

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ALLEN W. RAPP, JR.,
Grievant,**

v.

Docket No. 2018-1417-TucED

**TUCKER COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Allen W. Rapp, Jr., filed this action on or about June 21, 2018, challenging Respondent's failure to select him for an Athletic Director position. Grievant seeks to be placed in that position. Superintendent Alicia R. Lambert denied this grievance after a Level One conference on July 12, 2018. A Level Two mediation was conducted on September 26, 2018. The grievance was placed in abeyance in an attempt to allow the parties additional time to settle the matter until October 26, 2018. A Level Three evidentiary hearing was conducted before the undersigned on October 26, 2018, at the Randolph County Development Authority, Elkins, West Virginia. Grievant appeared in person and by his counsel, John Everett Roush, AFT-West Virginia. Respondent appeared by its counsel, Denise Spatafore, Dinsmore & Shohl, LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on March 18, 2018.

Synopsis

Grievant is employed by Respondent as a classroom teacher. Grievant applied for an extracurricular position that was posted by Respondent as a county athletic/activities director. Grievant was not the successful applicant for the position. Grievant did not prove by a preponderance of the evidence that the selection of the other qualified applicant for the position was unreasonable, arbitrary and capricious, or constituted an abuse of discretion. Accordingly, the grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is employed by Respondent as a classroom teacher. He is currently assigned as a ninth grade Science and Options Pathway teacher at Tucker County High School. Grievant also holds extracurricular contracts as a coach for the Tucker County High School football and softball teams.

2. Prior to 2018, Respondent employed athletic directors at each of the secondary schools, with each employee holding an extracurricular contract for the purpose of being responsible for coordinating and overseeing athletics at their school.

3. David Kyle held the extracurricular position of athletic director at Tucker County High School for thirty years, where he was also employed as a physical education teacher. When Mr. Kyle retired in 2017, he retained the position as athletic director for the next school year, but also resigned from that position at the conclusion of the 2017-2018 school year.

4. Upon Mr. Kyle's retirement, former Superintendent Eddie Campbell decided to create a new position for a county athletic/activities director, with one person being

responsible for all athletics in the county, along with overseeing/coordinating academic activities, such as competitions and fairs. Dr. Campbell believed the new extracurricular position would provide for better coordination of activities at all schools, with continuity, communication, and oversight at the county level.

5. On May 23, 2018, Respondent posted the extracurricular position of “County Athletic/Activities Director,” describing the duties as “coordinate athletic events and academic activities county-wide,” with a preference for current employees or substitutes.

6. Applicants for the position included Grievant and Jonathan Hicks, who were deemed to be the only qualified applicants.

7. Both Grievant and Mr. Hicks discussed the new position with Dr. Campbell, asking questions regarding the specific duties of the position before the posting closed and a recommendation was made.

8. Dr. Campbell had worked closely with both Grievant and Mr. Hicks during his seven years as superintendent, and he was very familiar with their experience and qualifications.

9. At the time of the posting of the position, Mr. Hicks was employed by Respondent as Director of Support Services, which includes responsibility for directing the departments of child nutrition, maintenance, and transportation for the entire school system.

10. Mr. Hicks is not a certified teacher, but is currently pursuing a degree in Education Administration. He has been involved with and responsible for directing

numerous athletic activities in Tucker County for many years, including coaching baseball and softball for Respondent.

11. Mr. Hicks created the middle school softball program for Respondent, being responsible for scheduling and coordination of events, transportation arrangements, and obtaining funding. He also had many years of experience coaching and directing youth sports, including basketball, and directed the county little league program for several years. Mr. Hicks had experience in planning events, arranging for officials, organizing concessions, and fund raising. Respondent believed that Mr. Hicks displayed excellent organizational skills and was familiar with planning and coordinating school facilities for activities.

12. Grievant also has many years of experience as a coach of various athletics and for a period of time had served as an athletic administrator at one of Respondent's middle-elementary schools. He also had substantial experience with planning and coordinating athletic activities, coordinating officials, dealing with financial and scheduling issues, along with experience working in county youth sports programs.

13. It was not a customary practice in Tucker County to conduct interviews for extracurricular positions, and Dr. Campbell felt comfortable with his knowledge and familiarity with both qualified applicants, so he did not feel that interviews were necessary.

14. Because this new position was required to oversee and coordinate all activities at the county level, Dr. Campbell did not believe a current teacher would be able to attend to all the responsibilities of the position without neglecting students.

15. The record established that when the athletic director was employed at the school level in the past, there had been issues with students not being properly

supervised while the teacher dealt with athletic activities issues throughout the school day. In addition, due to this position being responsible for all schools' activities, the individual employed would need to be available to deal with issues throughout the county, not just at one school.

16. Dr. Campbell indicated that both Grievant and Mr. Hicks were well qualified for the position, but he recommended Mr. Hicks, mainly because of his more flexible schedule and availability as a central office administrator, rather than being a teacher directly responsible for students. Dr. Campbell had also seen Mr. Hicks' organizational skills and administrative experience, which were important to this county-wide position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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).

There is no dispute that the position at issue is extracurricular, pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-16.¹ “The assignment of teachers to extracurricular duties is a matter of educational policy within the discretion of the county boards of education.” Syl. Pt. 2, *State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 908 (1980). It has been held that the standard of review for filing professional extracurricular positions is whether the board of education abused its broad discretion in the selection or acted in an arbitrary and capricious manner. *Dillion v. Bd. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *DeGamo v. Wood Co. Bd. of Educ.*, Docket No. 06-54-025 (Mar. 8, 2006); *Hood v. Brooke Co. Bd. of Educ.*, Docket No. 07-05-155 (Nov. 30, 2007). County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, *Dillon, supra*.

"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

¹WEST VIRGINIA CODE § 18A-4-16 provides:

Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.

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 Resources*, 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

The record failed to establish that the selection of Mr. Hicks constituted an abuse of discretion or was arbitrary and capricious. As Dr. Campbell indicated, both Grievant and Mr. Hicks had extensive backgrounds and experience with athletics, so he did not consider either to be more qualified than the other. Dr. Campbell did take into consideration that Mr. Hicks would be more available throughout the work day, since he is not in a classroom teaching and supervising children. Although Grievant has argued that his planning period at the end of each day would provide the necessary flexibility, this is not comparable to the availability of a central office administrator who already supervises county-wide programs. Grievant failed to acknowledge that the purpose of a teacher's planning period is to attend to their specific classroom teaching duties, not to make phone calls and leave the building to tend to other matters. It is appropriate, and not arbitrary and capricious, for a board of education to consider an applicant's availability to perform the duties of the extracurricular position when making a selection decision.

The record established that Dr. Campbell also took into consideration Mr. Hicks' organizational skills and established record as a county-wide administrator. There is no question that Grievant does have extensive experience with athletics as a coach, and on a school level, as an administrator, this newly created position was meant to be administrative in nature, and an experienced administrator was deemed to be the best fit. The new position would also have responsibility for overseeing academic activities on a county-wide basis, which is unrelated to athletics. Mr. Hicks' experience as a county administrator was a pertinent consideration in this regard. The selection of Mr. Hicks cannot be deemed by the undersigned as arbitrary and capricious, unreasonable, or unjustified in light of the record of this case.

Pursuant to the legal standard for selecting applicants for professional extracurricular positions, Respondent's hiring decision in this case was not legally improper. The applicant selected was qualified for the position at issue, and proper justifications for the selection were provided to the undersigned, and must be viewed in the context of Respondent's discretion in such personnel matters. Accordingly, this grievance is denied.

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 grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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. It has been held that the standard of review for filing professional extracurricular positions is whether the board of education abused its broad discretion in the selection or acted in an arbitrary and capricious manner. *Dillion v. Bd. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *DeGamo v. Wood Co. Bd. of Educ.*, Docket No. 06-54-025 (Mar. 8, 2006); *Hood v. Brooke Co. Bd. of Educ.*, Docket No. 07-05-155 (Nov. 30, 2007).

3. County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, *Dillon, supra*.

4. Grievant did not prove by a preponderance of the evidence that the selection of Mr. Hicks for the Athletic/Activities Director position was unreasonable, arbitrary and capricious, or constituted an abuse of discretion.

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 27, 2019

Ronald L. Reece
Administrative Law Judge