THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN J. PENNACCHIO, JR.
Grievant,

v. **Docket No. 2010-1432-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent, and

JESSICA YARTER,
Intervenor.

DECISION

John J. Pennacchio, Jr. ("Grievant") filed this grievance at level one on May 5, 2010, alleging that he should have been selected for the position of Girls' Soccer Head Coach at Weir High School. The grievance was denied at level one on June 7, 2010, following an evidentiary hearing. Appeal was made to level two and a mediation was conducted on August 16, 2010. Appeal to level three was perfected on August 24, 2010, and a level three hearing was conducted before the undersigned Administrative Law Judge on December 22, 2010, in the Grievance Board's Westover office location. Grievant appeared in person and was represented by Owens L. Brown of the West Virginia Education Association. Respondent was represented by William T. Fahey, Assistant Prosecuting Attorney for Hancock County, West Virginia. Intervenor Jessica Yarter appeared in person and was represented by Cassandra Bradshaw of the West Virginia Education Association. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on January 28, 2011.

Synopsis

Grievant alleged that he should have been selected over the successful applicant for the position of Girls' Soccer Head Coach at Weir High School. An interview committee was appointed to recommend a candidate for the soccer coaching position. After the interviews, the committee recommended the intervenor for the position based upon her qualifications. Grievant claimed that he was more qualified for the position, and that Respondent abused its discretion based upon some comments made by the athletic director. Evidence established that Respondent did not act arbitrarily or capriciously or abuse its broad discretion in hiring Ms. Yarter for the position. This grievance is denied.

After a detailed review of the record in its entirety, the undersigned makes the following findings of fact.

Findings of Fact

1. Grievant has been employed by Respondent as a physical education teacher for the past three years. The previous three years Grievant had worked for Respondent as a long term substitute teacher.

2. Grievant has also been employed as an assistant coach for the Weir High Boys Soccer Team for the past four years.

3. On March 10, 2010, Respondent posted a vacancy for the head coaching position for the Weir High Girls Varsity Soccer Team. The posting set forth the application process, duties, required qualifications, and desired qualifications for the position. Desired qualifications included the following: a broad background of athletic experience and

coaching, demonstrated ability to produce quality athletic teams, a demonstrated ability as a quality classroom teacher, and demonstrated abilities to interact with individuals and groups in motivating school and community interest in the athletic programs.

4. Grievant and the successful applicant, the assistant Weir High Girls' Soccer Team Coach, were the only applicants for the position.

5. A committee was appointed to recommend a candidate for the soccer coaching position. The committee was comprised of Marty Hudek, Principal of Weir High, and Mike Green, Athletic Director of Weir High School.

6. Grievant believed he was the most qualified applicant for the position, and that the selection committee was biased toward him because Mr. Green was part of the selection committee. Prior to the interview, Mr. Green asked Grievant if he would consider rescinding his bid in the context of the then existing soccer coach, who was not employed by Respondent in any other position and was without a professional teaching certificate. Mr. Green also made an aside comment that a female in the position might help with Title IX. The record was not developed on these assertions; however, Principal Hudek indicated that this subject was not discussed, was not considered, and was not a selection factor.

7. During the interview, Principal Hudeck and Athletic Director Green asked the candidates such questions as: why they wanted the position, what were their goals for the program, what their time commitment to the program could be, how they would discipline student athletes, how they felt about weight conditioning, their thoughts on scheduling, and their philosophy on dealing with athletic booster clubs.

8. Intervenor Yarter was recommended for the position, and the Hancock County Board of Education approved her appointment to the extracurricular assignment as head coach for the girls' soccer team at Weir High School.

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).

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.

Ms. Yarter was the first choice of the interview committee based mostly on her experience and background coaching, and playing soccer at the high school level. Ms. Yarter had three years experience as an assistant coach of the team and was familiar with the players. In addition, she was directly involved with the team's two past highly successful seasons. Although it is true that Grievant has more years of coaching experience, it was only an additional year of experience in the sport of soccer. The undersigned does not find that committee's preference for experience in the girls' soccer

program was arbitrary and capricious or evidences an abuse of discretion.[1] Indeed, the Grievance Board has often recognized that it is not arbitrary and capricious for a board to choose a less experienced applicant, so long as the deciding factors were valid considerations. *DeGarmo v. Wood County Bd. of Educ.*, Docket No. 06-54-025 (Mar. 8, 2006); *Wright v. Mason County Bd. of Educ.*, Docket No. 05-26-367 (Jan. 9, 2006).

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 assertion that the choice was arbitrary and capricious or an abuse of discretion.

The following conclusions of law support the decision reached.

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).

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 a filling position, but this

[1]The record established that in her first year as Girls' Soccer Head Coach at Weir High School, Ms. Yarter, led the team to the West Virginia State semi-final tournament game.

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. Grievant has not met his burden of proving Respondent's selection of Ms. Yarter 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: April 27, 2011

_____

Ronald L. Reece
Administrative Law Judge