AUSTIN CORDELL,

Grievant,

v.

DOCKET NO. 04-20-137

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent,

and

THOMAS WATKINS,

Intervenor.

D E C I S I O N

Grievant, Austin Cordell, filed this grievance against his employer, the Kanawha County Board of Education ("KCBOE") on July 9, 2003, alleging:

> Kanawha County Board of Education has been arbitrary and capricious in hiring the head boys [sic] basketball coach for Riverside High School. They have abused their discretion by not using the available information on the candidates. In addition, Grievant alleges age discrimination since his years of experience and success were not considered in the hiring.

The Relief Sought: "Grievant wishes to be granted the position of head boys [sic] basketball coach for Riverside High School."

Because the original grievance form was not forwarded to the Grievance Board, it is unknown when this grievance was filed. Apparently, this grievance was denied at Level I. The grievance was denied at Level II after a hearing by Decision dated April 7, 2004. Grievant appealed to Level IV on April 14, 2004, and a Level IV hearing was held on May 4, 2004. This case became mature for decision on May 17, 2004, after receipt ofGrievant's proposed findings of fact and conclusions of law.

Grievant was represented by Anita Mitter of the West Virginia Education Association, and KCBOE was represented by its attorney James Withrow, Esq.

Issues and Arguments

Grievant asserts he was the most qualified candidate for the position, and the selection of Intervenor was arbitrary and capricious. Additionally, Grievant asserts Intervenor was illegally asked to fill in as Head Coach, (See footnote 1) Intervenor lied about his experience and qualifications, Intervenor was unjustly favored, and Grievant was discriminated against because of his age. (See footnote 2)

Respondent notes the position was filled as soon as possible with the most qualified candidate. Respondent also avers its decision was not arbitrary and capricious.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed as a health and physical education teacher at Capital High School. He has been Assistant Boys' Basketball Coach at George Washington High School since 1999. 2. In late December or early January 2004, the Head Basketball Coach at Riverside High School decided to retire due to health reasons. As this was around the start of the season, Intervenor, an Assistant Basketball Coach, was asked to assume the role of Acting Head Boys' Basketball Coach until the position could be posted and filled. Intervenor agreed to this change.

3. On January 5, 2004, the principal at Riverside High School retired, and he requested the position be posted before he retired. (See footnote 3) Nancy Alexander was asked to assume the role of Acting Principal until the principal's position could be filled. She agreed to this change.

4. Principal Alexander was directed to take charge of the selection for the Head Boys' Basketball Coach. She formed an Interview Committee made up of Assistant Principal Brian Eddy, Athletic Director James Fout, (See footnote 4) and Chairperson of the LSIC, Gloria Rhem. (See footnote 5)

5. The Interview Committee members met and drew up three questions to ask the candidates. They also decided the fourth question would be, "Do you have anythingyou wish to share with the

committee?" Grt. No. 1 at Level II. Principal Alexander drew up a scoring grid for the interview questions.

6. Interviews were conducted of all four candidates on February 11, 2004. Although Principal Alexander asked the questions during the interview process, she did not participate in the scoring, in case there was a need for a tie-breaker. She was not required to break a tie.

7. All four candidates were qualified for the position, and the Interview Committee found Grievant and Intervenor to be very qualified.

8. There was a total of sixty available points for the score sheets drawn up by Principal Alexander. Grievant received the following individual totals: 48, 54, and 55 for a cumulative total of 157. Intervenor received the following individual totals: 54, 60, and 60 (See footnote 6) for a cumulative total of 174.

9. Principal Alexander recommended Intervenor for the position, and her recommendation was approved by KCBOE.

10. Grievant is 58 years old and Intervenor is 45.

11. Grievant has many years of coaching experience in various sports. He has coached both boys' and girls' basketball, and was a head girls' basketball coach from 1981 to 1993 at East Bank High School. Grievant was also a head boys' basketball coach from 1978 to 1981 at Sissionville High School. Since 1993, Grievant has not served as a headbasketball coach, but has only served in Assistant Coaching positions. (See footnote 7) Grievant has directed or coached in basketball many camps. Test. Grievant, Level IV Hearing.

13. Intervenor has also been a coach for many years, many of those at the collegiate level at West Virginia Tech, both with the men and women. He was twice voted Coach of the Year by West Virginia Colleges and Universities. (See footnote 8) Intervenor has also coached in many sports at the high school level including work as an assistant coach for boys and girls. Intervenor also participates in AAU Basketball in the summers and has directed or coached in many basketball camps. Test. Intervenor, Level IV Hearing. Because Intervenor's coaching position at West Virginia Tech is a yearly contract, and this contract had been renewed for ten years, West Virginia Tech's Director of Personnel noted the college is pleased with his performance. Test. Lord, Level IV Hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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. "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'tof Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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. "The grievance procedure . . . allows for an analysis of 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).

"The standard for the selection of professional personnel for extracurricular coaching positions is whether the board acted in an arbitrary or capricious manner or otherwise abused its discretion in matters relating to the hiring of school personnel." Montgomery v. Raleigh County Bd. of Educ., Docket No. 03-41-291 (Nov. 13, 2003). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Chafin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993). Coaching positions are considered to be extracurricular assignments, which are governed by the provisions of W. Va. Code § 18A-4-16, which sets forth the legal requirements for the employment of persons in these types of positions. Inessence, under W. Va. Code § 18A-4-16, the terms and conditions of the extracurricular assignment must be mutually agreed upon by the employer and employee, and formalized by a contract separate from the worker's regular contract of employment. Spillers v. Brooke County Bd. of Educ., Docket No. 95-05-329 (Sept.

18, 1995). See Ramey v. Mingo County Bd. of Educ., Docket No. 93-29-470 (May 12, 1994). 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).

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, supra; 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, supra; Chaffin, 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 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 & Human Res., 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 andcapricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Grievant's arguments will be examined one at a time.

I. Credibility

Grievant has asserted Intervenor lied in listing his experience. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995);

Perdue v. Dep't of Health & Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'sinformation. (See footnote 9) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The undersigned Administrative Law Judge saw no evidence to support Grievant's contention. Grievant's assertions are based on several elements. First, Grievant insists Intervenor lied about his experience as Head Basketball Coach at West Virginia Tech because Intervenor said he was Head Basketball Coach for more years than West Virginia Tech's Director of Personnel had listed in Intervenor's personal file. Intervenor explained this difference. The first couple of years at West Virginia Tech, he was a student assistant, and he was in charge of the women's team when the paid coach was with the men's team. West Virginia Tech records would not show this experience because there would be no contract for this time period.

Second, although subpoenaed to do so, Principal Alexander forgot to bring Intervenor's recommendation letters with her to the Level IV hearing. Grievant made no argument concerning this issue at the time, and did not request a continuance or for the record to remain open for these letters.

Now, however, Grievant asserts there is no documentation of Intervenor's experience. Principal Alexander testified clearly that she had these documents and the Interview Committee saw them. The experience she recalled from memory matches the information testified to by West Virginia Tech's Director of Personnel, and Intervenor's testimony. This assertion is ill-founded and borders on an attempt to impugn Intervenor'scharacter. It is noted that Grievant's coaching history is supported by only his testimony, whereas Intervenor's was documented by West Virginia Tech's Director of Personnel.

II. Whether the selection was arbitrary and capricious

Grievant also asserts the selection of the successful applicant for the head basketball coaching

position at Riverside High School was arbitrary and capricious. The Board argues the standard for reviewing selection of coaching positions is whether the decision was arbitrary and capricious, and maintains Principal Alexander's selection was based upon legitimate factors.

Principal Alexander's testified that all four candidates were qualified for the position, and Grievant and Intervenor were the two best candidates. Clearly, it was a difficult decision to make, as both candidates could have performed well in the job. While Grievant had more coaching seniority than Intervenor, this did not make Intervenor's selection arbitrary and capricious given the breath and depth of Intervenor's experience.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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. "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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. "The standard for the selection of professional personnel for extracurricular coaching positions is whether the board acted in an arbitrary or capricious manner or otherwise abused its discretion in matters relating to the hiring of school personnel." Montgomery v. Raleigh County Bd. of Educ., Docket No. 03-41-291 (Nov. 13, 2003). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Chafin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993).

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 & 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 & Human Res., 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." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp.670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

4. Grievant failed to prove by a preponderance of the evidence that KCBOE's selection of Intervenor for the Head Basketball Coach position at Riverside High School was an abuse of discretion, or arbitrary and capricious.

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. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: June 30, 2004

Footnote: 1

As Grievant did not indicate any statute, policy, rule, or regulation that had been violated by asking an assistant coach to fill in until the head coaching position could be posted and filled this issue will not be addressed further. As Grievant is aware, there is no substitute list for coaching, as this is an extracurricular assignment.

Footnote: 2

As the facts revealed both Grievant and Intervenor were over forty years old, this assertion will not be discussed further. See Blake v. Higher Educ. Comm'n/Marshall Univ., Docket No. 02-HEPC-026 (Oct. 17, 2002).

Footnote: 3

It is unknown when the position was posted. Grievant asserted the position was not posted until the basketball season was over, but this contention is incorrect, as the evidence of record shows the four applicants were interviewed on February 11, 2004. The undersigned Administrative Law Judge takes judicial notice that the high school basketball regular season ends in the last of February, and is followed by play-off season in March.

Footnote: 4

Mr. Fouts was the former Head Boys' Basketball Coach.

Footnote: 5

Principal Alexander had also asked Assistant Principal Neil Hopkins to serve on the Interview Committee, but he had to withdraw because of health reasons. LSIC stands for Local School Improvement Council.

Footnote: 6

On one of Intervenor's score sheets, the totals were three 20's for the individual sections, but the total score was written as 61. The undersigned Administrative Law Judge has corrected this calculation in Finding of Fact 8.

Footnote: 7

Grievant submitted a Players Guide, dated 2004 - 2005, for consideration at his interview. In this Guide, Grievant listed multiple quotes from the Bible, including one which stated there was only one God, Jesus. Additionally, he stated a Riverside High School player's proper priorities were: God first, family second, school, and basketball.

Footnote: 8

Intervenor was also voted Coach of the Year twice as the Head Tennis Coach.

Footnote: 9

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).