and sportsmanship.[2]

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[2]The record indicates that Grievant mishandled funds while in the position of track coach with the Respondent. Grievant was not prosecuted for this action, however, he did enter into an agreement with Respondent to make restitution and commit to a one year hiatus from any coaching 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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

At first blush, this would seem a simple case. Respondent hired a teacher with no football coaching experience instead of a teacher with sixteen years of successful football coaching experience. However, county boards of education have substantial discretion in matters relating to the hiring, assignments, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Normally, a board is subject to the provisions of W. VA. CODE § 18A-4-7a when filling a position, but this Grievance Board has determined that section is inapplicable to the selection of professional personnel for extracurricular assignments, such as coaching positions. *DeGamo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19, 2004).

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*, *supra*; *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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). A grievant must therefore prove by a preponderance of the evidence that he would have been hired but for an arbitrary and capricious decision or an abuse of discretion by the board of education.

Respondent has a valid policy in place that dictates how, in the absence of statutory guidance, coaching positions should be filled, and this policy also dictates what information an applicant must submit to be considered. “An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999). Although Grievant argues that he never went through this interview process before when he was hired as a coach, the evidence clearly shows the policy had recently been adopted, and was so new that even

the interview committee was unaware of the changes. Respondent was obligated to follow the procedure it established instead of using the old way of doing things.

Under the old policy, there is no question that Grievant would have been placed in the position. However, the new policy looks beyond base qualifications, and expressly states "longevity and winning are not the only important considerations in selecting a coach." It requires the applicant to invest in the application process by providing details and explanations to support his or her job bid. It requires the selection committee to evaluate the whole applicant. The new process takes into account objective factors such as resume, training, and experience, but also allows for subjective judgment based on interview performance, attitude, reputation, and demeanor.

Grievant asserts that he was not properly informed of new hiring procedures for this vacant coaching position at Brooke High School. The record of this case indicates that Grievant was provided notice of the new hiring policy. Grievant was informed prior to the second interview process of the application letter expectation, and should have known that the policy language was readily available for review. The lower level record establishes that the assistant athletic director at Brooke High School communicated to Grievant that the first round of interviews had been discarded, and that new interviews were to be conducted based on a new questionnaire. In addition, assistant principal, Melissa Komorowski, informed Grievant of the new policy prior to the initial interview in June of 2008. (Level One Hearing transcript p. 60). Accordingly, Grievant has failed to establish that he was not properly informed of the new hiring policy for coaches and assistant coaches at Brooke High School.

Grievant did not complete a letter of application with the required information set out in the policy. The information contained in the letter of application becomes part of the basis for the hiring decision. In this case, given Grievant's coaching experience, the interviewers already knew most of the experience information sought. However, the policy required the applicant to submit the information in writing, and Grievant indisputably did not do this. While Mr. Wagner's application lacked documentation of the type of substantial experience Grievant has gained, Grievant's failure to submit an application resulted in the interview committee lacking important fundamental subjective information to be considered. Unanimously, the interviewers felt that Mr. Wagner far outperformed Grievant in the areas of demonstrated experience working with and fund raising with boosters and athletic groups; ability to be a positive role model; professional demeanor on/off field and in the community; emotional stability and self-control; honesty, integrity, and sportsmanship.[3]

Respondent made a coach selection based on the subjective and objective criteria contained in its coaches' selection policy. All the factors required to be considered by the policy were considered. The evidence does not support Grievant's case that the choice, while seemingly counter intuitive, was arbitrary and capricious or an abuse of discretion.

The following Conclusions of Law support the decision:

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

[3]While not fully developed in the record, all of these assessments have a direct nexus to Grievant's admitted mishandling of money entrusted to him when he was acting as a track coach for Respondent.

of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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. County boards of education have substantial discretion in matters relating to the hiring, assignments, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Normally, a board is subject to the provisions of W. VA. CODE § 18A-4-7a when filling position, but this Grievance Board has determined that section is inapplicable to the selection of professional personnel for extracurricular assignments, such as coaching positions. *DeGamo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19, 2004).

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*, *supra*; *Chaffin v. Wayne County Bd. of Educ.*, Docket No. 92-50-398 (July 27, 1993).

4. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

5. Grievant has not met his burden of proving Respondent's selection of Mr. Wagner for the coaching position in question was arbitrary and capricious or an abuse of discretion.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: June 22, 2009

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Ronald L. Reece
Administrative Law Judge