**PAULA FLEENOR,**

**Grievant,**

**v.** **DOCKET NO. 04-55-343**

**WYOMING COUNTY BOARD**

**OF EDUCATION,**

**Respondent,**

**and**

**SHARI D. GIBSON,**

**Intervenor.**

## DECISION

Grievant filed this grievance on May 28, 2004, claiming Respondent abused its discretion and violated of W. Va. Code §§ 18A-4-16 and 18A-4-7a in the selection of a candidate for a cheerleading coach position. Grievant seeks placement in the position.

Having been denied at all lower levels, the parties submitted the matter for decision at level four based on the record developed below. Grievant was represented by Ben Barkey, WVEA UniServ Consultant, and Respondent was represented by Gregory W. Bailey, Esq. of Bowles Rice McDavid Graff & Love, LLP. Intervenor appeared at level two without representation, and at level three she was represented by Gary Archer, WVEA UniServ Consultant. This matter became mature for decision on October 29, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record, I find the following material facts have been proven:

## FINDINGS OF FACT

1. Grievant is employed by Respondent as a classroom teacher at Westside High School, and she has been employed by Respondent a total of 24 years.

2. In October, 2003 Respondent posted a position for Head Varsity Cheerleading Coach at Westside High School. Grievant and Shari Gibson timely applied.

3. The position came open when the incumbent resigned. Grievant volunteered to fill in on an interim basis until it could be filled, and did so.

4. Because it was awaiting the outcome of litigation about the filling of another coaching position and what qualifications must be considered in doing so, Respondent failed to fill the position until May, 2004.

5. The applicant's qualifications were reviewed by Superintendent Frank Blackwell and Assistant Superintendent Frank Mann. Interviews were not conducted. Both were well-qualified, and Mr. Mann determined that Grievant had more experience. 6. Grievant had claimed two years as assistant cheerleading coach at Oceana High School, and Mr. Mann did not count these years because the head varsity coach at Oceana High School said she had not been his assistant. Grievant had actually been the assistant junior varsity coach those years.

7. Deborah Marsh, Principal of Westside High School and Superintendent Blackwell both received complaints about Grievant's use of inappropriate language in front of students, both in the classroom and while coaching. Grievant was warned by Ms. Marsh against such conduct, but Grievant continued to curse while coaching, and more complaints were received. Grievant admitted using such language on occasion in front of students, but never “at” students. 8. Messrs. Mann and Blackwell considered Grievant's inappropriate language use, especially after having been counseled against such conduct, to be the deciding factor between two closely-matched candidates.

9. No complaints had ever been received against Intervenor.

## DISCUSSION

This is a non-disciplinary grievance in which 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).

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, 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 cheer coaching position at issue here. *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 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).

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 mannercontrary 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).

In this case, both candidates were well-qualified for the position, and Grievant had a slight edge experience-wise. However, Grievant's inability to control her tongue while teaching and coaching detracted from her application. Intervenor had no such negative attributes. In the coaching selection process, there is no set of particular factors by which Respondent must compare candidates, and in this case it found two experienced coaches and made its choice between them based on a reasonable consideration. It considered all the qualifications of both candidates, but one candidate, Grievant, also had disqualifications to consider. The undersigned cannot find unreasonable, arbitrary or capricious the decision to choose a coach who appeared to be the better role model for the students entrusted to her tutelage. The fact that Grievant appeared unrepentant about her

inappropriate language use lends further weight to Respondent's decision.

Two inconsequential errors were made by Respondent in the selection process. First, Mr. Mann erroneously discounted Grievant's years of experience when he could not verify Grievant was assistant varsity cheerleading coach at Oceana. Even had this errorbeen corrected, the outcome would have been the same. Both candidates would have still been closely-matched, but since more weight was given to Grievant's inappropriate conduct, the extra experience would not have mattered. Second, the delay in filling the position after it was posted did not harm Grievant's position, even though some of her misconduct occurred during the delay. Respondent was not obligated to fill the position after it was first posted, and the remedy for its delay would be to order Respondent to re-post the position and reconsider the new crop of candidates. Grievant provided no evidence that she would have been successful had that proper procedure been followed.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which 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).

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

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 capriciousmanner. *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. 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 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)).

5. "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).

6. Grievant failed to sustain her burden of proving Respondent abused its discretion in selecting Intervenor for the position in question.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming County. Any such appeal must be filed within thirty (30) days ofreceipt 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

**Date: November 24, 2004** _____

**M. Paul Marteney**

**Administrative Law Judge**