WILLIAM SHOCKEY and

ALCINDA SHOCKEY,

Grievants,

v. **Docket No. 04-39-045**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent,

and

JAMES LIGGETT,

Intervenor.

DECISION

William and Alcinda Shockey ("Grievants") initiated this proceeding at level one on October 3, 2003, challenging their non-selection for soccer coaching positions at Preston High School ("PHS"). The grievance was denied at level one, and a level two hearing was held on December 2, 2003. The grievance was denied in a level two decision dated December 17, 2003. Level three consideration was waived, and Grievants appealed to level four on January 28, 2004. This matter was placed in abeyance for several months, while the parties sought clarification of a circuit court order regarding the same matter. The parties ultimately elected to have this matter submitted for a decision based upon the lower level record, accompanied by fact/law proposals, the last of which were received by the undersigned on July 21, 2004. Grievants were represented by counsel, Bader Giggenbach; Respondent was represented by counsel, Kimberly Croyle, and Intervenor was represented by Don Craft, WVEA Representative. The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievants (See footnote 1) held extracurricular contracts for coaching boys' and girls' soccer at PHS from July 1999 throughJune of 2002, pursuant to one-year contracts for each school year.

2. The soccer coaching positions at PHS were posted in the summer of 2002. Although Grievants applied, they were not selected to fill the positions. Intervenor was selected to fill both positions.

3. Grievants challenged their non-selection for the coaching positions and were successful in their grievance at level four. It was concluded in Shockey v. Preston County Board of Education, Docket No. 02-39-371 (June 9, 2003), that "Respondent's selection of Intervenor . . . was motivated by factors unrelated to qualifications, was accomplished in an arbitrary and capricious manner, and constituted an abuse of its discretion." Therefore, Grievants were granted back pay and related benefits they would have received if they had been awarded the positions for the 2002-2003 school year, because Intervenor had only received a one-year contract.

4. Respondent compensated Grievants for the amount of pay they would have received if they had served as coaches during the 2002-2003 school year, and neither party appealed the initial Grievance Board decision. 5. Grievants were employed as substitute classroom teachers by Respondent during the 2001-2002 school year. Their contracts were for that school year only, and Grievants did not substitute teach for Respondent at any time. (See footnote 2) Their substitute teaching contracts expired on June 30, 2002.

6. Grievants' names were not placed on the list of substitute teachers who were to be employed for the 2002-2003 school year, nor were they on the list of those approved for the 2003-2004 school year. Grievants were not formally notified of the decision not to re-employ them as substitute teachers.

7. Grievants knew during the 2002-2003 school year that they had not received employment contracts as substitute teachers, and they were not called to substitute during that year.

8. In July of 2003, Mr. Shockey telephoned PHS Principal Gary Henline, asking whether or not Grievants were employed as substitutes. Principal Henline was unsure of their status, and stated that he needed to verify it with the Board. Apparently, this conversation was not followed up by either party in order to confirm whether or not Grievants were, in fact, currently employed by Respondent.

9. The PHS soccer coach positions were posted on July 10, 2003, for the 2003- 2004 school year. Once again, Grievants and Intervenor timely applied. Applications were reviewed and

interviews were conducted by Principal Henline. 10. For the boys' soccer coach position, Mr. Shockey and Intervenor “tied” in four out of five evaluation categories, which included attendance at required coaches' clinics, total coaching experience, specialized training, and satisfactory evaluations. However, Intervenor was given an additional point over Grievant for “other qualifications,” because he was a currently employed educator who had been employed by Respondent for approximately 28 years, and Grievant was not employed by any board of education at the time the position was filled. Therefore, Principal Henline recommended Intervenor for the position.

11. For the girls' soccer coach position, Principal Henline recommended David McNeill over Mrs. Shockey. Although neither applicant was employed by Respondent at the time the applications were reviewed, Principal Henline selected Dr. McNeill because of his superior certification in soccer coaching (national versus Mrs. Shockey's regional certificate), and because he received several negative emails and phone calls from parents and students regarding Mrs. Shockey's performance as a soccer coach.

12. On July 23, 2003, Grievants requested, in writing, that Superintendent Lofink recommend them for employment as substitutes for the upcoming school year. These requests were not acted upon by the superintendent, because Grievants had not substituted during the time they were employed as substitute teachers.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

As a preliminary issue, Respondent contends that Grievants were not employed by the Preston County Board of Education in any capacity at the time the soccer coach positions were filled for the 2003-2004 school year, so they have no right to file a grievance. Indeed, pursuant to the provisions of W. Va. Code §§ 18-29-1 et seq., only “employees” of county boards of education are entitled to utilize the grievance procedure. The statute, in Code § 18-29-2(c), defines “employee” as “any

person hired as a temporary, probationary, or permanent employee by an institution either full or part time." That statute further provides:

> A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

Respondent is technically correct that Grievants were not employees during the summer of 2003, prohibiting them from filing a grievance.

Grievants posit a number of theories to support their contention that they are entitled to avail themselves of the grievance procedure. First, they contend that they did not know they were no longer employed as substitutes until this particular defense was asserted by Respondent after the instant grievance was initiated. Grievants argue that they relied upon Respondent's "treatment" of them as employees, including Respondent's failure to assert their lack of employment status at any time during the previous grievance, along with an alleged representation by Principal Henline in the July 2003 phone call which led them to believe they were still employed as substitute teachers. Additionally, Grievants now contend that the termination of their substitute employment contracts is the basis of their grievance, entitling them to grieve that issue.

In a case involving similar facts, a substitute did not file a grievance concerning the board of education's failure to re-employ him until several months after his contract expired, and it was held by this Grievance Board that he was no longer an employee at the time he filed his grievance. In Malcolm v. Monongalia County Board of Education, Docket No. 01-30-593 (Feb. 28, 2002), it was held that, because Grievant had not alleged "a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to [his substitute employment]", he was not eligible to pursue a grievance. Likewise, in the instant case, Grievants have made no effort to prove that their substitute contracts were not renewed for any illegal or improper reasons, nor have they alleged any statutory violations as a result of that non-renewal. (See footnote 3) In fact, it is quite clear that Grievants were not at all disturbed by Respondent's failure to call them as substitutes for an entire year, nor by the Board's failure to issue them substitute contracts, until the issue became pertinent regarding their status vis a' vis other applicants for the soccer coach positions. Grievants are correct that, if the termination of the employment relationship is the subject of the grievance, then the claim is permitted. Poling v. Tucker County Bd. ofEduc., Docket No. 02-47-264 (Nov. 22, 2002);

Spiroff/Nealis v. W. Va. Schools for the Deaf and Blind, Docket No. 99-DOE-314D (Sept. 30, 1999). However, the evidence in this case establishes that the true reason for the grievance was Grievants' non-selection for the coaching positions, and their substitute status was merely an auxiliary issue, which has not been sufficiently challenged. Because their employment relationship had ended when Grievants challenged their non-selection for the coaching positions, they are not entitled to challenge the selection decision through the grievance process. Spiroff, supra.

Nevertheless, even if Grievants were treated as employees who are entitled to utilize the grievance procedure, they would not prevail on the substance of their claims. 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). 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. 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).

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 theDeaf 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). Each coaching position will be discussed separately.

Boys' Soccer Coach Position

As set forth above, Mr. Shockey and Intervenor were tied in four of the evaluation categories utilized by Principal Henline, but Intervenor was ultimately selected because of his current employment status. Respondent's decision in this regard was based upon a portion of W. Va. Code § 18A-3-2a, which provides that certificates may be issued to athletic coaches who are not otherwise

employed, but only when “a currently employed certified professional educator has not applied for the position.” Grievants rely largely upon the West Virginia Supreme Court of Appeals' interpretation of this provision in Hanlon v. Logan County Board of Education, 201 W. Va. 304, 496 S.E.2d 447 (1997), in support of their contentions. Grievants argue that the above-cited portion of Code § 18A-3-2a, which is often utilized to issue certificates to so-called “citizen coaches,” only applies to individuals who do not possess valid teaching certificates, regardless of whether or not they are currently employed by a county board of education. However, as noted by Respondent, both applicants for the position at issue in Hanlon, supra, were currently employed by boards of education, although one was employed in a county different from the one in which the position was available. The Court's reasoning was as follows:

> While it is true that a board of education's authority to hire an individual as a coach is restricted in some circumstances where 'a currently employed certified professional educator' has applied for the position, this proviso does not apply to the instant case. W. Va. Code § 18A-3-2 requires '[a]ny professional educator . . . who is employed within the public school system . . . shall hold a valid teaching certificate licensing him or her to teach . . . for the period of his or her employment.' In accordance with this requirement, W. Va. Code § 18A-3-2a permits the State Superintendent . . . to issue such certificates. Additionally, subsection (4) of § 18A-3-2a permits the issuance of other certificates to those 'persons who do not qualify for the professional or paraprofessional certificate.' Within this category of other certificates, the State Superintendent also has the authority to 'issue certificates for persons to serve in the public schools as athletic coaches . . .' subject to various limitations.

The Court went on to hold that:

> [T]he limitations imposed by subsection (4) apply only to those individuals who do not possess a valid teaching certificate. As [the successful applicant] had a valid teaching certificate at the time of the events at issue, his hiring was not governed by the provisions contained in subsection (4). Rather, [he] qualified for the coaching assignment without having to resort to these particular provisions.

The undersigned believes that Grievants' reliance upon Hanlon, supra, is misplaced. Both applicants in that case were teachers currently employed by county boards of education, thus the portion of W. Va. Code § 18A-3-2a which provides for the issuance of a special coaching certificate only when no “currently employed” teacher applies for the position did not apply. In the instant case, between Mr. Shockey and Intervenor, Mr. Shockey was not a teacher “currently employed” by any county board of education, and Intervenor was. Accordingly, in order for Grievant to be hired as soccer coach, the portion of the statute allowing for the issuance of coaching certificates (a “citizen

coach" certificate) would have had to have been utilized, which is improper when a current employee, i.e. Intervenor, has applied for the position. Grievants' literal interpretation of Hanlon, supra,would render the "currently employed" language meaningless. As a currently-employed, full-time educator, Intervenor was entitled to the position over Grievant.

Girls' Soccer Coach Position

As with Intervenor and Mr. Shockey, the successful applicant and Mrs. Shockey were tied in the first four evaluation categories. However, with regard to "other qualifications," Principal Henline determined that the negative comments he had received from numerous parents and students should be considered, which led him to conclude that Mrs. Shockey's hiring would not be in the best interests of PHS. Grievant points out that "[w]hen the factor of community acceptance, not related to the qualifications of the applicants, is given inordinate and inappropriate weight and results in a selection which is arbitrary and capricious, the decision will be overturned." Elkins v. Boone County Bd. of Educ., Docket No. 00-03-209 (Sept. 7, 2000) (citing Milam v. Kanawha County Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988)). However, as was determined in Wilson v. Mineral County Board of Education, Docket No. 01-28-116 (July 6, 2001), complaints regarding a coach's previous conduct and performance as a coach are proper considerations in a coaching selection decision. See Butta v. Wood County Bd. of Educ., Docket No. 99-54-466 (Dec. 23, 1999). Accordingly, it was appropriate for Respondent to consider complaints regarding Mrs. Shockey's performance as girls' soccer coach and to decline to select her on that basis.

Grievants further contend that they are entitled to "retain" the coaching positions at PHS because of their success in proving that they should have been the successful applicants for the 2002-2003 school year. Grievants rely upon a portion of W. Va. Code § 18A-4-16, which states that "[a]n employee who was employed in any service personnelextracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding year." In Reed v. Harrison County Board of Education, Docket No. 03-17-075 (July 7, 2003), it was determined that this provision does not apply to coaching positions:

> When . . . . W. Va. Code § 18A-4-16 is considered in conjunction with W. Va. Code § 18A-3-2a, it must be concluded that coaching positions are considered professional extracurricular assignments, and the right to retain a service personnel extracurricular position does not apply to these positions. Clearly, State Policy 5202 and W. Va. Code § 18A-3-2a contemplate that some individuals who are not qualified as professional educators may become qualified to serve as coaches. Accordingly, certificates and permits for these individuals are provided for one-year periods only, and . . . such

persons can only serve as coaches if no currently employed certified professional educators apply for the same position.

Accordingly, even if Grievants were "presumed" to be the incumbents in these positions by virtue of the previous Grievance Board decision, they are not entitled to retain them under the provisions of W. Va. Code § 18A-4-16.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. W. Va. Code §18-29-2(c) defines an employee, for purposes of this grievance procedure, as "any person hired as a temporary, probationary or permanent employee by an institution either full or part time." 3. Grievants were not employees of Respondent during the summer of 2003 and were not eligible to pursue a claim under the grievance procedure for education employees set forth in W. Va. Code §§ 18-29-1, et seq.

4. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code § 18-29-6.

5. 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. 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).

6. Coaching certificates may be issued to individuals who are not otherwise employed by a county board of education, but only when a currently employed certified professional educator has not applied for the extracurricular position. See W. Va. Code § 18A-3-2a.

7. Coaching positions are considered professional extracurricular assignments, and the right to retain a service personnel extracurricular position does not apply to these positions. See W. Va. Code §§ 18A-4-16 and 18A-3-2a; Reed v. Harrison County Bd. of Educ., Docket No. 03-17-075 (July 7, 2003). 8. Grievants have failed to prove by a preponderance of the evidence that their non-selection for soccer coach positions at PHS was arbitrary and capricious or an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Preston 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 and State 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 26, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants are husband and wife.

Footnote: 2

Although Grievants dispute the superintendent's "vague" assertion that they were unavailable when called, they have presented no evidence to establish that they were available or taught on any occasion. Moreover, it is undisputed that

both grievants have full-time employment elsewhere, which would explain their unavailability.

Footnote: 3

Although W. Va. Code § 18A-2-8a provides that probationary employees whose contracts are not renewed are entitled to notice of the board of education's decision after the fact, Grievants have not alleged any violation of that statute in this case.