RODNEY BROWN,

Grievant,

v. DOCKET NO. 01-27-563

MERCER COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Rodney Brown filed this grievance on September 27, 2001, alleging a violation of W. Va. Code § 18A-4-16 in the selection of a head boys' basketball coach for Pikeview High School, and as relief seeks instatement into the position. His grievance was denied at Levels I, II and III, and a Level IV hearing was convened at the Grievance Board's Beckley Office on December 13, 2001. Grievant was represented by Ben Barkey, Region VII UniServ Consultant for WVEA, and Respondent was represented by Kathryn Reed Bayless, Esq. of Bayless & McFadden, LLP. At the conclusion of the hearing, the parties agreed to supplement the record with proposed findings of fact and conclusions of law filed by January 15, 2002, on which date the matter became mature for decision. Based on a preponderance of the relevant evidence adduced at the Level IV hearing and contained in the record of the foregoing levels, the undersigned Administrative Law Judge makes the following findings:

FINDINGS OF FACT

1. Grievant has at all times relevant to this grievance been regularly employed by Respondent as a teacher at Glenwood Elementary School.

2. During the summer of 2001, Respondent posted a job vacancy for the head varsity basketball coaching position at Pikeview High School.

3. Grievant and two other regularly employed teachers applied for the position, and all met the minimum qualifications.

4. All three candidates were interviewed for the position by Dan Zirkle, Principal of Pikeview High School. Mr. Zirkle selected William Anderson as the most qualified candidate, and recommended to Superintendent Deborah Akers that he be hired. The recommendation was passed on to the County Board of Education, which instated Mr. Anderson in the position.

5. Grievant filed a grievance challenging his nonselection, and that grievance was partially granted at Level II by Superintendent Akers.

6. Superintendent Akers ordered that the job be re-posted and that all three candidates be re-interviewed in an objective manner by Assistant Superintendent Michael McPherson.

7. The three original candidates and one other applicant were interviewed by Dr. McPherson.

8. Dr. McPherson developed a list of ten questions to ask each candidate, and using a grid system scored each applicant using his judgment of the relative strength of the answers. Each question was worth a maximum of two points. 9. Dr. McPherson also presented each candidate with three written questions, with a maximum score of seven points each.

10. In reviewing the applicants' qualifications, Dr. McPherson looked at coaching evaluations (all had coaching experience within the county), with a maximum weight of 20 points if no bad evaluations were present, and a further possibility of 20 points if the applicants had no “known incidents of behavioral referrals.” He also weighted prior high school head or assistant coaching experience, with more weight given to experience coaching boys' teams.

11. In addition to coaching in schools, Dr. McPherson had a separately-scored category for “relevant basketball coaching,” scored depending on the applicant's years of experience.

12. Based on Dr. McPherson's selection criteria, Mr. Anderson, who scored a total of 196 points, was again recommended and ultimately hired for the position.

13. Grievant's score was second-highest at 121 points.

14. For the interview questions, Mr. Anderson scored 14 points and Grievant scored 10 points. Mr. Anderson scored a full 20 points in the area of “known incidents of behavioral referrals,” while Grievant scored no points in that category due to a reprimand in his personnel file that was related to his coaching duties. Both scored 20 points based on their evaluations. In the area of experience, Mr. Anderson was scored at 129 points and Grievant was scored at 78 points.

15. Dr. McPherson counted Mr. Anderson's 21 years of coaching experience in the military as 105 point's worth of relevant coaching experience. 16. Grievant's coaching experience was all within the county's schools, and he was given ten points for one year as head girls' coach at Giles High School, 14 points for seven years' coaching at the middle school/junior high level, and a total of 54 points for nine years' assistant coaching experience at the high school level in two different locations.

DISCUSSION

This is the second grievance filed by Grievant relating to the selection for this position. The first was partially granted at Level II, resulting in the candidates for the position being re-interviewed. Grievant was again not selected, and filed the grievance under consideration now following this second round of interviews. At issue in the present grievance is only the selection process used by Respondent in this second round of interviews. As this issue is not disciplinary in nature, Grievant bears the burden of proving his allegations by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Coaching positions are considered to be extracurricular assignments, governed by W. Va. Code § 18A-4-16's requirements for the employment of persons in those assignments. However, the statute does not designate how, or under what standard, extracurricular coaching assignments are to be made. Ramey v. Mingo County Bd. of Educ., Docket No. 95-29-483 (Apr. 30, 1996). "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 or capricious manner. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398(July 27, 1993)." Daniels v. Wyoming County Bd. of Educ., Docket No. 01-55-109 (June 5, 2001).

> 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). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Id. Grievant argues that Dr. McPherson improperly considered both Mr. Anderson's military coaching experience and Grievant's reprimand. Respondent counters that these were sufficiently relevant that there was no abuse of discretion in evaluating these factors.

No evidence was presented that indicates Dr. McPherson designed the selection process to include factors that would give Mr. Anderson, who had originally been chosen for the position, an advantage over the other applicants. While his position in the central office would likely have given

him prior knowledge of the applicant's disciplinary history, there is no way he could have known how the weight he gave this category would contribute to the outcome of the selection process, or that he included the category to deliberately single out Grievant. Board member Janet Williams stated her opinion that this category was added to exclude Grievant, and communicated her concern to the rest of the board in its meeting prior to the vote. She did not indicate knowledge of any evidence tosupport her opinion. Because Grievant's reprimand was related to his coaching, I cannot find it was irrelevant.

Grievant pointed out the high number of points Mr. Anderson was given for his military coaching experience, and questioned whether coaching experience gained outside the school system was relevant to the process. Dr. McPherson stated that not all outside experience was counted, and specifically that he found Grievant's peewee or little league coaching to be irrelevant. However, Mr. Anderson described his military coaching in the interview, and Dr. Anderson judged it to be on a technical level similar to high-school coaching, while peewee play was not. The distinction makes sense, and I cannot find it to be implausible.

While not included in the Statement of Grievance, which reads simply, " **WV § 18a-4- 16** [sic]," Grievant argued at the Level IV hearing that the Board had prejudged the outcome of the selection process, and therefore improperly ratified Superintendent Aker's hiring recommendation. Grievant subpoenaed all the board members for the Level IV hearing, (See footnote 1) and their testimony indicates that although they knew the position was being reevaluated as a result of the prior grievance, none had any prior knowledge of or influence over the evaluation factors or had decided to hire Mr. Anderson simply because he was previously chosen for the position. (See footnote 2)

Grievant further presented written argument, citing Spolarich v. Wyoming County Board of Education, Docket No. 99-55-452 (December 23, 1999), that Respondent was bound to use the selection process it had used before, rather than to develop new factors for evaluating the applicants. In the present case, however, Respondent's use of the new procedure was not arbitrary, but was the result of a prior grievance filed by the Grievant himself. Grievant cannot have it both ways.

This case is unlike State ex rel. Oser v. Haskins, 174 W. Va. 789, 374 S.E.2d 184 (1988), where the petitioner was clearly both the better-qualified candidate and had more experience than the applicant selected by the Marshall County Board of Education. Here, Respondent and its officials reasonably concluded that the successful applicant was better qualified for the position. The

Superintendent granted the initial grievance and ordered a reevaluation, which reflects a concern that the selection process be fair and the relative qualifications of the candidates be fairly assessed. On this record, I see no basis for concluding that Respondent acted arbitrarily or capriciously in filling the position.

The following Conclusions of Law supplement the above discussion:

CONCLUSIONS OF LAW

1. As this issue is not disciplinary in nature, Grievant bears the burden of proving his allegations by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

2. Coaching positions are considered to be extracurricular assignments, governed by W. Va. Code § 18A-4-16's requirements for the employment of persons in those assignments. However, the statute does not designate how, or under what standard,extracurricular coaching assignments are to be made. Ramey v. Mingo County Bd. of Educ., Docket No. 95-29-483 (Apr. 30, 1996). "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 or capricious manner. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993)." Daniels v. Wyoming County Bd. of Educ., Docket No. 01-55-109 (June 5, 2001).

3.

> 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). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Daniels, *supra*.

4. Grievant has not met his burden of proving that Respondent's selection process was arbitrary and capricious or otherwise improper.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court

of Mercer County. Any 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 andState 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATED: January 22, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *Board member Gene Bailey was unable to appear due to an injury.*

Footnote: 2

Board member Greg Prudich recused himself from the vote because his brother-in-law was one of the candidates. Mr. Prudich had inquired of Ms. Akers why his brother-in-law was not considered the first time, and this person was interviewed but not selected the second time.