WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANTHONY F. FILBERTO,
Grievant,

v. **Docket No. 2008-1101-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Anthony F. Filberto ("Grievant") initiated this proceeding against the Hancock County Board of Education ("BOE") on or about January 25, 2008, alleging that he was the most qualified applicant for the extracurricular position of "Physical Fitness I" at Oak Glen High School and was not selected for the position. As relief, Grievant seeks "[c]ompensation for [lost] salary for [the position of] Physical Fitness I" and the "Physical Fitness I [p]osition."

This grievance was denied at Level One. The parties jointly waived Level Two. Similarly, a Level Three evidentiary hearing was waived and the parties chose to submit this matter on the record. The parties have submitted a transcript of the Level One hearing and deposition transcripts of several witnesses.

Grievant appears by and through his counsel, William J. Ihlenfeld, II. The BOE appears by and through its counsel, William T. Fahey, Assistant Prosecuting Attorney of Hancock County. This matter became mature for decision on or about October 1, 2008, the date proposed findings of fact and conclusions of law were due. On February 6, 2009, this grievance was transferred to the undersigned Administrative Law Judge ("ALJ") for administrative reasons. Both parties have submitted proposed findings of fact and conclusions of law. This matter is mature for decision.

Synopsis

Grievant, the Head Football Coach at Oak Glen High School, was not selected to fill an after-school extracurricular position as a "Physical Fitness I" instructor. He challenges his non-selection, maintaining that there was a significant flaw in the selection process and the BOE's selection for the position was arbitrary and capricious.

The arbitrary and capricious standard is deferential in nature. The Grievant has failed to meet his burden of proving a significant flaw in the selection process that reasonably questions the selection occurred. The record does not indicate a significant flaw occurred. Review of the BOE's selection is limited to the facts before it at the time the selection was made. Grievant has failed to prove, by a preponderance of the evidence, that the BOE's selection for the position was arbitrary and capricious or otherwise unreasonable. This grievance is **DENIED**.

The following findings of fact are based upon a thorough review of the record produced in this matter:

Findings of Fact

1. Grievant is employed by the BOE as a teacher at the John D. Rockefeller Career Center. He also holds an extracurricular position as the Head Football Coach at Oak Glen High School.

2. By posting dated November 27, 2007, the Hancock County Board of Education advertised the position of "Physical Fitness I" at Oak Glen High School. This position was an instructional extracurricular position and *not* a coaching position. The duties were listed as "[t]o direct all the activities normally associated with physical fitness. Fitness instructors

are involved in the assessment, teaching, training, and supervision of all students in the school in which they are assigned."

3. The qualifications for "Physical Fitness I" were listed as follows:

> (1) Hold a valid professional teaching certificate issued by the West Virginia State Department of Education;
> (2) Preferred – a minimum of two (2) years of successful experience in both classroom teaching and coaching; and
> (3) Preferred – that the Physical Fitness Instructor not be in active coaching during the months scheduled for this activity.

4. The "Months of Employment" for the position were listed as July, January, February and March. The position was to instruct a physical fitness program that took place in the "weight room" at Oak Glen High School, outside of regular school hours. The instructor had latitude when determining the particular days the program would be offered.

5. Grievant's experience and qualifications are as follows:

- BA Degree + 15 graduate hours;
- WV Teaching Certification – PE 7-12, Drivers' Education, Mental Retardation 7-12, Safety Education 7-12;
- 33 years – Teaching Experience;
- 9 years – Physical Fitness instructor;
- 1 year – Head Wrestling Coach;
- 11 years – Head Football Coach;
- 8 years – Assistant Football Coach at three different schools;[1] and
- Grievant has attended some strength training seminars at Division I Universities.

6. Both the Grievant and the successful applicant were interviewed for the extracurricular position in question.[2] The interview/selection committee consisted of Oak

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[1] Attached to the Grievant's resume he submitted for the position was a print-out copy of a *football* strength training program.

[2] It appears that other applicants were also interviewed for the position. But for the successful applicant, every applicant also applied for the Head Football Coach position at Oak Glen High School which was similarly vacant.

Glen High School Principal Barbara Logue, Assistant Principal Dan Enich and Assistant Principal Alice Klakos. The candidates were asked questions from a particular list of questions created for the purpose of the position. When choosing the successful applicant, the committee examined the job requirements and each applicant's qualifications. Applicant Larry Shaw was selected for the extracurricular position.[3]

7. The successful applicant's experience and qualifications are as follows:

- BS Degree in Health and Physical Education;
- MS Degree in Health and Physical Education + 45 graduate hours;
- WV Teaching Certification – Health and PE 7-12, Library Science K-12;
- 29 years – teaching experience;
- 19 years – Physical Fitness instructor;
- 28 years – Head Wrestling Coach;
- Coached football, track and baseball at the high school level;
- Developed and implemented successful training programs for individuals and teams;
- Designed and implemented off-season and pre-season strength and conditioning programs for Oak Glen High School's fall, winter and spring sport athletics;
- Worked with volleyball, soccer and track coaches in creating training programs for their respective teams;
- Assisted athletes with programs for injury rehabilitation;
- Helped athletes develop healthy lifestyles, including good physical and nutritional habits;
- Designed strength and conditioning programs for faculty members; and
- Selected and maintained existing weight equipment in Oak Glen

[3] The precise rating score given to each applicant by the selection committee is not in the record. The Level One Hearing Examiner would not permit this information to be disclosed to the Grievant. The parties chose to submit this matter upon the record and did not attempt to compel or present any further evidence or argument at Level Three. As the Grievant has not pursued this evidentiary issue at Level Three, it will be considered abandoned. *See Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987); *Toney v. Lincoln Co. Bd. of Educ.*, 2008-0535-LinEd (Nov. 7, 2008)(recognizing that elements or allegations of the grievance which are raised but not pursued or developed will be considered abandoned).

High School weight room.[4]

8. The successful applicant for the position, Mr. Shaw, was employed as a Librarian at Oak Glen High School. Additionally, he held the extracurricular position of Head Wrestling Coach at Oak Glen High School. Mr. Shaw has been the Head Wrestling Coach at Oak Glen for 29 years.[5]

9. Wrestling season encompasses the month of January. Assuming the team (or a member thereof) advances to the West Virginia State Wrestling Championships, the season additionally covers a time period near the end of February. Wrestling practice typically occurs after school, Monday through Friday. Wrestling matches usually occur on the weekends and those matches that do occur during the week usually take place after 6:00 p.m. The selection committee was aware of this scenario when it selected Mr. Shaw as the successful applicant.

10. Mr. Shaw has held the position of "Physical Fitness II" instructor for approximately 19 years. The "Physical Fitness II" position is very similar to the "Physical Fitness I" position (the position at issue) but covers the months of August, September, October and November.

11. While the position of "Physical Fitness I" was historically used as a football

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[4] Attached to the resume Mr. Shaw submitted for the position were examples of three strength training programs he developed.

[5] The students of Oak Glen were very familiar with Mr. Shaw. Unlike the Grievant, Mr. Shaw's regular position was at Oak Glen High School. This also meant that the "weight room," where the instruction would occur, would likely not be left unattended for the period of time between the end of the regular school day and the start of the program at issue. The Grievant would not be able to go directly to the program after school as he worked nearly thirty minutes away.

player strength training/conditioning program, the need for the position has further evolved to be accessible for *all* students and sports.

Discussion

Because this is a non-disciplinary grievance, Grievant has the burden of proving his grievance by a preponderance of the evidence. 156 C.S.R. § 1.3 (2008). *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). "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). Where the evidence equally supports both sides, the employee has not met his burden. *Id*.

This grievance must be denied because the Grievant has not established by a preponderance of the evidence that the BOE's selection of Mr. Shaw was arbitrary and capricious. First, Grievant maintains that there was a significant flaw in the selection process because the successful candidate, Mr. Shaw, did not meet a *preferred* requirement contained within the position posting. Secondly, Grievant argues that he should have been selected for the extracurricular[6] position because of his experience and the alleged

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[6] Initially, in his conclusions of law, Grievant maintained that this position was governed by WEST VIRGINIA CODE § 18A-4-7a. Upon examination of the record in this matter, the undersigned conducted a telephone conference on March 2, 2009, to inquire as to the nature of the position, the applicable hiring standard and the standard of review. As previously recognized by this Board, WEST VIRGINIA CODE § 18A-4-7a does not apply to professional extracurricular positions. *Allison v. Hancock Co. Bd. of Educ.*, 94-15-1090 (June 15, 1995)(citations omitted). By letter dated March 3, 2009, Grievant advised the Board that the position in question was an extracurricular assignment. WEST VIRGINIA CODE § 18A-4-16(1) defines extracurricular assignments and provides, in part, that

"traditional" practice of the Head Football Coach being selected for the "Physical Fitness I" position.

"The assignment of teachers to extracurricular duties is a matter of educational policy within the discretion of the county boards of education." Syl. Pt. *2, State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 908 (1980). 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).

WEST VIRGINIA CODE § 18A-4-16(1) provides the definition of extracurricular duties. *See* Footnote 6 *supra*. However, it does not designate how, or under what standard, professional extracurricular positions are to be made. *Ramey v. Mingo County Bd. of Educ.*, Docket No. 95-29-483 (Apr. 30, 1996). In their proposed conclusions of law, both parties

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> 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: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.

The position in question is an extracurricular instructional assignment as it involves after-school student instruction. *Baker v. Lincoln Co. Bd. of Educ.*, Docket No. 01-22-528 (Mar. 1, 2002). *See also Holmes v. Bd. of Educ.*, 206 W. Va. 534, 526 S.E.2d 310 (1999)(recognizing a coaching position as an extracurricular assignment); *Cruciotti v. McNeel*, 183 W. Va. 424, 396 S.E.2d 191 (1990)(recognizing an "Athletic Trainer" position as extracurricular in nature).

cite WEST VIRGINIA CODE § 18A-4-8b as the applicable standard for the position in question.[7]

Both parties are incorrect. WEST VIRGINIA CODE § 18A-4-8b exclusively concerns school *service* personnel positions. The standard of review for filling professional extracurricular positions is whether the BOE abused its broad discretion in the selection or acted in an arbitrary and 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); *Baker v. Lincoln Co. Bd. of Educ.*, Docket No. 01-22-528 (Mar. 1, 2002); *DeGarmo v. Wood Co. Bd. of Educ.*, Docket No. 06-54-025 (Mar. 8, 2006); *Hood v. Brooke Co. Bd. of Educ.*, Docket No. 07-05-155 (Nov. 30, 2007).

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 and 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*,

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[7] Both parties' averments are unclear. Both recognize the position in question is an extracurricular instructional assignment, yet cite WEST VIRGINIA CODE § 18A-4-8b without any analysis or reasoning.

547 F. Supp. 670 (E.D. Va. 1982)).

The first consideration is whether there was a significant flaw in the selection process so as to reasonably question the committee's selection of Mr. Shaw. "Generally, it is the grievant's burden ... to show, by a preponderance of the evidence, that the assessment was flawed and/or did not comply with policy, and that, but for the errors, the outcome of the selection process might reasonably have been different. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989)." *Hopkins v. Monroe Co. Bd. of Educ.*, Docket No. 95-31-477 (Feb. 21, 1996). Stated differently, Grievant must prove that the selection procedure was arbitrary and capricious and the alleged procedural flaw resulted in an arbitrary and capricious selection. In this matter, the linchpin of the Grievant's argument is that the successful applicant, Mr. Shaw, did not meet the *preferred* qualification listed in the posting requiring "that the Physical Fitness Instructor not be in active coaching during the months scheduled for this activity." Finding of Fact No. 3 *supra*.

The qualification the Grievant complains of is *not* a mandatory qualification, but a preferred qualification. When something is preferred, it is generally favored or considered best. BLACK'S LAW DICTIONARY 959 (Abridged 7th Ed. 2000); MERRIAM-WEBSTER ONLINE DICTIONARY, prefer, http://www.merriam-webster.com/dictionary. *See also Harris v. Mingo Co. Bd. of Educ.*, Docket No. 01-29-120 (Oct. 26, 2001)(recognizing the distinction between a preferred qualification and a required qualification). *See generally Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970)(recognizing that plain language should be afforded its plain meaning). Hence, mere consideration of a candidate who does not strictly meet a preferred qualification does not, based upon the mere language of the

position posting, create a substantial flaw. The Grievant maintains that there was a substantial flaw because Mr. Shaw was selected even though he did not meet a preferred qualification. While the record indicates that Mr. Shaw did not unequivocally meet the preferred qualification because he would be coaching wresting for the month of January and, more likely than not, the month of February, Grievant's argument ignores the preferential nature of the qualification. It is not mandatory; it is simply favored or preferred. There is no indication that there was a substantial flaw in the selection process that reasonably questions the BOE's selection of Mr. Shaw.[8] Moreover, based upon the Grievant's argument, there is no indication that any flaw occurred in the process as a

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[8] Although Oak Glen High School Principal Barbara Logue preferred to have the weight room open three days a week (Mondays, Wednesdays and Fridays), the successful applicant for the position was ultimately responsible for selecting the particular days in which the program would occur and there was no prohibition against holding the program on Tuesdays and Thursdays. Mr. Shaw was free to choose which days he operated the program. Generally, the time of the program was from approximately 2:00 to 4:15 p.m., Mondays, Wednesdays and Fridays. It appears that in July, when school was not in session, the program was held on Tuesdays, Thursdays and Saturdays from approximately 8:30-10:30 a.m.

The Grievant has provided evidence that ultimately, Mr. Shaw was absent from the weight room on numerous occasions during the months of January and February because of wresting season. Mr. Shaw testified that he paid another Oak Glen physical education teacher, Trisha Wells, thirty dollars a day to cover for him on several different occasions in January and February of 2008. Principal Logue testified that this assignment was like any other assignment. If the instructor was sick or could not make it, someone else would substitute for the day. *Level One Transcript*, 94-95. Though not directly raised by the parties, it seems inappropriate that Mr. Shaw is individually and without written authority entering into side-deals to cover missed days. This issue is not properly before this ALJ. Insofar as the Grievant seeks to incorporate events that are related to Mr. Shaw's actual performance and not the facts particularly know by the selection committee at the time of hiring, these events are not relevant to this decision. Events that occurred *after* Mr. Shaw's selection cannot be used to Monday morning quarterback and question the committee's selection based upon information not available at the time of selection. "The grievance procedure ... allows for an analysis of the legal sufficiency of the selection process at the *time it occurred*." *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989)(emphasis added).

preferred qualification is an element that may be measured and weighed when determining a successful applicant. Indeed, this is precisely what Principal Barbara Logue testified the interview committee did. *Level One Transcript*, 95.

The Grievant's second, albeit overlapping, argument is that he is more qualified than the successful applicant. Even when taking into account the preferred qualification, the BOE's selection of Mr. Shaw is still not arbitrary and capricious. In order to establish that the Respondent's selection of Mr. Shaw for the position was arbitrary and capricious, Grievant must prove, by a preponderance of the evidence, that the selection was generally implausible, unreasonable or not subject to a difference of opinion. *See Beford*, *supra*; *Eads, supra*.

Grievant avers that the "Physical Fitness I" position is inextricably intertwined with the Head Football Coach position, and the positions should be given to the same individual because the program has many football players. Grievant's argument is unpersuasive. Just as extracurricular contracts are separate and distinct contracts from an employee's regular position, so too are different extracurricular positions. W.VA. CODE § 18A-4-16(4)(recognizing that an extracurricular contract is separate and distinct from an employee's regular contract).

Grievant has presented evidence that a "Physical Fitness I" extracurricular position is usually given to the individual that holds the Head Football Coach position and in the past, the two extracurricular positions went hand in hand.[9] However, he has presented no

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[9] Grievant previously held the position of "Physical Fitness I" instructor at Weir High School. While holding this position, he also held the Weir High School Head Football Coach position. When he resigned from the Weir High School coaching position, the principal of Weir High School instructed Grievant that he needed to resign from both

statute, rule or policy that requires hiring in this manner. During the interview for the "Physical Fitness I" position, Grievant was told that these positions were separate and distinct. *Level One Transcript*, Testimony of Barbara Logue, 102-114. Moreover, insofar as Grievant argues that it is primarily football players who attend the class, it must be recognized that the extracurricular class is open to *all* students, and the programmatic needs of all students, both athletes and non-athletes, must be accounted for by the instructor. Holding the position of Head Football Coach simply does not establish an entitlement to the extracurricular position. Nor does holding a Head Football Coach position, in and of itself, make an applicant exceptionally qualified for the "Physical Fitness I" extracurricular position so that no other applicant may be considered. *See Level One Transcript*, Testimony of Dan Enich, 150.

When comparing the qualifications of the Grievant and Mr. Shaw, it is clear that the BOE's selection was not unreasonable. Both candidates are well-qualified for the position and have excellent credentials. Both have dedicated many years to high school athletics. However, Mr. Shaw has a greater level of overall education and has more years of experience teaching physical education. Mr. Shaw has a masters degree plus forty-five hours of graduate work, compared to the Grievant's bachelors degree plus fifteen hours of graduate work. Mr. Shaw has nineteen years of experience as a Physical Education instructor, compared to the Grievant's nine years. *See* Findings of Fact Nos. 5 and 7 *supra*. Moreover, it appears that Mr. Shaw submitted more information that indicated his ability and past performance relating to the development of strength training programs for all students,

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positions as they went hand in hand. The Grievant did not grieve the principal's instruction.

not just football players. Grievant has not established that it is more likely than not that the selection of Mr. Shaw was unreasonable.

In summation, denial of this grievance is appropriate. The arbitrary and capricious standard is deferential in nature. Consistent with this standard of review, the grievance process is not intended as a "super interview," but merely an analysis of the legal sufficiency of the selection process at the time it occurred. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89- 20-75 (June 26, 1989). *See Sparks v. Mingo County Bd. of Educ.*, Docket No. 96-29-447 (Feb. 18, 1997). The BOE's selection was not arbitrary, capricious or unreasonable.

The following conclusions of law are appropriate:

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

2. The grievance process is not intended as a "super interview," but merely an analysis of the legal sufficiency of the selection process at the time it occurred. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989). *See Sparks v. Mingo County Bd. of Educ.*, Docket No. 96-29-447 (Feb. 18, 1997).

3. "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).

4. "It is the grievant's burden in such cases to show, by a preponderance of the evidence, that the assessment was flawed and/or did not comply with policy, and that, but for the errors, the outcome of the selection process might reasonably have been different. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989)." *Hopkins v. Monroe Co. Bd. of Educ.*, Docket No. 95-31-477 (Feb. 21, 1996).

5. Grievant has not established, by a preponderance of the evidence, that a significant flaw in the selection process occurred.

6. "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 and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997).

7. Grievant has not established, by a preponderance of the evidence, Respondent's selection of Mr. Shaw was arbitrary and capricious.

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. *See* W. VA. CODE § 6C-2-5. 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 26, 2009

Mark Barney
Administrative Law Judge