**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**KEVIN BOONE HEDINGER,**
**Grievant,**

**v.** **Docket No. 2010-0589-WyoED**

**WYOMING COUNTY BOARD OF EDUCATION,**
**Respondent.**

## DECISION

Kevin Boone Hedinger, Grievant, filed this grievance against the Wyoming County Board of Education, Respondent, on November 4, 2009. Grievant contends in his Statement of Grievance that he was the most qualified and senior candidate for the position of boys' varsity basketball coach at Wyoming East High School. Grievant makes allegations that the Respondent violated numerous statutory provisions and policy governing the selection of coaches. Grievant alleges that one member of the interview committee had an inherent conflict of interest; another member failed to participate in the interviews; and the Superintendent harbored personal animosities against him. Grievant also alleges that the Respondent's hiring of a less qualified candidate was arbitrary and capricious.

For relief, Grievant seeks "immediate instatement to that position, and any and all lost pay, benefits, and all costs incurred as a result of this proceeding, including but not limited to legal fees and costs as well as any other appropriate benefit due to him. Additionally, Grievant hereby requests a valid cause/reason from the Wyoming County

Board of Education as to why he was not employed in this position. Ultimately, the children are denied the opportunity to be coached by the best and most qualified available person."[1]

A level one hearing was held on January 21, 2010, before James McGrady, the Superintendent's designee. Grievant appeared in person and was represented by his counsel, Warren R. McGraw II. Respondent was represented by its counsel, Rebecca Tinder, Bowles Rice McDavid Graff & Love LLP. This grievance was denied on March 23, 2010, by the Superintendent's designee. A level two mediation session was conducted on August 24, 2010. Appeal to level three was perfected on September 9, 2010, and the matter was scheduled for a level three hearing to be conducted on October 27, 2010. Prior to the hearing, the parties agreed to submit the matter for decision based upon the record developed at level one and as supplemented by the parties' proposed findings of fact and conclusions of law. This matter became mature for decision upon receipt of those proposals on December 2, 2010. Thereafter, for administrative reasons, the matter was reassigned to the undersigned Administrative Law Judge on December 6, 2010. On December 3, 2010, Respondent filed an "Objection and Motion to Strike," objecting to Grievant's submission of additional evidence (in the form of attachments to his proposals) after the close of the evidence. That Motion requires a short discussion.

**Motion to Strike**

Respondent's Motion is granted as it relates to the first attachment, entitled "Coaching Reminders," because that document was not introduced and admitted at the

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[1]WEST VIRGINIA CODE § 6C-2-6 is entitled, "Allocation of expenses and attorney's fees." It specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense."

level one hearing. All but one of the remaining attachments in Grievant's proposals were introduced and admitted at the level one hearing, and accordingly, are already part of the record below. The last attachment is a copy of a Grievance Board case cited in Grievant's proposals. The undersigned takes administrative notice of this document. Motion to Strike granted as it relates to Grievant's first attachment in his proposals.

## Synopsis

Grievant was not selected for a coaching position although he had greater experience than the person who was selected; however, he failed to show Respondent abused its discretion by placing weight in the selection decision on other factors such as demeanor, decorum, interview performance and related education and training. The evidence established that Respondent did not act arbitrarily or capriciously or abuse its broad discretion in hiring Mr. Chapman for the position. This grievance is denied.

The following findings of fact are based upon the record developed at level one.

## Findings of Fact

1. Grievant is employed as a teacher and a coach by the Wyoming County Board of Education. Grievant has nearly thirty years of teaching experience, and has a Bachelor of Science degree in Physical Education, Secondary Education 7 through 12, with a certification in Social work and Attendance. Grievant has a Master's Degree in Special Education, plus 90 hours toward a second Master's Degree in Administration.

2. On September 16, 2009, the Respondent posted a position for "Varsity Boys Basketball Coach" at Wyoming East High School. The deadline for receipt of applications or resumes was set at September 29, 2009, at 4:00 p.m. Candidates were expected to

meet the requirements of a West Virginia teacher or possess a coaching certification. Joint Exhibit 1.

3. The candidates included the successful applicant, Rory Chapman, and Grievant. Both of these applicants were employed as teachers by the Respondent.

4. Superintendent Frank Blackwell appointed an interview committee consisting of Barry Smith, principal of Wyoming East High School, and Frank Mann, assistant superintendent in charge of secondary schools. Pursuant to Wyoming County Board of Education Policy 3200, "Employment of Coaches and Assistant Coaches," the building principal, Barry Smith, was a required member of the interview committee. Joint Exhibit 2.

5. On or about October 1, 2009, Superintendent Blackwell sent a letter to the applicants requesting that each applicant submit documentation responsive to the requirements of Policy 3200. Respondent's Exhibit 6. Both Rory Chapman and Grievant sent additional information to Superintendent Blackwell before October 12, 2009.

6. Grievant submitted a chart outlining his experience both as a basketball coach and as a football and baseball coach in Wyoming County. It appears from the record that Grievant had a win/loss record of 244/106 as a basketball coach; had attended coaching clinics held by West Virginia University Coach Bob Huggins, Marshall University Coach Greg White, and a team camp conducted by former West Virginia University Coach John Beilein. Grievant cited experience playing basketball for Pineville High School, and baseball at Concord College. Grievant's Exhibit 2.

7. Rory Chapman relied upon his experience as a volunteer assistant boys' basketball coach at Wyoming East High School during the 2008-09 and 2006-07 seasons,

and as a junior varsity football coach at Wyoming East High School from 2007 to 2009. Mr. Chapman attended basketball team camps conducted by West Virginia University from 2004 through 2006, and in 2008 and 2009, as well as attendance at basketball camps conducted by Wyoming East Coach Lester from 2007 to 2009. Mr. Chapman indicated that he played both varsity basketball and varsity football for Wyoming East High School. Grievant's Exhibit 3.

8. Neither Grievant nor Mr. Chapman had previously served as the head coach of a high school varsity basketball team.

9. All candidates were asked the same interview questions designed to elicit information relating to the hiring criteria established in Policy 3200.

10. The posting for this coaching position had erroneously made reference to a policy that was adopted by the Wyoming County Board of Education on July 6, 1983, rather than Policy 3200, effective October 11, 2006.

11. Policy 3200 sets forth a list of areas of consideration when considering applicants for coaching and assistant coaching positions. The policy makes clear that longevity and winning are not the only important considerations in selecting a coach. Joint Exhibit 2.

12. Policy 3200 lists many considerations including actual experience as a participant in high school athletics, the ability to effectively communicate and interact with students and parents, evidence of a professional demeanor on and off the field, and the ability to act as a positive role model for students. Joint Exhibit 2.

13. Because of the erroneous policy number in the posting, Superintendent Blackwell notified the applicants of the requirements of Policy 3200, and gave all of them

the opportunity to supply him with information related to the policy in his letter of October 1, 2009, before the interviews were scheduled.

14. The evaluation of each applicant's interview performance was completed by the two members of the interview committee following the criteria set forth in Policy 3200. Respondent's Exhibits 2 and 3.

15. Principal Smith expressed several concerns about Grievant's lack of cooperation with other coaches, his demeanor, his methods of communication, which included the use of profanity, while coaching, and his behavior which had resulted in technical fouls.

16. Principal Smith was impressed with Mr. Chapman's demeanor throughout the interview, in particular, his professional appearance, the depth of his answers to the interview questions, and the relative ease with which he answered those questions. Principal Smith was also impressed with Mr. Chapman's high level of involvement over the past few years with the recently successful Wyoming East High School basketball team.

17. When ranking the candidates for the position, the interview committee scored Mr. Chapman first, followed by Gary Houck, a coach with more years of coaching experience than Grievant, and Grievant was scored third on the list.

18. Superintendent Blackwell recommended the hiring of Mr. Chapman for the coaching position to the Board of Education, and it was accepted.

**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. Public Employees Grievance Bd. 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Grievant makes a few different arguments.[2] The first is that Grievant "under any possible standard, is the most qualified for the job, and the fact that the Wyoming County Board of Education does whatever they want in this and these type hirings [sic] without any regard to any set, fair rules that allow every candidate a chance to be judged fairly and on the merits of his entire life's work."[3]

County boards of education have substantial discretion in matters relating to the hiring, assignments, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Normally, a board is subject to the provisions of W. VA. CODE § 18A-4-7a when filling a position, but this

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[2]Not all of the assertions in the original Statement of Grievance were discussed in Grievant's proposals. Those assertions need not be addressed. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

[3]Grievant's proposals page 3.

Grievance Board has determined that section is inapplicable to the selection of professional personnel for extracurricular assignments, such as coaching positions. *DeGamo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19, 2004). The standard of review for filling coaching positions is to assess whether the Board abused its broad discretion in the selection or acted in an arbitrary or capricious manner. *Dillon*, *supra*; *Chaffin v. Wayne County Bd. of Educ.*, Docket No. 92-50-398 (July 27, 1993). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health 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). A grievant must therefore prove by a preponderance of the evidence that he would have been hired but for an arbitrary and capricious decision or an abuse of discretion by the board of education.

It is true that Grievant has more coaching experience that the successful applicant, and Grievant has a winning record. However, these factors do not dictate who is the most qualified candidate for the coaching position. Respondent has a valid policy in place that dictates how, in the absence of statutory guidance, coaching positions should be filled, and this policy also dictates what information an applicant must submit to be considered. “An

administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999). Policy 3200 requires more than a coach's longevity in the county sports program and his record of wins be considered when seeking the most qualified candidate for a coaching position.

Policy 3200 requires the applicant to invest in the application process by providing details and explanations to support his or her job bid. It requires the selection committee to evaluate the whole applicant. The process takes into account objective factors such as resume, training, and experience, but also allows for subjective judgment based on interview performance, attitude, reputation, and demeanor.

The record demonstrates that Grievant did not favorably impress the interview committee with regard to some of these factors, while the successful applicant did. Grievant's admitted use of profanity, prior technical fouls, and lack of cooperation with the building principal in the past were all considered by the interview committee members. The record makes clear that Grievant refused to condemn the practice of using profanity as a high school coach, and Grievant referenced the past use of profanity by coaches for whom he had played.

Respondent made a coach selection based on the subjective and objective criteria contained in its coaches' selection policy. All the factors required to be considered by the policy were considered. The evidence does not support Grievant's argument that the choice was arbitrary and capricious or an abuse of discretion.

Grievant's next argument concerns Respondent's policy regarding employment of coaches, which was adopted on or about October 11, 2006, but he asserts was not

uniformly followed. The record of this grievance does not support such an allegation. The posting for this position had erroneously made reference to a policy that was adopted by the Wyoming County Board of Education on July 6, 1983, rather than Policy 3200, which became effective on October 11, 2006. Because of this error, Superintendent Blackwell notified the applicants of the requirements of Policy 3200, and gave all of them the opportunity to supply him with information relevant to Policy 3200.

"The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008). None of the applicants received an unfair advantage as a result of the ability to supply additional information following the posting period and after the bid sheets were received. Grievant was treated the same as every other candidate in the selection process in that he was given the same information about the requirements of Policy 3200; he was subjected to the same policy requirements; and he was interviewed and evaluated in the same manner as the other candidates. Respondent acted properly in giving all applicants the opportunity to supply information relevant to Policy 3200.

Grievant also alleged an inherent conflict of interest when naming Barry Smith to the committee to interview and make a recommendation since he had a child likely to be on the basketball team. Policy 3200 requires that the building principal be on the interview committee. In addition, whoever was selected as coach would have coached Mr. Smith's son. The record does not indicate that Principal Smith had any prior personal relationship

with any candidate or some personal stake that would be dependent on the outcome of the selection process. Grievant testified at level one that he never had any problems with Mr. Smith. In fact, Grievant noted that he had received positive coaching evaluations from Principal Smith. Grievant had previously coached Mr. Smith's son and Mr. Smith indicated that he was satisfied with Grievant's performance as coach. Grievant failed to establish that Principal Smith's participation on the interview committee constituted a conflict of interest.

The following conclusions of law support the decision reached.

**Conclusions of Law**

1. 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. Public Employees Grievance Bd. 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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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. County boards of education have substantial discretion in matters relating to the hiring, assignments, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Normally, a board is subject to the provisions of W. VA. CODE § 18A-4-7a when filling a position, but this Grievance Board has determined that section is inapplicable to the selection of professional personnel for extracurricular assignments, such as coaching positions. *DeGamo v. Wood County Bd. of Educ.*, Docket No. 04-54-062 (Mar. 19, 2004).

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 capricious manner. *Dillon*, *supra*; *Chaffin v. Wayne County Bd. of Educ.*, Docket No. 92-50-398 (July 27, 1993).

4. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

5. Grievant has not met his burden of proving Respondent's selection of Mr. Chapman for the coaching position in question was arbitrary and capricious or an abuse of discretion.

6. "The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008).

7. Respondent acted properly in correcting its error in the posting by giving all applicants the opportunity to supply information relevant to Policy 3200.

8. Grievant has failed to prove, by a preponderance of the evidence, that the hiring process was lacking in fundamental fairness or was otherwise flawed to such a degree to call into question the outcome of this process.

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 W. VA. 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 4, 2011**

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**Ronald L. Reece**
**Administrative Law Judge**