SUSAN ARMSTRONG,

Grievant,

v. **Docket No. 98-37-102**

PLEASANTS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Susan Armstrong, employed by the Pleasants County Board of Education (PCBE), filed a level one grievance on February 27, 1998, in which she alleged violations of County Policies 6.10.2 and 6.7, W. Va. Code §§18A-2-1, 18-5-4, and 18A-4-b [sic], and Title IX, Sections 106.51-2, 106.53-A, and 106.55- b&c, when she was not selected to fill the position of assistant girls' softball coach at St. Mary's High School. Grievant's immediate supervisor lacked authority to resolve the matter, and the grievance was denied following an evidentiary hearing at level two. Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(d). Appeal was made to level four on April 1, 1998, and a supplementary hearing was conducted on June 3, 1998. The parties elected not to file proposed findings of fact and conclusions of law. (See footnote 1)

The following Findings of Fact are made based upon the evidence provided at the level two and level four proceedings.

Findings of Fact

1. Grievant has been employed by the PRT Administrative Council continuously since 1974 as a business teacher at the PRT (Pleasants, Ritchie, Tyler) Vocational- Technical Center, located in St. Mary's, Pleasants County. 2. On June 2, 1997, PCBE posted vacancies for four (4) athletic positions, including assistant [girls'] softball coach at St. Mary's High School. The posting stated, “[a]pply in writing to the Superintendent by June 16, 1997.”

3. Grievant submitted a timely application for the position with Superintendent Harold C. Carl, II, and with Glen M. DeHaven, Principal of St. Mary's High School.

4. The position of assistant softball coach was reposted on July 1, 1997, with the directive to “[a]pply in writing to the Superintendent by July 11, 1997.” Upon inquiry, Grievant was advised the

reposting was for administrative reasons.

5. Four (4) individuals applied for the softball position. Two (2) of the applications were filed with Superintendent Carl, and two (2) were filed with Principal DeHaven. Applications for extra-curricular positions were regularly submitted directly to the principal, and those submitted to the superintendent were simply forwarded to the principal.

6. Three (3) of the applicants were male; Grievant was the sole female applicant.

7. Interviews for the position were conducted by a three (3) member team headed by Principal DeHaven.

8. Grievant was interviewed on November 17, 1997. Two (2) of the male applicants were interviewed on December 2, 1997. The record does not indicate when, or if, the fourth interview was conducted.

9. Each applicant was posed a series of identical questions and was evaluated on a matrix developed by PCBE for non-classroom teaching positions.

10. The interview team recommended, and PCBE accepted, William Brizendinefor the position of assistant softball coach at St. Mary's High School.

11. Coaches employed by PCBE are predominately male. Grievant's undisputed count indicates that twenty-four (24) of the twenty-five (25) head and assistant coaches, excluding cheerleading coaches, are male.

12. Mr. Brizendine was already employed by PCBE as Head Wrestling Coach and Athletic Director.

13. Grievant has no coaching experience.

14. Females who have applied for coaching positions in the past have not been selected for the positions.

Argument

Grievant concedes that she has no experience in coaching, but asserts that she should have been awarded the position of assistant softball coach because PCBE does not recruit or hire females for coaching positions. Grievant argues that PCBE engages in irregularities when filling coaching positions, including not filling the position within thirty (30) days of the posting. She cites a volleyball position which was not posted at the PRT Center, the fact that she was interviewed much earlier than the male applicants, the position was reposted for no apparent reason, and the successful applicant

was awarded the position despite the fact that he already held two (2) athletic positions, while John Armstrong had been advised that he could not hold three (3) such assignments. Grievant asserts that the evaluation matrix used by PCBE discriminates against women who traditionally do not have coaching experience, and have no opportunity to gain experience. She suggests that experience is not so important, and should not be weighted as heavily, for assistant coaching positions.

Grievant additionally argues that only she and Mr. Winland should have been considered for the position, because only they applied at the superintendent's office, as directed by the posting. She opines that the reposting, and the failure to previously post the volleyball position at the PRT Center, were intentional acts to keep her from obtaining the positions. Finally, Grievant suggests that girls need a woman to be involved in their athletic activities for reasons other than coaching abilities, and that one should be placed on girls' teams whether or not she is the most qualified applicant.

PCBE denies that it discriminates against females when filling coaching positions, and notes that many times the successful applicant for an athletic position is the only applicant. The matrix used to determine the successful applicant is comparable to that used for filling professional positions, and assists in evaluating the applicants uniformly. PCBE asserts that the matrix does not discriminate against females, because males with no coaching experience would be evaluated in the same manner. Superintendent Carl testified that the volleyball posting was sent to the PRT Center, but could offer no explanation if it was not posted. However, he noted that Grievant had actual notice of the vacancy since it was created when her husband resigned.

Superintendent Carl also indicated that the softball position was reposted due to concerns regarding the first posting, and that the second posting did not elicit any additional applicants. He also noted that applications were frequently submitted directly to the principal, and that Mr. Armstrong had filed applications in that manner himself. Superintendent Carl stated that as a practical matter it made no difference where the application was filed because 1) the Board office is in the same building as the high school, and 2) applications received at his office are directed to the principal for processing. Addressing the concern that the successful applicant holds three (3) athletic positions, Superintendent Carl stated there was no county policy regarding the number of positions an individual may hold. He noted that Mr. Brizendine coaches two (2) minor sports, and recalled that Mr. Armstrong was advised that he would not be recommended for the position of Athletic Director if he continued to hold two (2) major coaching assignments. He denied that any

efforts were made to prohibit Grievant from holding a coaching position, and reiterated that all positions are based on qualifications. Addressing the two (2) female applicants cited by Grievant who were not awarded coaching positions, Superintendent Carl stated that one (1) individual accepted a position elsewhere, and the second applicant was not determined to be the most qualified.

Principal DeHaven testified that he scheduled the interviews for the softball position, and perhaps had “dragged his feet” in filling the vacancy, but due to the period of time before the season began, he did not perceive there to be a rush. He confirmed that the interview committee determined Mr. Brizendine to be the most qualified applicant for the assistant softball coaching position.

PCBE additionally raises a procedural issue, arguing that Grievant lacks standing to file a grievance against it because she is not an employee. PCBE notes that Grievant is employed by the Advisory Council and is an employee of the multi-county vocational technical center. While the center is located in Pleasants County, and PCBE serves as fiscal agent for the center, it denies that Grievant is an employee of the board of education. Grievant responds to this argument stating that she received a number of contracts from PCBE and has tenure in Pleasants County.

Discussion

The first issue to be addressed is that raised by PCBE as to whether Grievant had standing to file a grievance based upon her employment status. This is an interesting question not addressed by statute. It appears that Grievant is an employee of a multi- county vocational-technical center, and has never been assigned to the schools of Pleasants County. Yet, she claims to have received employment contracts from Pleasants County, and has been advised that she has tenure there. Because PCBE presented this issue in the nature of an affirmative defense, it bears the burden of proving Grievant lacked standing. Absent any authority for PCBE's position, and in light of Grievant's response, it is concluded that she has standing to file a grievance in this matter.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6.

The standard of review for filling coaching positions is to assess whether the Board abused its discretion in the selection or acted in an arbitrary and capricious manner. Dillon v. Bd. of County of

Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993). In applying an “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286S.E.2d 276 (1982).

Further, the grievance procedure is not intended to be a “super interview” for unsuccessful applicants; rather, in this context, it allows an analysis of the legal sufficiency of the selection process at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). An agency's decision by “appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong.” Sloane v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1988).

Pleasants County Board of Education Policy 6.10.2 states in pertinent part:

Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description.

* * *

If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the posting period.

Pleasants County Board of Education Policy 6.7 (6) provides:

When vacancies occur in new or existing positions, such vacancies shall be posted in all schools and other work locations for all professional personnel to observe at least five working days.

Accepting Grievant's claim that the volleyball coaching position was not posted at the PRT Center, PCBE violated provisions of the above-referenced policies. However, Grievant did not grieve the volleyball position at the time, and does not request the positionas relief in the present matter.

By PCBE's admission, interviews for the softball position were not conducted for several months

following the posting. The admission supports a finding of a violation of Policy 6.10.2, which requires that vacancies be filled within thirty (30) working days of the end of the posting period. Grievant offered no evidence that the delay caused her any injury or loss. Although a technical violation of policy, the delay was harmless error on the part of PCBE in this case.

This matter differs from the usual non-selection grievance in that Grievant does not claim to have been the most qualified applicant, but rather requests that she be appointed to the position as a correction of past and present gender discrimination by PCBE. Education employees are specifically protected from “discrimination”, defined as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code §18-29-2(m).

An employee seeking to establish that her non-selection was motivated by unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Applying this prima facie analysis to the facts presented her, Grievant has demonstrated that she is similarly situated to one or more other employees. However, Grievant has not established by a preponderance of the evidence that other employees have been given advantage or treated with preference in a significant manner not afforded her. Although Grievant apparently perceives that

other employees have been given some type of advantage in securing coaching positions, the evidence shows only that PCBE hires the most qualified applicant as determined by an evaluation matrix. While applicants with experience may be ranked higher, and be more likely to receive a position, this fact is true for males and females alike. The record establishes that female coaches are rare in Pleasants County; however, it does not establish that PCBE makes any effort to exclude females from applying or holding such positions. Therefore, Grievant has failed to make a prima facie case of discrimination.

Grievant did not address the alleged statutory violations. W. Va. Code §18A-2-1 speaks to employment in general, §18-5-4 discusses county boards of education, their meetings, employment and assignment of teachers, and other matters, and §18A-4-8brefers to the seniority rights of school service personnel. None of these provisions relate to the issues raised by Grievant, and warrant no further consideration.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6.

2. The standard of review for filling coaching positions is to assess whether the Board abused its discretion in the selection or acted in an arbitrary and capricious manner. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993). In applying an “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

3. The grievance procedure is not intended to be a “super interview” for unsuccessful applicants; rather, in this context, it allows an analysis of the legal sufficiency of the selection process

at the time it occurred. Stover v. Kanawha County Bd. of Educ.,Docket No. 89-20-75 (June 26, 1989).

4. An agency's decision by “appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong.” Sloane v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1988).

5. Discrimination is defined in W. Va. Code §18-29-2(m) as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

6. An employee seeking to establish that her non-selection was motivated by unlawful discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Storev. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

8. Grievant failed to prove by a preponderance of the evidence that PCBE's selection of the most qualified applicant was arbitrary and capricious, or that it engaged in discrimination.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Pleasants County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board

nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: July 24, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by John Armstrong, and PCBE was represented by Howard Seufer, Esq.