WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RUBEN C. WRIGHT,
Grievant,

v. **Docket No. 2016-0876-McDED**

MCDOWELL COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Ruben C. Wright, Grievant, employed as a substitute teacher filed this grievance against his employer McDowell County Board of Education ("MCBE" or "Board"), Respondent. The original grievance was filed on or about November 17, 2015. Grievant's statement, among other information, provides that he unsuccessfully applied for two extracurricular coaching assignments. The first of the assignments, which he characterized as his first choice, was as Assistant Girls' Basketball Coach at Mount View High School. The second was as Head Girls' Basketball Coach at Mount View Middle School. The written complaint cites "bias reasoning" as the basis for non-selection and suggests that he may have been denied at least one of the positions because the principal and he do not agree on many things.

W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits. Grievant checked the box on the grievance form for

"Proceed directly to Level 3" and filed his complaint with the Grievance Board. In a Dismissal and Transfer Order dated December 1, 2015, the Grievance Board found that Grievant had not met the requirements to begin a grievance at Level Three. The order dismissed this case from the Level Three docket and transferred it to the Level One docket. Subsequently and upon clarification instructs, the parties were to hold a Level One conference or hearing.

A Level One conference was held on April 25, 2016. The grievance was denied at that level by an April 28, 2016, letter decision signed by the McDowell County School Board Superintendent. Grievant appealed to Level Two on May 16, 2016. A mediation session was held on July 19, 2016. Grievant appealed to Level Three on July 26, 2016. A Level Three hearing was held before the undersigned Administrative Law Judge on November 9, 2016 at the Grievance Board's Beckley facilities. Grievant appeared *pro se*. Respondent MCBE appeared by McDowell County School Board Superintendent Nelson Spencer and its counsel Howard Seufer, Jr., of Bowles Rice LLP.

At the Level Three hearing, Grievant testified on his own behalf and called two witnesses: Personnel Director Tonya White, and Superintendent Nelson Spencer. Grievant offered three exhibits, all of which were entered into the record: his applications for each of the two coaching assignments (G Ex 1-A and 1-B), and a copy of a letter (G Ex 2) Grievant sent to the Superintendent more than two years ago. The undersigned administrative law judge agreed to take judicial notice of W. Va. Code § 18A-5-1 ("Authority of teachers and other school personnel; exclusion of students having infectious diseases; suspension or expulsion of disorderly students; corporal punishment

abolished") and W. Va. Code § 18A-3-2a ("Certificates valid in the public schools that may be issued by the State Superintendent"). The parties were provided the option of presenting written Proposed Findings of Fact and Conclusions of Law (PFFCL) documents. The assigned mailing date for the submission of the parties' PFFCL, established at the Level Three hearing, was determined to be December 14, 2016. By email on December 19, 2016. Grievant requested an extension of the deadline. Grievant's request for an extension was made five days after the PFFCL document was due and only after he had already received Respondent's proposal. Grievant did not provide an acceptable excuse for his untimely request. A December 23, 2016, Public Employees Grievance Board Order denied Grievant's request for an extension. The matter is ripe for decision.

Synopsis

Grievant complained that he unsuccessfully applied for two extracurricular coaching assignments. Grievant contends bias and other rationale was the motivation for Respondent not hiring him for one or more of the vacancies. Grievant woefully failed to meet the recognized burden of proof for a non-selection grievance. Grievant did not demonstrate a significant flaw in the selection process, or that he was the best qualified candidate. Grievant failed to establish, by a preponderance of the evidence, that his non-selection for one of two extracurricular coaching assignments was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation. Accordingly, this grievance is DENIED.

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

Findings of Fact

1. For the period of November 3-9, 2015, Respondent posted notices of vacancy in two extracurricular assignments. One was for the position of Assistant Girls' Basketball Coach at Mount View High School. The other was for the position of Head Girls' Basketball Coach at Mount View Middle School.[1]

2. There were four applicants for the position of Assistant Girls' Basketball Coach at Mount View High School. Upon the recommendation of Mount View High School Principal Debra Hall the Board, on November 13, 2015, appointed applicant Dominique Newbill, a long-term substitute teacher at Mount View, to fill the vacancy.

3. Nelson Spencer, who is Superintendent of McDowell County School Board, agreed with Principal Hall that Dominique Newbill was the most qualified candidate for the assignment. *L-3 Testimony Personnel Director White and Superintendent Spencer.*

4. There were five applicants for the position of Head Girls' Basketball Coach at Mount View Middle School. Upon recommendation of Mount View Middle School Principal Leon Gravely the Board, on December 7, 2015, appointed a different Newbill - applicant Kimberly Newbill, a long-term substitute teacher at Mount View - to fill the

[1] By mistake, the middle school Head Girls' Basketball Coach assignment was subsequently posted for the period of November 17-23, 2015. When the error was discovered, the posting was rescinded before November 23. This mistaken posting and its rescission had no effect upon Grievant's application or eligibility for any of the assignments at issue in this grievance.

vacancy. Superintendent Spenser agreed with Principal Gravely that Kimberly Newbill was the most qualified candidate for the assignment. *L-3 Testimony Personnel Director White and Superintendent Spencer.*

5. On December 19, 2015 (before the girls' basketball season ended), Dominique Newbill resigned from the position of Assistant Girls' Basketball Coach at Mount View High School which she had assumed about a month earlier.

6. For the period of January 5-12, 2016, the Board posted a notice of vacancy in that position. There were two applicants. Upon recommendation of Mount View High School Principal Hall the Board, on February 1, 2016, appointed applicant Derek Brooks, a fulltime teacher, to fill the vacancy created by Dominique Newbill's resignation. The Superintendent agreed with Principal Hall that Derek Brooks was the most qualified candidate for the assignment. *L-3 Testimony White and Spencer.*

7. Grievant, a substitute teacher, was an applicant under each of the postings described above. *L-3 Testimony Director White, Superintendent Spencer and Grievant.*

8. Superintendent Spencer placed values in the recommendations of Principals Hall and Gravely. He also was of the opinion that the appointed applicants were more qualified than Grievant for the posted vacancies.

9. The Superintendent had concerns and reservation regarding Grievant's past behavior while working as a substitute for the Board. On one occasion Grievant received a written reprimand for inappropriately picking up a student's chair, with the student in it, causing the student to fall to the floor. On another, Grievant was reprimanded for admittedly placing Windex on the thumbs of two students who had been placing their

thumbs in their mouths. Grievant had also received a disciplinary suspension for using profanity toward a teacher while students were present. *L-3 Testimony Superintendent Spencer and Grievant.*

10. In a year prior to the postings at issue in the case, Grievant was appointed by the Board to fill a posted assignment as Assistant Volleyball Coach. Grievant was the only applicant for the then Assistant Volleyball Coach position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant asserts that he should have been selected for one of the two extracurricular coaching assignments positions for which he applied. Grievant strongly maintains that the selection process was flawed and infers the rationale for his non-

selection was due to bias.[2] Respondent denies Grievant's claims and asserts that its selection of both coaching positions was proper and lawful. Superintendent Spencer was of the opinion that the appointed applicants were more qualified than Grievant for the posted vacancies. In addition to the recommendation of Principals Hall and Gravely, the entire McDowell County Board of Education voted on the appointed applicants suitability.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

"Coaching positions are considered to be extracurricular assignments, which are governed by the provisions of W. VA. CODE § 18A-4-16, which sets forth the legal requirements for the employment of persons in these types of positions." *DeGarmo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19, 2004). "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)." *Id.* "The standard of review for filling

[2] Grievant has made several allegations about the selection process which suggest that he is alleging that the recommendation process and/or the selection was flawed, that he was never given a fair chance at the position, and/or that he was deliberately not selected for the positions. Grievant, who is African-American, is not alleging racial discrimination.

coaching positions is to assess whether the Board abused its broad discretion in the selection or acted in an arbitrary or capricious manner." *Id. See also 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 is 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). 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))."

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Grievant claims that Mount View Middle School Principal Gravely is biased against Grievant. The only evidence Grievant offered on this issue was that several years ago, Grievant had asked Principal Gravely to prevent a particular individual from refereeing

basketball games at which Grievant apparently coached. Principal Gravely did not do so. The individual was a then current or former member of the McDowell County Board of Education. G*rievant testimony.* Further, Grievant provided that on five occasions when Grievant substituted at Mount View High School, he disagreed with Principal Hall's approach to student discipline. Basically, Grievant contends that select key members within the recommendation or selection process did not like him and thus he was not given a fair chance at either of the two positions in discussion (Assistant Girls' Basketball Coach at Mount View High School and/or Head Girls' Basketball Coach at Mount View Middle School).

Grievant did not make an allegation of retaliation or discrimination as motive for Respondent's actions. Grievant is not perceived to be a novice and unaware of various allegations of wrongdoing. W. VA. CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." 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). Grievant did not establish or pursue a *prima facie* argument in support of a retaliation or discrimination claim asserted under the grievance statutes.

Grievant was aware of his right to call and subpoena witnesses to give evidence on his own behalf. In fact, the record in this matter shows that Grievant requested, and the Grievance Board issued, subpoenas for eight witnesses (only one of whom he called

to testify at the hearing). Grievant offered three exhibits that were admitted to the record, his applications for each of the two coaching assignments (G Ex 1-A and 1-B), and a copy of a letter (G Ex 2) Grievant sent to the Superintendent more than two years ago. Grievant testified on his own behalf and called two witnesses: Personnel Director Tonya White, and Superintendent Nelson Spencer.

Grievant needed to prove that his qualifications for the posted vacancies were greater than those of the persons appointed by the Board to fill the assignments, and/or the selection process was significantly flawed.[3] Grievant did not meet his burden. Grievant failed to present any evidence whatsoever regarding the successful applicants' qualifications thus, a comparison of qualifications was impossible.

Other than his own opinion, Grievant produced no evidence that, in recommending the successful candidates, both Principals and the Superintendent acted arbitrarily or capriciously. Likewise, he failed to show the Board was arbitrary or capricious in approving the Superintendent's recommendations. Grievant did not establish that the Board breached any policy about how to determine which applicant for a coaching position should be hired.

Lastly, Grievant failed to persuasively establish that Respondent abused its discretion and unlawfully barred him from consideration as a candidate for the positions relevant to the instant grievance (Assistant Girls' Basketball Coach at Mount View High School and/or Head Girls' Basketball Coach at Mount View Middle School).

[3] At various points during the Level Three hearing, Grievant was specifically made aware that he needed to prove that his qualifications for the posted vacancies were greater than those of the persons appointed by the Board to fill the assignments.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of 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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. "Coaching positions are considered to be extracurricular assignments, which are governed by the provisions of W. VA. CODE § 18A-4-16, which sets forth the legal requirements for the employment of persons in these types of positions." *DeGarmo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19, 2004). "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)." *Id.*

4. “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.” *Id. See also Chaffin v. Wayne County Bd. of Educ*., Docket No. 92-50-398 (July 27, 1993).

5. Grievant has failed to prove by a preponderance of the evidence that his qualifications for the extracurricular coaching assignments were greater than those of the persons appointed by Respondent to fill the assignments.

6. Grievant has failed to prove that the actions of Respondent in filling the relevant extracurricular coaching assignments were unreasonable.

7. Grievant did not demonstrate a flaw in the selection process, or that the selection decision(s) made were arbitrary and capricious or an abuse of discretion.

8. Grievant has failed to prove by a preponderance of the evidence that the Respondent abused its discretion and failed to properly consider him as a candidate for the extracurricular coaching positions relevant to the instant grievance.

Accordingly, 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: March 31, 2016

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Landon R. Brown
Administrative Law Judge