INDIA RUSH,

Grievant,

v. **Docket No. 02-20-362R**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

India Rush ("Grievant") originally initiated this grievance against her employer the Kanawha County Board of Education ("KCBOE" or "Board") on August 6, 2002. In her first Statement of Grievance, Grievant asserted KCBOE had revoked or terminated her position as cheerleading coach, believed false allegations that were made about her, and the board members had used their positions to discriminate against her. The relief sought was reinstatement as the cheerleading coach.

Grievant reworded her Statement of Grievance when she filed at the next level on August 12, 2002. Grievant again asserted she had been terminated from the position of cheerleading coach and had been subjected to false allegations and discrimination, and the actions of KCBOE were prohibited by the Civil Rights Act of 1964. She also averred her reputation as a Kanawha County employee had been "damaged." According to this document, Grievant was represented by attorney Cynthia Evans at the time.

The original grievance was denied by Grievant's immediate supervisor on August 19, 2002, and a Level II hearing was held on September 25, 2002, and October 15, 2002. The grievance was denied at that level on October 30, 2002. Level III proceedings were waived, and Grievant appealed to Level IV on November 4, 2002.

The parties subsequently agreed to submit this grievance for a decision based upon the record developed below, supplemented by fact/law proposals submitted by January 31,2003. At that time, Grievant was represented at Level II and IV by counsel, Sharon F. Iskra, and Respondent was represented by counsel, James W. Withrow. The major focus of Grievant's argument was she should not have been fired from her position as cheerleading coach at George Washington High School

("GW"), and during this termination, multiple errors occurred. This grievance was denied by Level IV Decision dated February 28, 2003. Administrative Law Judge Denise Spatafore found Grievant had not met her burden of proof and demonstrated she had been hired to fill the position at issue.

Grievant appealed this Decision to the Kanawha Circuit Court and on December 21, 2004, the Circuit Court remanded this case for "further consideration. The Circuit Court directed the Grievance Board to "receive and consider any additional evidence required to review the issue of the Appellant's nonselection for the position of cheerleading coach at GW, including the statute-based issues which the Appellant advances in this court but, apparently, not to the satisfaction of the Grievance Board below." The Circuit Court also directed the Grievance Board to "decide the issue of the Appellant's non-selection and, if necessary, any or all statute-based issues necessary for such determination which the Appellant advanced in this Court but, not to the satisfaction of the Grievance Board below. . . ."

The Grievance Board received this Order on February 24, 2005, and requested hearing dates from the parties that same day. A hearing was set for April 19, 2005, but the parties in a pre-hearing phone conference held April 15, 2005, requested the case besubmitted on the record developed previously. (See footnote 1) The parties were directed to delineate clearly the statutory and other issues to be addressed. This case became mature for decision on July 11, 2005, after receipt of the last of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant made numerous arguments. One, Grievant was hired for the position, and she was not afforded due process during her termination at the Board meeting, including a fair opportunity to respond. Two, the action of the Board members, especially Becky Jordan (See footnote 2) , were inappropriate as they did not follow past practice and the suggestions of the Board's attorney, complaints about her prior performance should have been handled by the evaluation process, and/or the issue should have been tabled and an investigation conducted. Three, the prior administrative law judge committed errors when she 1) allowed the testimony of Respondent's witnesses to remain in the record as it was irrelevant; and 2) did not remove the transcript of the Board meeting from the lower level record. Four, the prior administrative law judge should have addressed the non-selection issue. Five, the prior administrative law judge could not reframe the issue as defined by the

Grievance Evaluator in the Level II Decision. (See footnote 3) Six, the Board meeting where thedecision to not hire Grievant was made was a "hearing," and Grievant was not afforded the right to representation, and to cross-examine witnesses, the "witnesses" at this hearing were not sworn, and they presented hearsay and double hearsay, and she did not receive notice of this "hearing." (See footnote 4)

Although not clarified by the parties, the undersigned Administrative Law Judge, takes judicial notice that coaching positions are extracurricular assignments that are to be filled by professional employees. A service personnel employee can only fill an extracurricular coaching position, if no certified professional employee applies. W. Va. Code § 18A-3-2a(4). The only statutory argument made by Grievant was KCBOE did not follow W. Va. Code § 18A-4-8b when it did not select Grievant to fill the cheerleading coach position. It is noted this Code Section applies to "the filling of any service personnel positions. . . ," as listed in W. Va. Code § 18A-4-8, not for extracurricular coaching assignments. Accordingly, this statutory argument will not be addressed further.

Respondent asserts Grievant's hiring as the cheerleading coach at GW was never approved by KCBOE, so there can be no termination. Respondent also avers the action of the Board in not hiring Grievant was not arbitrary and capricious in light of thestatements made by parents at the Board meeting. The requirements of W. Va. Code § 18A-4-16, which governs the filling of extracurricular assignments, were followed.

The following findings of fact are based upon a preponderance of the evidence of record. Because several of Grievant's arguments had to do with testimony, witnesses, and documents, it should be noted Grievant chose not to correct some of the alleged errors from below when she twice agreed to submit the case on the record developed at Level II. For example, Grievant's attorney asserted she had no opportunity to review the transcript of the Board meeting when it was placed into evidence at the Level II hearing, and she averred there were certain witnesses that should have been called by Respondent. (See footnote 5)

Findings of Fact

1. Grievant was first employed by the Kanawha County Board of Education ("KCBOE") in 1997 as a substitute special education aide and autism mentor. This is a service personnel position, not a professional position. Grievant's first regular employment with KCBOE was in December 11, 2001,

when she signed a probationary contract of employment, up until that time she was employed as a substitute. Grievant also received a probationary contract of employment for the 2002 - 2003 school year. (See footnote 6) Exh. No. 1 inGrievant's proposed Findings of Fact and Conclusions of Law. (See footnote 7) Grievant is an African- American.

2. During the 2000-2001 school year, Grievant was assigned to John Adams Junior High School ("JA") as a long-term substitute, and she served as an autism mentor. She also held an extracurricular contract as cheerleading coach at JA, only for the 2000- 2001 school year. The average age of these cheerleaders was twelve.

3. Multiple parents and students complained to Principal Kidd during the 2000 - 2001 school year about Grievant's behavior and treatment of the cheerleaders. When Principal Kidd received these complaints, he told the parent or cheerleader that he would take care of it and talk to Grievant. He may have talked to Grievant, but these discussions did not effect change in her behavior and Grievant's evaluation did not reflect this lack of change. Test. Norma Adkins, mother, and students, EV, AT, and AB at Level II Hearing. (See footnote 8) 4. Parents complained to Grievant about how she talked to the students and asked her to address them with more respect, indicated she was too hard on them, and disapproved of her requiring the cheerleaders to run laps for a disciplinary infraction at Homecoming in front of the entire stadium. The infraction was failure to pay attention. Grievant believes this type of punishment of 12 year olds in front of a large crowd of parents, peers, and the opposing team was appropriate. Test. Grievant at 50. 5. While working as the cheerleading coach at JA, Grievant received a satisfactory performance evaluation for her coaching from Thomas Kidd, Principal at JA, although he noted there were "parent communication problems."

6. At the Level II hearing, Principal Kidd could not remember any problems with Grievant, did not really remember why he wrote the statement about parent communication problems, did not recall any parent and/or student conferences or complaints about Grievant, but acknowledged they could have occurred. He testified he was too busy with other athletic duties to pay much attention to cheerleading activities, as they make only 1/20th of his duties at a ball game. Principal Kidd testified if he had been made aware of a problem he would have investigated, cursing is never appropriate behavior, and if indeed Grievant engaged in this behavior, he would change his opinion about Grievant's ability to coach. He also stated it was inappropriate for a coach to require students to run laps for disciplinary reasons during an actual athletic contest.

7. Assistant cheerleading coach Terri Williams, did not attend practice except in Grievant's absence. She saw no problems with Grievant's behavior while she was cheerleading coach, noted she maintained discipline, and talked in a "stern" voice. Ms. Williams never heard Grievant curse and no one complained to her about any problems with Grievant. Ms. Williams' testimony that the cheerleaders appeared to be having fun while they ran the disciplinary laps in front of the Homecoming crowd is not believed.

8. Grievant's testimony at Level II was confusing and contradictory. She stated she had no problems with the "children" and their parents, and they liked her, and then she identified multiple complaints made against her, her responses to them, and her belief that these complaints were always groundless. Test. Grievant at 20 -21, 23, 26, 39. Grievant noted the parents did not like the way she talked to the students, said Grievant was too hard on them, did not like that she made them run at the Homecoming game, and did not like that she "was disciplined." She took these complaints to Principal Kidd, but "didn't take it at heart." Test. Grievant at 20.

9. Grievant first testified she had no complaints from then Ms. Jordan while she was the cheerleading coach at JA, but Grievant then testified Ms. Jordan did tell Grievant she did not like the way Grievant talked to the cheerleaders. Grievant saw this complaint as "nothing." Test. Grievant at 39. Grievant later testified Ms. Jordan "stormed" into one of the practices "really out of control" and later that day threatened her. Grievant told Ms. Jordan to "do what she damned well pleased," and then complained to Principal Kidd about Ms. Jordan the next day. According to Grievant, Principal Kidd stated Ms. Jordan should not have acted like that, and if she did it again he would bar her from the premises. Test. Grievant at 53. The undersigned Administrative Law Judge finds this testimony by Grievant to be an exaggeration and misrepresentation of the facts.

10. Grievant was assigned as an aide at South Charleston Middle School for the 2001-2002 school year. She had no extracurricular duties that school year. Grievant could not or would not clearly state why she did not seek the cheerleading coaching position at JA during the 2001-2002 school year. Test. Grievant at 53 - 54.

11. During the summer of 2002, KCBOE advertised a vacancy for the extracurricular position of cheerleading coach at GW. No professional employee applied, Grievant was the only applicant for the position, and she was qualified as she had received the required training to coach. 12. On July 29, 2002, Chris Courtney, the Certification Coordinator, informed Grievant her "name has been

submitted to me today stating you will be the Cheer Coach at George Washington High School for the 2002 - 2003 school year." Grt. No. 3. Grievant scheduled cheerleading tryouts to begin during the week of August 6, 2002.

13. On or about July 23, 2005, Board Member Jordan called Grievant at home to voice her concerns about Grievant's possible placement as the cheerleading coach at GW. Board Member Jordan's primary concern was "the cussing." Grievant informed Board Member Jordan her comments had been taken out of context and noted she had never received a reprimand. Grievant reported Board Member Jordan began the conversation in a nice way, but then became rude and threatening. Grievant hung up on her. Test. Grievant at 60 - 62.

14. Superintendent Ron Duerring placed Grievant's name on the agenda for the Board meeting of August 5, 2002, and he recommended she be hired as GW's cheerleading coach.

15. At the August 5, 2002 Board meeting, four parents voiced concerns regarding the treatment of their daughters by Grievant while she was cheerleading coach at JA and stated they did not want her placed at GW and to coach their daughters. One parent who made statements regarding Grievant's alleged mistreatment of her child was Board Member Jordan, whose daughter had been a cheerleader while Grievant coached at JA.

16. Board Member Jordan and three other mothers informed KCBOE Grievant had cursed frequently in front of their children, embarrassed them by requiring them to run laps as a disciplinary measure during the Homecoming football game with hundreds of people in the stands, did not demonstrate leadership, belittled the students, and did notpromote team work and self-esteem. Board Member Jordan noted their complaints had fallen on deaf ears, and the problem now facing the Board was caused by the failure of Principal Kidd to evaluate Grievant properly.

17. Grievant was informed her hiring was being discussed at the Board meeting and arrived late to the meeting. Contrary to Grievant's testimony, she was briefly informed of the allegations and was allowed to respond and speak on her own behalf. She admitted she had said "s--t" in front of the cheerleaders once and affirmed she had made the cheerleaders run laps during the Homecoming game in front of all the spectators as a disciplinary measure.

18. Because of the complaints of parents and Board Member Jordan, KCBOE voted not to hire Grievant for the GW position, and it was reposted.

19. Grievant continues to be employed by KCBOE as an itinerant autism mentor, and she is

currently assigned to Stonewall Jackson Middle School.

20. Grievant's recollection of her interaction at the meeting and with Board members, as reflected by her Level II testimony, was inaccurate. See Test. Grievant at 33 - 35 and Board Transcript at 19 - 25.

21. KCBOE gave Grievant's former attorney a tape of the Broad meeting, and Grievant's next attorney, Ms. Iskar, never asked for a copy of the tape.

22. Grievant frequently used profanity in front of the cheerleaders. These words included s--t and m-----f---(er), and she called the squad "spoiled little b---hes," and told them they "really p----d her off." She was confrontational to parents and told a parent who complained to her about the way she talked to students that she would do as she "damnedwell pleased." Test. Norma Adkins, mother, and students, EV, AT, and AB at Level II Hearing.

Discussion

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 (2004); 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).

I. Was Grievant terminated from the position of GW cheerleading coach and was she promised the position by the letter she received dated July 29, 2002

The answer to this question is clearly, no. Although Grievant contends a disciplinary termination occurred in this case, the evidence simply does not support such a finding, and Grievant's assertion is incorrect. Originally, this issue, her alleged termination, was the major focus of Grievant's arguments. Grievant asserted she was denied the procedural due process to which she was entitled, and the Board committed improprieties in their method of "terminating" her coaching position. As discussed in the Findings of Fact, the evidence in this case is irrefutable--Grievant was simply not hired as cheerleading coach at GW.

What happened was Grievant was the only applicant, and as such, was provisionally informed the

position was hers. It is understandable Grievant might have thought she"had" the position. But, as stated in W. Va. Code § 18A-2-5, a board of education must approve all service personnel employees before they can be hired. (See footnote 9) While it is unfortunate that Grievant was led to believe her selection for the position was a "done deal," this Grievance Board has held that any representations made without Board approval, by principals or other school personnel indicating an applicant has been selected for a particular position, would be ultra vires and not binding upon the Board. Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-09 (March 24, 1998). See Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998).

It is well settled that representations are not binding on an agency, where the individual does not possess authority to make that determination. Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998). The board of education is the final authority on the use of its funds, and "[u]ltra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." Franz v. Dep't of Health and Human Res., Docket No. 99-HHR-228 (Nov. 30, 1998). See Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000). See also Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

Although this is a harsh rule, the board of education has the final authority to act, and it is clear Grievant was never hired for the GW position, so she could not have beenterminated. Since no disciplinary action occurred, Grievant bears the burden of proof for any allegations about her non-selection.

II. Credibility

An issue that must be addressed is credibility, as Grievant asserts she did not use profanity around the cheerleaders and multiple witnesses testified that she did curse with regularity. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp.,

Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'sinformation. (See footnote 10) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The undersigned Administrative Law Judge finds Grievant to be somewhat unclear and evasive in her testimony. First, she said she only cursed one time when a student was hurt, and when asked about any other times she said, "I don't recall," then she said it was possible she had cursed at other times, and then she testified she told a parent to do as she "damned well pleased." Second, Grievant also said the parents liked her, and then recounted multiple complaints she had received and discussed with Principal Kidd. Third, some of Grievant's explanations did not make sense and appeared evasive, for example her explanation why she did not coach at JA during the 2001 - 2002 year, and what happened to her work placement at that time. (See footnote 11) Additionally, several of her reports of how she was treated by Ms. Jordan in 2002, and at the Board meeting were skewed and embellished.

By contrast, the students and one parent, who volunteered to testify at Level II, were consistent in their testimony. They reported some of the same incidents and were especially upset by being called "spoiled little b---hes" and cursed at when they failed to perform up to Grievant's expectations. The comments of the mothers at the Boardmeeting, while not sworn testimony, were consistent with the testimony of these students and the parent.

III. The hiring/selection process

A. Extracurricular assignment

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d

265 (1991); Syl. Pt 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va 145, 351 S.E.2d 58 (1986).

The position for which Grievant applied was an extracurricular assignment and as such is controlled by W. Va. Code § 18A-4-16. (See footnote 12) This Code Section states in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: . . .
>
> (2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.
>
> (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.

(Emphasis added). Coaching positions are extracurricular assignments, governed by the provisions of W. Va. Code § 18A-4-16. This Code Section, as noted above, sets forth the legal requirements for the employment of persons in these types of positions. In essence, 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).

The Grievance Board has previously held that the standard of review for filling coaching positions is whether the Board abused its discretion in the selection or acted in an arbitrary or capricious manner. Montgomery v. Raleigh County Bd. of Educ., Docket No. 03-41-291 (Nov. 13, 2003); Elkins v. Boone County Bd. of Educ., Docket No. 00-03- 209 (Sept. 7, 2000); Butta v. Wood County Bd. of Educ., Docket No. 99-54-466 (Dec. 23, 1999); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon, supra; Foley

v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 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). 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

The arbitrary and capricious standard of review also requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). B. Was the non-selection of Grievant arbitrary and capricious

As previously stated, the standard of review in filling an extracurricular assignment is whether the action by the board of education was arbitrary and capricious. Extracurricular assignments, such as coaching, require a board of education's approval, and that is why Grievant's name was before KCBOE. The Board was preparing to vote on a list of assignments when Board Member Jordan stated she wanted to remove one name from the list. She noted she had concerns about Grievant's ability to fulfill the duties of the positions and so did other parents who were present to speak.

After the information offered by Ms. Jordan, the comments by three other parents, and Grievant's response, which confirmed some of the complaints, KCBOE voted not toapprove Grievant's hiring. In the present case, the Board's actions were within its statutory mandate, and it actions were not arbitrary and capricious. In examining the Board's action, the undersigned Administrative Law Judge

finds the Board relied on factors that should be considered; and reached a plausible decision. Given this state of affairs, the undersigned Administrative Law Judge cannot find that the decision-making process was fatally flawed, or that KCBOE overstepped its broad discretion as described in W. Va. Code § 18A-5-2.

C. Did KCBOE violate any statute, policy, rule, or regulation or fail to follow any past practice when it did not approve Grievant for the position

Grievant asserts the issue of Grievant's selection should have been tabled and an investigation should have been conducted. Additionally, Grievant asserts any problems should have been handled through the evaluation process. These assertions are based on comments made during the August 5, 2002 Board hearing. No testimony or document was placed into the record about any violation of any statute, policy, rule, regulation, or past practice. While it is clear the non-selection of Grievant could have been done in another way, Grievant did not meet her burden of proof and demonstrate there were any violations in the manner in which KCBOE handled this issue. As for handling the matter of Grievant's behavior through the evaluation process, that process did not work here, leaving parents with little choice but to address KCBOE about their concerns at a Board meeting.

In a similar case, Brown v. Wetzel County Board of Education, Docket No. 0052- 402, (March 29, 2001), the grievant, a service personnel employee, was not selected for a coaching position at Short Line School, even though she was the only applicant. The position was reposted and filled by a certified professional teacher. The grievant hadreceived a satisfactory coaching evaluation the year before even though the principal at Short Line School was not satisfied with the grievant's work and did not believe the grievant had functioned in a positive manner with faculty and students. The administrative law judge in Brown found, given the valid complaints of the principal, the decision to repost the position was not arbitrary and capricious and no violations occurred. The same holding applies in this case.

IV. Whether it was error to allow the testimony of Respondent's witnesses to remain in the record and to not remove the transcript of the Board meeting from the record.

In essence, Grievant asserts Respondent must present the testimony of the same witnesses at Level II that spoke at the Board meeting, but then complains the "unsworn testimony" at the Board meeting was hearsay and double hearsay.

Grievant, in her case-in-chief, testified she did not curse in front of the cheerleaders, and did not treat them badly. Respondent then rebutted this testimony with testimony from a parent and three cheerleaders. The testimony of the cheerleaders was appropriate as they were the ones present for the bad language and treatment. KCBOE had the right to respond to Grievant's testimony and was correct to present direct testimony, not hearsay. The testimony of the Level II witnesses closely correlated to the statements made at the Board meeting. The undersigned Administrative Law Judge finds no error here. If Grievant wished to call additional witnesses, including the parents who testified at the Board meeting, she could have done so.

As for the transcript: 1) Grievant recounted her inaccurate version of what happened at the meeting, so the placement of this document into the record was beneficial; 2) Grievant's prior attorney received a copy of this transcript/tape, and Grievant's nextattorney never requested a copy of this transcript/tape; and 3) Grievant's attorney requested and was given another day of hearing to read and respond to the transcript. Subsequently, Grievant did not opt for another day of hearing at Level II and also did not elect to have a Level IV hearing. Again, the undersigned Administrative Law Judge finds no errors here.

The above-discussion will be supplemented by the following 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 (2004); 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).

2. Pursuant to W. Va. Code § 18A-2-5, a board of education must approve all service personnel employees before they can be hired. Accordingly, Grievant was never hired for the cheerleading coach position.

3. Representations, without Board approval, made by principals or other school personnel indicating an applicant has been selected for a particular position would be ultra vires and not binding

upon the Board. Toney v. Lincoln County Bd. of Educ., Docket No.98-22-09 (March 24, 1998); See Blevins v. Raleigh County Bd. of Educ., Docket No. 97- 41-314 (Jan. 29, 1998).

4. The board of education is the final authority on the use of its funds, and "[u]ltra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." Franz v. Dep't of Health and Human Res., Docket No. 99-HHR-228 (Nov. 30, 1998). See Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000). See also Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

5. Any promise perceived by Grievant that she "had" the position would have been ultra vires and non-binding.

6. It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va 145, 351 S.E.2d 58 (1986).

7. Extracurricular assignments are controlled by W. Va. Code § 18A-4-16, and this Code Section, requires 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). 8. The standard of review for filling coaching positions is whether the Board abused its discretion in the selection or acted in an arbitrary or capricious manner. Montgomery v. Raleigh County Bd. of Educ., Docket No. 03-41-291 (Nov. 13, 2003); Elkins v. Boone County Bd. of Educ., Docket No. 00-03-209 (Sept. 7, 2000); Butta v. Wood County Bd. of Educ., Docket No. 99-54-466 (Dec. 23, 1999); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Dillon, supra; Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993).

9. "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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. 10. The arbitrary and capricious standard of review also requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

11. KCBOE's decision was not arbitrary and capricious as it relied on criteria that should be considered, the decision was not contrary to the evidence before it, and the decision was so implausible that it could not be attributed to a difference of opinion. KCBOE did not overstep its broad discretion as outlined in W. Va. Code § 18A-5-2.

12. Grievant did not meet her burden of proof and establish any violation of any statute, policy, rule, regulation, or past practice.

13. Grievant did not meet her burden of proof and establish any errors in the admission of testimony or the Board transcript at Level II.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 25, 2005

Footnote: 1

Grievant is now represented by Erica Harich, Esq.

Footnote: 2

Although not clearly stated by the parties, the undersigned Administrative Law Judge believes Board Member Jordan was not a member of KCBOE at the time Grievant was cheerleading coach at John Adams Junior High School ("JA"). The undersigned Administrative Law Judge also believes, but is not sure, that JA was still a junior high school at the time Grievant was cheerleading coach.

Footnote: 3

Since the hearing and review at Level IV is de novo, and it is the responsibility of the administrative law judge to determine the questions raised by the parties, thiscontention will not be addressed further. It is noted Grievant's original proposals at Level IV focused almost exclusively on the termination issue.

Footnote: 4

It is clear this event was a Board meeting and not a hearing. Accordingly, there was no need for any of these concerns asserted by Grievant, and this issue will not be addressed further. Additionally, there were no claims of discrimination made in the materials submitted by Grievant upon remand, and there was little to no testimony about discrimination during the Level II hearing. Accordingly, this issue also will not be addressed further.

Footnote: 5

It is also noted Grievant's attorney asked for and received the opportunity for another day of hearing at Level II to respond to issue of the Board meeting transcript. Although unclear from the record, it appears Grievant's attorney did not avail herself of this option as there was no further hearing.

Footnote: 6

Grievant did not signed the contract placed into the record.

Footnote: 7

Although it is unclear if this document was admitted into the record, it was considered as it was supportive of other statements.

Footnote: 8

This testimony is similar to the statements of the four parents at the Board meeting, one of whom was Board Member Becky Jordan.

Footnote: 9

Pursuant to W. Va. Code §18A-2-5."[t]he board is authorized to employ such service personnel . . . as is deemed necessary for meeting the needs of the county school system. . . . The employment of service personnel shall be made a matter of minute record."

Footnote: 10

The undersigned Administrative Law Judge originally obtained this list factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 11

Although not sworn testimony, Board Member Jordan stated she was told by Principal Kidd when she complained about Grievant that Grievant would not be there as an aide the following year, and that way JA could get rid of her. Resp. No. 2.

Footnote: 12

Grievant did not discuss this Code Section.