THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAUL MICHAEL JULIO,
Grievant,

v. **Docket No. 2009-0254-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Paul Michael Julio is employed by the Brooke County Board of Education as a teacher. He filed this grievance on or about August 22, 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:

> 1) The most qualified applicant for the posted position - Assistant Football Coach at Brooke High School was not hired and 2) the Brooke County Board of Education acted in an arbitrary and capricious manner, discriminated against me, and violated WV Code 6C-2-1 and 6C-2-2 in filling this position with another applicant.
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> I, as the most qualified applicant that is supported by the letter of application, be hired for this position - Assistant Football Coach at Brooke High School.

This grievance was denied at level one on September 26, 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 2009-0120-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. 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 also claimed he was discriminated against. Grievant has not met his burden of proving this claim, because he has shown no difference in treatment from similarly situated employees. 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 July 23, 2008, the Respondent posted a position for an assistant football coach at Brooke High School, for which Grievant and one other employee applied.

3. On July 30, 2008, Grievant and the other applicant 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

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[1]West Virginia Secondary Schools Activities Commission.

• 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 include:

• 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.

5. Grievant was interviewed by the selection committee in June of 2008 for the same position. 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 in an interview process involving the applicant that was selected for the position that is the subject of this grievance.

6. 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.

7. According to the interviewers, the successful applicant, Ryan Scherich, 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/off field and in the community; emotional stability and self-control; honesty, integrity, and sportsmanship.[2]

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

[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.

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 little 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 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). 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.

Unanimously, the interviewers felt that the successful applicant, Ryan Scherich, 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] Grievant argues that the new matrix created by Principal Shute is a "blatant attempt to manipulate the selection process against the Grievant."[4] The undersigned disagrees. The evaluations completed on the applicants by the interview committee uniformly followed the criteria set forth in the Respondent's policy and there is no evidence that their rating of the candidate using the matrix questionnaire was unfair in any way or factually inaccurate. 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 somewhat counter intuitive, was arbitrary and capricious or an abuse of discretion.

Grievant also claimed he was discriminated against. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);

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[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.

[4]Grievant's Proposed Findings of Fact and Conclusions of Law, page 2.

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In discussing discrimination claims under the grievance statutes, the West Virginia Supreme Court of Appeals has noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (Aug. 3, 1998). No evidence was offered which supported Grievant's assertion of discrimination. Grievant has not met his burden of proving this claim, because he has shown no difference in treatment related to the selection process. Both he and Mr. Scherich were given the same information about the policy, were subjected to the same policy requirements, and interviewed and evaluated in the same way.

The following Conclusions of Law support this 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 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. Sherich for the coaching position in question was arbitrary and capricious or an abuse of discretion.

6. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant has not proven that he was the victim of discrimination.

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

Ronald L. Reece
Administrative Law Judge