ROBIN LAHITA,

Grievant,

v. Docket No. 05-05-237

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Robin Lahita ("Grievant"), employed by the Brooke County Board of Education ("BCBE") as an aide, filed a level one grievance on April 26, 2005, following her nonselection for the position of assistant softball coach. Grievant seeks back pay for the 2005 season. The grievance was denied at levels one and two. BCBE waived consideration at level three, and appeal to level four was made on July 8, 2005. Grievant, represented by Eric M. Gordon, Esq. of Berry, Kessler, Crutchfield, & Taylor, and BCBE counsel David F. Cross, Assistant Prosecuting Attorney, agreed to submit the grievance for decision based on the level two record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before September 26, 2005.

The following facts are derived from a preponderance of the credible evidence made part of the level two record.

Findings of Fact

1. Grievant has been employed by BCBE for approximately nineteen years, and has been assigned as an aide at Wellsburg Primary School at all times pertinent to this grievance.

2. By posting of March 7, 2005, BCBE announced a vacancy for the position ofAssistant Softball Coach at Brooke High School. Qualifications for the position were "[c]ertification or license as required by the West Virginia Board of Education and the West Virginia Secondary Schools Activity Commission. Experience in both classroom teaching and specialty in the area is preferred."

3. Two individuals submitted applications for the position, Grievant and Robert Beckelheimer.

4. An interview team composed of the Athletic Director, Assistant Athletic Director, and the Head Softball Coach, interviewed both applicants.

5. The interview team recommended Mr. Beckelheimer for the position, based upon his greater experience and an in-depth knowledge of the sport.

6. Superintendent Charles Baker recommended Mr. Beckelheimer, and BCBE approved his appointment as Assistant Softball Coach.

7. While employed by BCBE, Grievant has served as a volleyball coach a number of years, and as Assistant Softball Coach at Brooke High School for six years, from 1989-1995.

8. Mr. Beckelheimer is not employed by BCBE, or any school system, but has been coaching softball in the area for twenty-five years.

9. Mr. Beckelheimer's spouse serves on the BCBE. She voted for his employment as part of a group of individuals recommended by Superintendent Baker.

Discussion

Grievant argues that BCBE engaged in favoritism, and acted in violation of W. Va. Code § 61-10-15, rendering the selection of Mr. Beckelheimer arbitrary and capricious. BCBE denies that it acted in an arbitrary and capricious manner, and asserts that it properly hired the most qualified applicant.

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

Because neither applicant was a professional employee of BCBE, the standard of review is 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). (See footnote 1)

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). If the selection was based on favoritism, it would most assuredly be arbitrary and capricious.

"Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18- 29-2(o). To establish a prima facie case of discrimination or favoritism Grievant must prove by a preponderance of the evidence:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Chaddock v. Div. of Corrections, Docket No. 04-CORR-278 (2005); Frymier v. Glenville State College, Docket No. 03-HE-217R (2004).

Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Grievant has failed to establish a prima facie case of favoritism for two reasons. First, she was not treated differently than another employee. Second, BCBE stated a clear, legitimate reason it chose Mr. Beckelheimer for the position. While situations involving relatives employed by a board of education are frequently attributed to favoritism, it is not illegal for a board to hire a relative of a member. W. Va. Code §61-10-15, states in part:

(a) It is unlawful for any member of a county commission, overseer of the poor, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: *Provided,* That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse. (Emphasis added.)

BCBE could have avoided any appearance of impropriety if Board Member Beckelheimer had not voted on the employment of her husband; however, the evidence does not indicate that she has been charged with any wrongdoing in this instance. To the contrary, the evidence establishes that Mr. Beckelheimer was determined to be the more qualified applicant based upon his years of experience, and his knowledge of the game, as demonstrated during the interview. Under these circumstances, BCBE did not act in an arbitrary and capricious manner when he was approved for the coaching position. 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 her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18- 29-2(o).

3. To establish a prima facie case of discrimination or favoritism Grievant must prove by

a preponderance of the evidence:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Chaddock v. Div. of Corrections, Docket No. 04-CORR-278 (2005); Frymier v. Glenville State College, Docket No. 03-HE-217R (2004).

4. 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 amanner 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).

5. Grievant failed to prove by a preponderance of the evidence that her non- selection for a coaching position was due to favoritism, or was an arbitrary and capricious action by the board of education.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Brooke 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: NOVEMBER 18, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Citizen coaches may only be employed by a board of education if no certified professional employee applies. W. Va. Code §18A-3-2A(4)(c).