

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**TANNER HILL,
Grievant,**

v.

Docket No. 2021-1876-HarED

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

DECISION

Grievant, Tanner Hill, filed this action on or about November 13, 2020, asserting that he should have been hired as the Athletic Director at Washington Irving Middle School on an extracurricular contract. Grievant has served as an interim Athletic Director at the school and the head baseball coach at another school. Grievant seeks to continue as the head coach and to be awarded the position of Athletic Director.

This grievance was denied by Dora L. Stutler, Superintendent, by Level One Decision dated December 8, 2020. A level two mediation was conducted on April 8, 2021. A level three hearing was conducted before the undersigned on September 13, 2021, at the Public Employee Grievance Board's Westover office. Grievant appeared in person, and by her representative, Ben Barkey, WVEA. Respondent appeared by Dora L. Stutler, Superintendent, and by its counsel, Denise M. Spatafore, Dinsmore & Shohl LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 15, 2021.

Synopsis

Grievant is currently employed as both the Baseball Coach at Robert C. Byrd High School as well as the interim Athletic Director at Washington Irving Middle School. Grievant was denied a full-time extracurricular contract for an Athletic Director position at Washington Irving Middle School due to a perceived conflict and availability. Oddly enough, Grievant was awarded the Athletic Director's position on an interim basis. Grievant was able to demonstrate by a preponderance of the evidence that the Respondent's decision was arbitrary and capricious in that it was contrary to the facts of the case. This grievance is granted.

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

Findings of Fact

1. Grievant has been employed by the Harrison County Board of Education for over nine years. Grievant has held a classroom teaching position as well as coaching positions for most of that time.
2. Grievant is currently employed as both the Baseball Coach at Robert C. Byrd High School as well as the interim Athletic Director at Washington Irving Middle School.
3. Beginning in 2014, Respondent began a practice of no longer allowing employees to hold extracurricular contracts at different schools that are not on the same campus. This decision was meant to ensure that employees would be fully available to perform all required duties of their extracurricular positions without scheduling conflicts.

4. All occasions where employees seek to hold more than one extracurricular position are evaluated for potential conflicts and lack of availability for performing required duties.

5. In 2018, Grievant was the Athletic Director at Washington Irving Middle School. That same year, Grievant was the successful applicant for the Baseball Coach at Robert C. Byrd High School.

6. Grievant resigned from the Athletic Director position to avoid a pending Board of Education policy prohibiting staff from holding both positions at once. Grievant knew other employees that held the same positions and wanted to avoid the potential of knocking other employees out of a job. The policy was never adopted by the Board of Education.

7. The Harrison County Board of Education has no adopted policy regarding any limitation on coaching and being an athletic director. The record provided no policy, directive, or any official statement by the Board of Education that they wanted to preclude this practice.

8. Superintendent Stutler indicated that the practice of being both a coach and an athletic director was only precluded at middle and high schools that did not share the same campus. Superintendent Stutler explained that Washington Irving Middle School and Robert C. Byrd High School did not share the same campus but did share attendance zones.

9. Superintendent Stutler felt there was a conflict between the two assignments, making it impossible to complete both.

10. Since 2018, Grievant has continued to hold the baseball coach position at Robert C. Byrd High, School while being employed full-time at Washington Irving Middle School as a teacher and football coach.

11. In the fall of 2020, the Athletic Director at Washington Irving Middle School resigned the position to work in another school system. The vacated position was posted, and Grievant was the only applicant.

12. At the Board of Education meeting considering Grievant's hiring, the Board of Education declined to hire Grievant for the Athletic Director position due to a perceived scheduling conflict. Oddly enough, the Board of Education choose to employ Grievant as an interim Athletic Director at Washington Irving Middle School.

13. The distance between Robert C. Byrd High School and Washington Irving Middle School is not more than one or two miles. While the two schools do not share a campus, they do share some athletic facilities.

14. Principals at both the above-mentioned schools established that Grievant was currently performing both jobs and had done so without incident or conflict of scheduling for over a year. While it was noted that the previous year had some sports cancelled due to the pandemic, this year has proceeded without those obstacles.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievant bears 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 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The 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).

Respondent argues that there is no legal requirement to have a formal policy regarding how many extracurricular positions employees may hold. In addition, Respondent's reasoning in denying Grievant the extracurricular contract for the Athletic Director position was based upon valid concerns over possible scheduling conflicts. Grievant failed to establish by a preponderance of the evidence that Respondent's decision to not allow him to hold an additional extracurricular contract was unreasonable or arbitrary and capricious..

Grievant contends that the preclusion of an employee from being both a coach and an athletic director is arbitrary and capricious when it is established that the employee has no scheduling conflicts or availability concerns in performing both jobs. The undersigned agrees. "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 arbitrary and capricious manner. *Dillion v. Bd. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *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 hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualifications and placement of personnel

implementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious.” *Cowen v. Harrison County Bd. of Educ.*, 195 W. Va. 377, 465 S.E.2d 648 (1995). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

Availability is an implicit requirement of all job postings, and, regardless of whether he would otherwise be legally entitled to it, a current employee seeking an additional assignment with a county board of education must be able to carry out the duties of both jobs to the board’s satisfaction. *Barber v. McDowell County Bd. of Educ.*, Docket No. 94-33-405 (April 21, 1995). To prevail, an employee who is denied this additional assignment on the grounds that time or other constraints rendered him unavailable for the post, must

demonstrate, by a preponderance of the evidence, that the county board's decision was arbitrary and capricious. *Id.*

In the instant case, the arbitrary and capricious standard has been demonstrated by a preponderance of the evidence. The record of this case lacks any evidence that there is any kind of scheduling conflict that is preventing Grievant from performing both jobs. This case presents the undersigned with a decision by the Board of Education that appears to be a difference without a distinction. It is undisputed that Grievant is acting as the Athletic Director on an interim basis. If the Board of Education had any legitimate concerns about a potential conflict, it could have easily reposted the Athletic Director position for Washington Irving Middle School and obtained applicants without this perceived conflict. This decision is unreasonable, without consideration, and in disregard of facts and circumstances of the case. For the reasons set out above, this grievance is granted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievant bears 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 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The 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. “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 arbitrary and capricious manner. *Dillion v. Bd. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *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 hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualifications and placement of personnel implementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious.” *Cowen v. Harrison County Bd. of Educ.*, 195 W. Va. 377, 465 S.E.2d 648 (1995). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

4. Availability is an implicit requirement of all job postings, and, regardless of whether he would otherwise be legally entitled to it, a current employee seeking an additional assignment with a county board of education must be able to carry out the duties of both jobs to the board’s satisfaction. *Barber v. McDowell County Bd. of Educ.*, Docket No. 94-33-405 (April 21, 1995). To prevail, an employee who is denied this

additional assignment on the grounds that time or other constraints rendered him unavailable for the post, must demonstrate, by a preponderance of the evidence, that the county board's decision was arbitrary and capricious. *Id.*

5. Grievant was able to demonstrate by a preponderance of the evidence that the Respondent's decision to deny him the full-time extracurricular contract was arbitrary and capricious in that it was contrary to the facts of the case.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to provide Grievant with the full-time extracurricular contract for the Athletic Director position with seniority and all the other benefits he would have accrued dating back to the Board of Education meeting date at which it was 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 (2018).

Date: November 30, 2021



Ronald L. Reece
Administrative Law Judge

