WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LARRY HOOD,

Grievant,

v. **Docket No. 07-05-155**

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Larry Hood ("Grievant") filed this grievance at level one on November 15, 2006, alleging he should have been selected for the position of Girls' Basketball Coach at Brooke High School. The grievance was denied at level one on December 13, 2006, and at level two, following an evidentiary hearing, on May 3, 2007. Grievant appealed to level four on May 7, 2007. Upon submission to this Grievance Board, the parties agreed that the grievance could be decided based upon the record developed at level two. Grievant was represented in this matter by Rosemary Jenkins of the West Virginia Federation of Teachers, and Respondent was represented by counsel, David Cross. This matter was reassigned to the undersigned administrative law judge on August 16, 2007, following the resignation of Administrative Law Judge Wendy A. Campbell.

Synopsis

Grievant alleged that he should have been selected over the successful applicant for the position of Girls' Basketball Coach at Brooke High School. An interview committee asked a prepared set of

questions of each of the four applicants for the position, ratingtheir answers on a scale of one to three. After the interviews, the scores were totaled, and the applicant with the highest score was selected. Grievant claimed that, because he had more total coaching experience, he was more qualified, and he also alleged that he should have received a higher score in the category of "availability." Evidence established that Respondent did not act arbitrarily and capriciously or abuse its broad discretion in selecting coaches.

After a detailed review of the record in its entirety, the undersigned makes the following findings of fact.

Findings of Fact

1. Grievant has been employed by Respondent for more than 32 years. He is currently employed as a classroom teacher at Follansbee Middle School and serves as that school's athletic director.

2. Grievant has approximately 30 years of coaching experience in various sports, including boys' and girls' basketball, at the middle school level.

3. The position of Girls' Basketball Coach at Brooke High School ("BHS") became vacant sometime during the fall of 2006.

4. David Cucarese, Athletic Director of BHS, formed an interview committee to begin the selection process for the position. The committee consisted of Mr. Cucarese, Rob Robinson, Assistant Athletic Director of BHS, and BHS Principal Toni Shute.

5. The interview committee met and compiled a list of interview questions to be asked of each applicant, encompassing the qualification areas of availability, knowledge of the sport, coaching experience, ability to communicate, ability to fit into the program, andgoals for the program. Each response was rated on a scale of one to three, with three being the best score.

6. Four individuals applied for the position, including Grievant. Three were regularly employed teachers and the other, Erica Hall, was a substitute teacher.

7. After the interviews were completed and the points had been totaled, Erica Hall had the highest score with 51 points. Grievant scored third out of the four candidates, with a total of 43 points.

8. Ms. Hall had played basketball at BHS for four years, along with playing basketball in

college. She had been an assistant Varsity Girls' Basketball Coach for two years with a nationally ranked high school team (See footnote 1) and had also served as BHS Assistant Girls' Basketball Coach for one year. Ms. Hall also serves as the Varsity Girls' Soccer Coach at BHS.

9. Ms. Hall was selected to fill the position, due mostly to her experience coaching and playing basketball at the high school level. She was also deemed to be more readily available to coach immediately after school, because she is not assigned to another school from which she would have to travel to BHS. Because she is a substitute and does not work every day, the interviewers believed Ms. Hall would be more available. Ms. Hall also received the highest score from each interviewer in the categories of ability to fit into the program and goals, while Grievant received lower scores in those categories.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6, 156 W. Va. C.S.R. 1 § 4.21. (See footnote 2) "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).

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). Normally, a board is 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 coaching positions. *DeGarmo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19. 2004). 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 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 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 her 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).

Ms. Hall was the overwhelming first choice of each of the members of the interview committee, based mostly upon her experience and background coaching and playing basketball at the high school level. Although it is true that Grievant has far more years of coaching experience, it has only been at the middle school level. The undersigned does not find that the committee's preference for high school level experience was arbitrary and capricious or evidences an abuse of discretion. Indeed, the Grievance Board has often recognized that it is not arbitrary and capricious for a board to choose a less-experienced applicant, so long as the deciding factors were valid considerations. *DeGarmo v. Wood County Bd. of Educ*., Docket No. 06-54-025 (March 8, 2006); *Wright v. Mason County Bd. of Educ.,* Docket No. 05-26-367 (January 9, 2006). Grievant also argues that he should have received higher scores in the area of availability, testifying that many sport practices do not begin right after school every day, due to teams taking turns using available facilities. Nevertheless, it is undisputed that Grievant works at a school ten minutes away from BHS, which dismisses thirty minutes later than BHS, making it impossible for him to ever begin practice at 3:00 p.m. when the high school dismisses for the day. Ms. Hall, being a substitute, may occasionally be unavailable exactly at 3:00 if assigned to another school for the day, but she would certainly be more frequently available at that time than Grievant. Accordingly, the undersigned does not find this to have been an unfair consideration in the committee's decision.

Grievant also argues that, as a regularly employed teacher, he was entitled to be placed in this position over Ms. Hall, a substitute. This is an issue which has been addressed many times by the Grievance Board. Grievant is correct in his allegation that a substitute teacher working under a temporary permit may not be selected for a coaching position over a “currently employed certified professional educator,” pursuant to the provisions of W. Va. Code § 18A-3-2a(4). (See footnote 3) *Arrington v. Jackson County Bd. of Educ.*, Docket No. 04-18-365 (Apr. 29, 2005); *Shockey v. Preston County Board of Education*, Docket No. 04-39-045 (July 26, 2004). However, as discussed in

Arrington and *Pettry v. Boone County Board of Education,* Docket No. 96-03-150 (Sept. 30, 1996), there is no such restriction if the substitute is *not* working under a temporary permit, and the individualis “a 'certified professional educator' currently employed and functioning as a substitute teacher.” *Arrington*, *supra*. The record in the instant case only identifies Ms. Hall as a substitute teacher who has been employed by Respondent for three years, and there is no mention of her working under a permit, rather than as a fully certified teacher. Accordingly, Grievant has failed to meet his burden of proof with regard to this argument.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

2. 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).

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)." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). 4. Grievant has failed to prove by the preponderance of the evidence that the selection of the successful applicant for the coaching position at issue was arbitrary and capricious or an abuse of Respondent's discretion in such matters.

Accordingly, this 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. See W. Va. Code § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). Neither the West Virginia Public 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 30, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Only the name of this school was given (Mt. DeChantal), and the record does not explain where this school is located.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 3

This statute allows the issuance of coaching permits to individuals who are not certified teachers and also provides for temporary permits for teachers who have not met all of the requirements for certification.