RODNEY E. CLINE,

Grievant,

v.

MINGO COUNTY BOARD OF EDUCATION,

DOCKET NO. 05-29-193

Respondent,

and

THOMAS HOFFMAN,

Intervenor.

DECISION

Grievant Rodney E. Cline filed a grievance on February 9, 2005, in which he claimed that Respondent, Mingo County Board of Education (MCBOE) “was arbitrary and capricious when he was not hired for the Head Football Coach at Tug Valley High School.” As relief, he is seeking “the position in question and any lost benefits.”

The grievance was denied at levels one and two, and level three was bypassed. Intervenor Thomas Hoffman, the successful applicant for the position at issue, intervened at level two. The parties agreed to submit the matter to level four based on the record developed at level two. After review of the record, the undersigned ordered that the West Virginia Department of Education (DOE) be joined as a party, and that a level four hearing be held in order to supplement the record with additional evidence of DOE's involvement. Grievant is represented by Sidney Fragale of AFT-West Virginia, and Respondent MCBOE was represented by counsel, Greg Bailey, of Bowles Rice McDavid Graff and Love, LLP. Respondent DOE was represented by counsel, Heather Deskins, and Intervenorrepresented himself, although he did not appear for the level four hearing. The matter became mature for decision on October 7, 2005, the deadline for submission of the parties' proposed

findings of fact and conclusions of law.

Issues and Arguments

MCBOE posted a head football coach position twice, not filling it the first time, when it had only one applicant. Grievant and Intervenor both applied pursuant to the second posting, and MCBOE determined Grievant was better qualified. After the intervention of DOE, though, Intervenor was placed in the position.

MCBOE does not argue Intervenor is better qualified, only that it was obligated to follow DOE's command, and that in the end the outcome was correct because Intervenor should have been selected when he was the only applicant for the first posting.

Intervenor makes no argument that he is better qualified than Grievant, but only argues he should have been selected the first time this same job was posted.

Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven:

Findings of Fact

1. On November 16, 2004, MCBOE posted a position for Head Football Coach at Tug Valley High School. Intervenor was the only applicant, and was recommended by the Superintendent, but the Board chose not to fill the position at that time. Intervenor did not file a grievance asserting he should have been hired.

2. On February 15, 2005, DOE intervened in the operations of the Mingo County Board of Education, limiting its authority as to the employment of school personnel, by delegating this authority to the State Superintendent of Schools. 3. Also on February 15, 2005, MCBOE re-posted the Head Football Coach position. Grievant and Intervenor were the only applicants.

4. An interview committee comprising the Tug Valley High School Principal, Assistant Football Coach and another faculty member with knowledge of football advised MCBOE's Superintendent that it had determined Grievant was the better qualified candidate, and she placed her recommendation on the agenda for the next Board meeting.

5. Due to DOE's intervention, the procedure for personnel matters is for Respondent's Personnel Coordinator, Nell Hatfield, to prepare the agenda as recommended by the Superintendent, and email it to Laura Kiser and Karen Huffman at the DOE, who then call or email her back with a

response as to whether the agenda is approved or not.

6. When Ms. Hatfield sent the agenda with Grievant's name on it, Ms. Kiser called her back and instructed her to take his name off, as he would not be approved by DOE. When Ms. Hatfield asked why, Ms. Kiser brought Nathan Estel, a person who also works for DOE but who was otherwise unidentified, into the conversation, and he told Ms. Hatfield “there were issues with the State Department of Education.” No other reason was given, and contrary to a finding in the level two decision, no mention was made of an investigation.

7. Grievant's name was replaced on the agenda with Intervenor's, and he was selected.

8. The interview committee met with both Grievant and Intervenor and asked them an identical set of thirteen interview questions. It then weighed the candidate's past experience and the interviewers' personal knowledge. Among other considerations, the committee found Grievant has seventeen years coaching experience, including pastexperience in the same position, while Intervenor only has three years of relevant experience. In addition, the committee considered Grievant's ability to recruit and work with players and assistant coaches. The committee opined that Grievant had a better knowledge of the game of football.

Discussion

This is a non-disciplinary grievance in which Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for the position in question rather than Intervenor. (See footnote 1) "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." (See footnote 2)

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. (See footnote 3) Normally, they are subject to the provisions of W. Va. Code § 18A-4-7a when filling positions, but this Grievance Board has determined that section is inapplicable to the selection of professional personnel for extracurricular assignments, such as the coaching position at issue here. (See footnote 4) 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. *(See footnote 5)* “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 footnote 6) "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 [his] judgment for that of a board of education. " (See footnote 7)

Although extracurricular coaching positions need not be filled pursuant to the requirements of that statute, they have been found by this Grievance Board to be subject to the posting requirements of W. Va. Code § 18A-4-7a. *(See footnote 8)* West Virginia Code § 18A-4- 7a(o)(3) states, “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.” Intervenor now claims he should have been given the job pursuant to the first posting, although he never filed a grievance within the time Respondent was obligated by statute to act, or within fifteen days after the time period was over.

“Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties.” (See footnote 9) While “[a]n intervenorhas the right to raise all defenses and make affirmative claims on his own behalf,” (See footnote 10) a hearing examiner may for good cause and in the cautious exercise of the examiner's discretion limit the claims that an intervenor may make; however, such limitations must be imposed in a fashion that will not unfairly prejudice the rights of the intervenor to have a proper determination made on the merits of his or her claims. (See footnote 11)

In this case, it appears Intervenor is attempting to raise as a defense the merits of a claim he should have filed after he was not selected under the first posting. That claim has nothing to do with whether the decision in this case affects his rights, but is entirely related to whether that inaction affected his rights. “Intervention should not be permitted to unfairly circumvent the time periods applicable to the grievance process.” *(See footnote 12)* Grievant waived his right to make that claim when the time limit for filing a grievance on that issue expired, so the question is now moot and has no bearing on the question *sub judice*, i.e., whether Grievant or Intervenor should have been selected pursuant to the second posting. As it appears to be an attempt to circumvent the time period

applicable to Intervenor's claim, that specific defense will not now be allowed.

It appears to be undisputed by any of the parties that Grievant was most qualified, by reason of his superior experience and knowledge, for the job advertised in the second posting. Intervenor never asserted he should have been selected when compared to Grievant, and neither Respondent asserted the most qualified applicant was picked. In fact, at the time the original hiring decision was made, MCBOE took the position that Grievant was most qualified and should be hired. Normally, it would be arbitrary and capricious to hire the least-qualified candidate for a position, without some extenuating circumstances. In this case, MCBOE acted properly, though, because it was acting on orders from DOE not to hire Grievant, and it had no discretion to ignore those orders. However, since DOE intervened and placed itself in the position of MCBOE as hiring authority, it assumed the same obligation, if not a higher duty, that MCBOE had to act properly. DOE's unexplained, evidently arbitrary decision to hire Intervenor instead of Grievant was improper and unjustified. While it could be true that DOE had a perfectly good reason to back up its order, that reason never made it into the record despite ample opportunity to rebut the presumption of capriciousness raised by Grievant's evidence. The failure is especially telling, as it is presumed the reason for DOE's takeover was to prevent such abuses of the process as is exemplified here.

When this case was initially appealed to level four, MCBOE, Grievant and Intervenor asked that it be decided on the record developed below. The undersigned found this would be against the interests of DOE, since it was not a party to the lower level and it never had an opportunity to justify its actions. DOE was joined as a party and a level four hearing was convened for the purpose of taking additional evidence. Nonetheless, DOE presented no evidence and made no argument. DOE declined the opportunity to file proposed findings of fact and conclusions of law. At the conclusion of that hearing, the record was entirely devoid of any evidence showing a rational motive for the decision to ignore the superintendent's recommendation and remove Grievant from the agenda.

The following Conclusions of Law support this decision:

Conclusions of Law

1. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

2. West Virginia Code § 18A-4-7a is inapplicable to the selection of professional personnel for extracurricular assignments, such as the coaching position at issue here. *DeGarmo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19, 2004).

3. 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).

4. When the state Department of Education intervenes in the operation of a county board of education, it has no more discretion in hiring decisions than the county board had.

5. “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). "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 [his] judgment for that of a board of education. *See generally*, *Harrison v. Ginsberg*, 169 W. Va.162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

6. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

7. Grievant met his burden of proving that the failure to hire him as head football coach at Tug Valley High School was arbitrary and capricious.

8. Extracurricular coaching positions are subject to the posting requirements of W. Va. Code §

18A-4-7a. *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 90-45-155 (Aug. 22, 1990); *Friend v. Nicholas County Bd. of Educ.*, Docket No. 34-87-286-4 (Jan. 19, 1988). *See also Catron v. Mingo County Bd. of Educ.*, Docket No. 95-29-060 (July 11, 1995).

9. "An intervenor has the right to raise all defenses and make affirmative claims on his own behalf." *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997). A hearing examiner may for good cause and in the cautious exercise of the examiner's discretion limit the claims that an intervenor may make; however, such limitations must be imposed in a fashion that will not unfairly prejudice the rights of the intervenor to have a proper determination made on the merits of his or her claims. *Id.*

10. "Intervention should not be permitted to unfairly circumvent the time periods applicable to the grievance process." *Id*. 11. Intervenor's defense that the posting requirements of W. Va. Code § 18A-4- 7a were violated when an identical position was posted was an attempt to circumvent the time limit for filing a claim on that issue.

For the foregoing reasons, this grievance is **GRANTED**. Respondents are **ORDERED** to instate Grievant in the position of Head Football Coach at Tug Valley High School. In recompense, Respondents are further **ORDERED** to pay Grievant any money he would have earned had he been placed in the position originally.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo County. Any such appeal must be filed within thirty 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.

October 21, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 2

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (1993).

Footnote: 3

Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

Footnote: 4

DeGarmo v. Wood County Bd. of Educ., Docket No. 04-54-062 (2004).

Footnote: 5

Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (1993).

Footnote: 6

Trimboli v. Dep't of Health & Human Res., Docket No. 93-HHR-322 (1997).

Footnote: 7

Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (2001).

Footnote: 8

Jarrell v. Raleigh County Bd. of Educ., Docket No. 90-45-155 (1990)

Footnote: 9

W. Va. Code 18-29-3(u).

Footnote: 10

Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Footnote: 11

Id.

Footnote: 12

Id.