MIKE WILSON,

Grievant,

v. **Docket No. 01-28-116**

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Mike Wilson ("Grievant") initiated this proceeding on December 18, 2000, alleging he was the most qualified applicant for the position of Assistant Boys' Basketball Coach at Keyser High School. He seeks placement in the position, back pay, and attorney's fees and costs. On December 21, 2000, Grievant's immediate supervisor advised that he was unable to grant relief. A level two hearing was held on February 9, 2001, and the grievance was denied in a subsequent written decision dated March 27, 2001. Level three consideration was bypassed, and Grievant appealed to level four on April 2, 2001. A level four hearing was held in the Grievance Board's office in Westover, West Virginia, on May 18, 2001. Grievant was represented by counsel, Daniel C. Staggers, and Respondent was represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 5, 2001.

The following findings of fact are made from a preponderance of the evidence of record, including the level three transcript and exhibits, and all evidence admitted at the level four hearing.

Findings of Fact

1. Grievant is employed as a classroom teacher at Keyser High School and has been employed by Respondent for approximately 31 years. 2. Grievant has served as a boys' basketball coach in Mineral County for approximately 23 years. His experience includes Assistant Coach at Piedmont High School, Junior Varsity Coach at Keyser High School, and Head Coach at Keyser High School. Most of Grievant's teams have been successful.

3. On October 19, 2000, Respondent posted a vacancy for the position of Assistant Boys' Basketball Coach at Keyser High School. The minimum qualifications were listed as follows:

> Experience in the sport.

Relevant training and/or certification in the sport.

Knowledge of coaching skills in the sport.

Ability to plan, develop, and implement an instructional program in the sport.

Recognition of students' social and personal development.

Willingness to work to develop self-esteem and sportsmanship in student athletes.

Willingness and ability to fulfill the required performance responsibilities.

4. Respondent has adopted a policy, GBDA-R, governing the hiring of coaches, which states in pertinent part:

> [I]t shall be the policy of the Mineral County Board of Education to recruit and hire the best possible qualified persons as coaches in Mineral County Schools.

* * * *

> Selection will be made on the basis of qualifications, which will include experience in the particular sport, any relevant training and/or certification in the particular sport, knowledge of coaching skills in the particular sport, knowledge concerning the physical development and conditioning of youth, recognition of students' social and personal development, and willingness to work to develop self-esteem and sportsmanship in student athletes.

5. After the initial posting, Grievant and Gary Liston were the only applicants for the position. The candidates were interviewed by Keyser High School Principal JohnHaines, who recommended Grievant for the position. At Board meetings on November 8, 2000, and again on November 21, 2000, the Board rejected the superintendent's recommendation that Grievant be placed in the position.

6. The coaching position was again posted on November 27, 2000. Four people applied, including Grievant. Applicants who had not previously applied were interviewed by Principal Haines, who again ranked Grievant as the number one candidate, followed by Jason Hartman. At a Board meeting on December 5, 2000, Grievant was again recommended by the superintendent, which recommendation was rejected by the Board.

7. On December 11, 2000, the Board accepted the superintendent's recommendation that

Jason Hartman be placed in the coaching position at Keyser High School.

8. During the 1994-1995 basketball season, while Grievant was serving as head coach at Keyser High School, parents began complaining about Grievant behaving unprofessionally during games and using inappropriate language in front of players. After investigation by Principal Haines, this area of concern was noted on Grievant's performance evaluation.

9. In a letter dated March, 1995, approximately twenty parents complained about Grievant's lack of success during that season. They also complained that he was exposing their children (players) to “negative experiences” by losing his temper and having two technical fouls called on him. These parents also alleged that Grievant was difficult to work with, causing many team members to quit. 10. At Grievant's request, a meeting was held with these concerned parents on April 5, 1995, so questions could be asked and Grievant could attempt to address the complaints.

11. In a letter to Principal Haines dated April 17, 1995, 13 basketball players expressed their frustrations with Grievant. They stated that he did not communicate well with them, not allowing them to talk during practice or ask questions. They further stated that Grievant was unable to control his temper, resulting in throwing chairs, kicking and punching walls, and using swear words that they were prohibited from using themselves.

Principal Haines met with the students and assured them that these problems had been discussed with Grievant and that he would be closely monitoring Grievant's conduct during the upcoming season.

12. On June 6, 1995, 39 parents signed a “Citizens Appeal Form,” requesting that Grievant be dismissed from his position as basketball coach, due to the conduct of which they had already complained to Principal Haines, which had not been resolved to their satisfaction. In response to the complaint, Principal Haines advised the parents that the matter had already been investigated, Grievant's conduct would be closely monitored, and he would not recommend Grievant's termination. (See footnote 1)

13. When Grievant was recommended for the coaching position at Keyser High School in November and December of 2000, one of the Board members already had personal knowledge that the citizen's complaint had been filed against Grievant in 1995. He shared this information with the other Board members, and the documents relating tothe complaint were reviewed by the Board. The matters discussed in the complaint and related letters were of enough concern to cause three Board

members to vote against Grievant. If Grievant had been placed in the position, the Board and superintendent discussed placing Grievant under some type of monitoring to make sure that he behaved professionally.

14. Jason Hartman is employed as a substitute teacher by Respondent. He had limited experience in coaching (church leagues, etc.), and he had never coached a school team.

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.

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. In essence, 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 designatehow, 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 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. (See footnote 2) Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 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 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 herjudgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

At level four, Grievant alleged that the Board had improperly considered the “confidential” citizen's complaint previously filed against him, in violation of the applicable policy. Respondent's Policy KN-R, governing citizen's appeals, states that documents related to such a complaint will be kept in a file separate from the employee's personnel file, and “shall remain confidential except by mutual written agreement of the parties.” Grievant contends that, because he did not consent to the release of these documents, their use by the Board during their deliberations over the coaching position at issue violated this policy. However, because the Board is the entity before which such complaints are filed, use of these documents by the Board did not violate any confidentiality provision, because the information was not released to the public. Moreover, at least two board members testified they knew generally that the complaint had been filed and that there were concerns about Grievant's performance.

In addition, Grievant contends that he was never informed that Policy KN-R provides that an employee can request that all documentation of the complaint be expunged after one year has passed. However, there is no requirement in the policy that the Board must tell an employee about this provision, and the policy--along with all other county policies-- was available to Grievant at the Board office. Knowing that the complaint had been filed, it would seem that Grievant would have investigated the matter at that time to determine where the information would be kept and what would become of it. Grievant also contends that the Board relied on “community input” in reaching their decision. This Grievance Board has previously held 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, in Elkins, the Board members testified that they simply ignored the applicants' qualifications and selected the successful candidate only because of his charisma. That did not happen in the instant case. Grievant's conduct with respect to his behavior toward and in front of his players during games and practices is hardly "extraneous" to his qualifications to be a basketball coach.

Grievant offered the testimony of numerous witnesses who testified that he worked well with parents and players and was an excellent coach. However, only one of those witnesses provided this information to the Board prior to its decision. In addition, Grievant introduced videotape of three games he coached, in an effort to demonstrate that his conduct is purely professional and that the Board's decision was improper. The undersigned simply cannot consider evidence which was not before the Board when it made its hiring decision. As set forth above, the standard of review is whether the Board abused its discretion or made a decision contrary to the evidence before it. None of this evidence was before the Board prior to its decision, and it would be improper for this Grievance Board to essentially grant Grievant a "new interview" by considering this evidence. There can be no dispute, and all witnesses in this case agreed, that Grievant had by far the most experience of the applicants who applied for this position. Nevertheless, years of experience does not alone make a candidate the most qualified. See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447. Because Grievant's previous conduct and the complaints against him were directly related to his duties as a basketball coach, it was proper for the Board to consider it. See Butta v. Wood County Bd. of Educ., Docket No. 99-54-466 (Dec. 23, 1999). Although Mr. Hartman clearly had limited experience, the Board believed he was a more appropriate choice, considering that Grievant's conduct would have to be closely monitored if he were placed in the position. There is no dispute here that Mr. Hartman was minimally qualified for the position, and the Board did not abuse its discretion in choosing him over Grievant, nor has that decision been demonstrated to have been arbitrary and capricious.

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

Conclusions of Law

1. 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.

2. The standard of review for filling coaching positions is to assess whether the Board abused its 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 (W. Va. 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). 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).

4. Grievant has failed to prove by a preponderance of the evidence that the selection of Jason Hartman as Assistant Boys' Basketball Coach and Keyser High School 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 the Circuit Court of Mineral County, and 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 GrievanceBoard. 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 6, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently, this complaint was not pursued further.

Footnote: 2

Placement in an extracurricular position is not, as Grievant alleges, a "promotion" which is to be based upon performance evaluations, pursuant to Policy 5300.