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STATE EMPLOYEES GRIEVANCE BOARD**

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DONALD STOVER

v.

Docket No. 89-20-75

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant Donald Stover is employed by Respondent Kanawha County Board of Education as classroom teacher and head boys' basketball coach at Stonewall Jackson High School (SJHS). School year 1988-89 is the last prior to the consolidation of SJHS with Charleston High School (Charleston) to form Capital High School (Capital). Grievant was chosen to be a social studies instructor at Capital, but was unsuccessful in his bid to be the new school's head boys' basketball coach (Coach). In early January 1989, Grievant initiated the following claim,

Grievant applied for the position of Head Basketball Coach (Boys) at Capital High School. Grievant was not selected for the position, despite outstanding qualifications and greater seniority than the individual recommended and approved for the position in violation of . . . [W.Va. Code] §18A-4-8b(a) and a large body of case law[,]

which was denied at Levels I¹ and II and waived at Level III prior to arriving at Level IV on February 28, 1989, supplemented by the following statements:

The Kanawha County Board of Education also denied grievant his procedural due process rights. Grievant had appealed to Level II on January 10, 1989, and had requested a hearing prior to the meeting of the Board of Education to consider the recommendation of John Vencill as Head Basketball Coach (Boys) so that the Superintendent and Board would be apprised of grievant's qualifications for the position.

The Board [of Education] refused this request, citing prematurity as the reason for the denial. This was done despite the fact that grievant had been informed his application was unsuccessful on January 5, 1989. The Board[of Education]'s failure to schedule a hearing within five working days of receiving the Level II appeal on January 10, 1989, violated. . .[W.Va. Code §§] 18A-29-3(i), . . .18-29-4, and West Virginia Board of Education Policy No. 5300(6)(b) and has rendered the grievance procedure meaningless at the lower levels.

Grievant requests that he be instated as Head Basketball Coach (Boys) at Capital High School.

The Level II decision was due on February 17, 1989, in accordance with. . .[W.Va. Code] §18-29-4(b). This decision was not received until February 21, 1989. The grievant filed a Level III appeal on February 17, 1989. The Kanawha County Board of Education has not taken any action on the appeal within the five day period pursuant to. . . [W.Va. Code] §18-29-4(c). The Kanawha County Board of Education is obligated to follow the statutory time requirements of. . .[W.Va. Code] §18-29-4 pursuant to [W.Va. Code] §18-29-3(i).²

¹ Acting SJHS Principal Carla Williamson did not "have the authority to grant the relief sought by Mr. Stover in this grievance."

² Some of the representations in these comments are not borne out by the evidence; others reveal a basic misunderstanding on Grievant's part of the education employees' grievance procedure. For example, the Level II grievance, while dated January 10, was not filed until
(Footnote Continued)

The Level IV hearing was conducted April 3 and 24, 1989,³ and with the submission of proposed findings of fact and conclusions of law by May 5, this matter is mature for resolution.⁴

A single job posting sheet, Gr. Ex. 1, was utilized to advertise all twenty-four extracurricular coaching vacancies at Capital. This notice provided, "First priority in filling these positions will go to those persons currently

(Footnote Continued)

January 11. Also, if the Level II evaluator had until February 17 to issue her decision, as Grievant asserts, then his filing at Level III on that date was clearly premature. February 17 was a Friday and Monday, February 20, was Presidents' Day, a federal holiday without mail service; therefore, Grievant's receipt of the Level II response, dated February 17, on February 21 seems consistent with timely decision and placement thereof in the mail. See also this Decision, infra. It appears that any rendering of "the grievance procedure meaningless at the lower levels" was at least contributed to heavily by Grievant.

³ Grievant's motion that Respondent be ordered to transcribe the Level II hearing free of charge to him was withdrawn. And, while it was recognized that the Level II audiotapes are part of the record of this grievance per W.Va. Code §18-29-6, the parties agreed it not necessary for Respondent to produce those tapes prior to Level IV disposition due to the iteration of pertinent information, and the undersigned assented to this arrangement. This stipulation is in keeping with the §18-29-6 caveat that "the development of the record shall not be limited" by the existence of lower level evidence.

⁴ Respondent adopted the findings and conclusions set forth in the Level II decision, with some supplementation, as its proposal at Level IV.

Grievant, in his proposals as to fact and law, was openly critical of evidentiary rulings of the undersigned and inappropriately included documentary information expressly excluded at the hearing. However, see n. 31, supra.

employed for Capital High School" and listed the following qualifications:

1. Knowledge of athletic costs.
2. Knowledge of Philosophy of Capital High School.
3. Experience as player/coach.
4. Educational background courses of study related to child development.
5. Recent continuing education, coaching clinics in relevant sport.
6. Demonstrated strengths as a classroom teacher.⁵

Glenn Wilson, an unsuccessful candidate for the position of head baseball coach, Capital, presented at Level IV and testified that during his related interview with Capital Principal John Clendenen, which was of about one-half-hour's duration, athletic costs were briefly touched upon but player/coach experience, educational background, sports clinics and strengths as an instructor were not broached. He offered the opinion that Clendenen, as interviewer, had the burden to ask "whatever he wanted to know." Wilson continued that Clendenen had been "very kind" and "gave . . . a fair opportunity to answer" the inquiries actually posed. He admitted that he did not remember whether or not his classroom abilities were explored during his separate teaching interview with Clendenen several months before and that at

⁵ None of these six qualifications was attacked by Grievant at Level IV as unreasonable.

that time he had given Clendenen a resume' outlining his teaching and coaching credentials.

Carl Clark, SJHS Assistant Boys' Basketball Coach, appeared at Level IV and explained he had worked in this capacity under Grievant the past twelve years. He stated that Grievant had consistently stressed the fundamentals of basketball playing to his teams. He further testified he was one of three applicants who sought to become Coach, and that during his twenty- to thirty-minute interview for that job with Clendenen, he was asked about his knowledge of athletic costs, participation in sports clinics and at least certain aspects of his experience as a player and/or coach but not about his familiarity with Capital's philosophy or completion of child development courses. He added, however, that during his earlier meeting with Clendenen regarding a Capital teaching post, "the educational approach of Capital" and "education in the classroom and what I would be doing" were covered, and a resume' detailing Clark's background was accepted.⁶ Clark also opined that during the coaching interview, he had "a fair opportunity to answer questions and discuss areas that were brought up."⁷

⁶ Clark also applied to be head girls' basketball coach and assistant boys' basketball coach at Capital. He was the successful candidate for the former position.

⁷ Throughout this Decision, the undersigned has attempted to capture the essence of testimony and not necessarily quote it verbatim.

Jim Scherr, SJHS guidance counselor and assistant boys' basketball coach, and incoming Capital guidance counselor,⁸ characterized Grievant as a teacher of basketball fundamentals. He identified himself, Grievant and Clark as getting along well, having different areas of expertise, and engaging in counseling of basketball players. According to Scherr, their "main goal, number one, is getting every kid that's on our basketball team toward a college program." He also testified that he has acted as a consultant to other Kanawha County schools' student athletes to assist them in preparing academically for post-secondary school education, upon requests from administrators, parents and perhaps other coaches or teachers. These requests have "basically" been directed to him and not to Grievant.

John Luoni, a member of the Kanawha County Board of Education since December 1988, testified that Respondent discussed the selection of Capital's Coach "just once and that was in executive session. . .in January after the regular Board meeting." Unrefuted evidence reveals Respondent's regular January meeting to have been on the 19th, and the 19th or 20th to have been the date John Vencill was

⁸ Scherr's application for certain Capital coaching jobs was not considered pursuant to Clendenen's policy that guidance counselors not be allowed cross-appointments as coaches. This "policy" is the subject of a grievance filed by Scherr currently pending at an administrative plane below Level IV.

chosen Coach.⁹ Luoni described the executive session as one where all five of Respondent's members were present along with Kanawha County Superintendent of Schools Dr. Richard Trumble, John Clendenen, Respondent's attorney Gregory W. Bailey, and perhaps certain personnel administrators in Respondent's employ. Luoni related that the "first comment was that there was a feeling that John Vencill was more qualified" and that Board Member Ditty Markham had noted "John was a math teacher and that we needed to. . .do all we could for them because we had a shortage of them in the County." According to Luoni, Clendenen expressed the following opinions: Vencill was the best qualified candidate, more capable of coaching basketball fundamentals; that "Stonewall did so well. . .[because] the players were all. . .basically good playground players and didn't need coaching;" Grievant "had [not] done as well [in the interview], especially around the area of philosophy of Capital High;" many of Grievant's awards were voted upon by sportswriters and not colleagues, other coaches not having "that high an opinion of Don as a coach;" Grievant "did not prepare his students for college as well as John Vencill, that John's students were more able to do well in college and that a lot of Don's players wound up dropping out or had trouble

⁹ It is clear that Vencill was selected during Respondent's executive session that evening in January; what is uncertain is whether this occurred before or after midnight.

finishing college." Luoni added that Clendenen had reported "that Don had gotten upset when John Vencill had gotten. . . a coaching award the year before and had walked out of the awards ceremony" and that nothing was mentioned about Grievant's relationships in the community or with booster clubs, or the candidates' relative knowledge of athletic costs. He advised that no one was there to support Grievant's application, although "I'm not saying we'd normally do that."

On cross-examination, Luoni explained that Grievant's representative, Kenneth C. Legg,¹⁰ had made an oral presentation to Respondent during its regular January 19 meeting, to extol Grievant's attributes and express that "it was unfair to deny him the job at Capital." Luoni stated Legg did not claim the information he submitted had been available to the Superintendent's designee, Clendenen, during the interview process, and that Clendenen's remarks in executive session were primarily rebuttal of Legg's points.

With regard to the manner in which Respondent fills vacant positions, Luoni explained that usually a large number of names matched with jobs appear on a written personnel agenda. This is presented as a single

¹⁰ Legg, the Executive Secretary of the West Virginia School Service Personnel Association, has represented Grievant at each phase of this grievance process. At least at Level IV, WVSSPA attorney John Everett Roush also appeared on Grievant's behalf.

recommendation from the Superintendent and the individuals listed are approved en masse for hiring without reference to their qualifications. He stated that "on occasion, advance publicity or controversy about a particular position requires the Superintendent or his designee to answer questions" Respondent might have. He characterized Clendenen's role in the January executive session not as this but as a "salesman" for the Superintendent's recommendation of Vencill for Coach. Luoni admitted that "other Board members" made comments supportive of Vencill as well, however.

He further testified that it is Respondent's policy to allow "anyone who wants to appear before the Board" to speak for five minutes in regular session. He recalled that Legg's January presentation was interrupted by the timekeeper after five minutes and never finished.¹¹ He stated, however, persons may submit "any amount of documentation they want" and this is commonly done, although Respondent is without obligation to review such. He believed Legg offered nothing in writing but remarked that "generally we do not have time to read information given to us during a Board meeting or the interval between the end of regular and the beginning of executive session." He also agreed with Grievant's representative that there were a number of

¹¹ Respondent submitted convincing evidence, Resp. Ex. 2 (reproduced approximately as Appendix A to this Decision), that this presentation was indeed completed, uninterrupted, and ten minutes, thirty seconds in length.

delegations and speakers and a capacity crowd at Respondent's January 19 meeting, mostly due to protests over various consolidation proposals.

Luoni commented, "I didn't feel I got enough information on Don Stover before the Board made its decision. I thought I needed more than the Superintendent's recommendation in this case because of the controversy over the job in order to make the best decision." Luoni did vote on the recommendation, however,¹² and admitted that Respondent's members had an adequate opportunity to question Dr. Trumble and Clendenen about matters of concern. He also stated that Respondent sometimes waives resolution of matters pending further study, and that no member, including himself, sought such delay or any further information whatsoever in this case.

John Vencill appeared at Level IV and testified that he is currently in his twenty-first teaching year with the Kanawha County Schools and tenth year as head basketball coach at Charleston.¹³ He added that his experience includes three years as assistant basketball coach, two years as a track coach, "a number of years" as a baseball coach,

¹² Luoni's vote was to reject the recommendation. He indicated he voted this way, in part, because of what he felt was the lack of information provided.

¹³ Vencill was hired as Charleston's head basketball coach eleven years ago, but missed one year due to a back ailment. During this year, he served as an assistant coach.

and work with wrestling, cross country and football and as an athletic director (AD). He is the holder of a bachelor's degree in education, with specializations in mathematics, chemistry, physics and physical science; a master's degree in math; and thirty graduate hours beyond the master's. He has no formal training in physical education and is not certified in school administration. He played basketball at Gauley Bridge, West Virginia, High School and for one-and-one-half years at West Virginia Institute of Technology before being benched because he "blew out a knee."

Vencill related that his interview with Clendenen for the Coach job, which was combined with one for Capital's AD post, lasted ten or fifteen minutes. He stated that Clendenen initiated the conversation and "to the best of my knowledge" asked questions specifically related to the six posted qualification areas. He opined that more time was devoted to the coaching job and only "a little bit" to the AD. He said athletic costs, his experience as a player and coach, his strength as a classroom instructor and his recent pursuit of continuing education and coaching clinics were discussed¹⁴ and that his knowledge of Capital's philosophy

¹⁴ Vencill related that he frequently attended clinics, including one in Pittsburgh a year ago, one in Columbus two years ago, and one sponsored by the University of Charleston. He also stated, "I'm not one to tell, [but] I speak at a couple basketball camps each summer and I go to a clinic here and there, but I don't know, I just kind of, leave those things out -- I don't get into that."

"may have" been addressed in that the school's integrated curriculum and ILT's¹⁵ were covered. When asked if his training in child development had been explored, he responded, "I told him where I went to graduate school" and "I had child development courses in college."

In addition, the following interchange occurred during the Level IV hearing:

Mr. LEGG: During your career as a coach have you had many players to go on to college?

Mr. VENCILL: What do you mean by "many?" I've had several.

Mr. LEGG: All right. About how many?

Mr. VENCILL: Oh, gee, I don't know, I'd have to go back and. . .you mean going to college and play ball?

Mr. LEGG: Uh-huh.

Mr. VENCILL: Well, let's see. . .right now, there's a Berkeley kid at Concord, there's a Dennis kid at East Tennessee State. . .gosh, I was just trying to think who played for us. . .and went on to play in college. You know, I'm going to be perfectly honest with you, I don't have, I haven't had a lot of kids that can play in college.

Hearing Examiner CRISLIP: Did I misunderstand your question, Mr. Legg? Are you talking about kids that have, that play college ball, or just that go on to college?

Mr. LEGG: Well. . .

Mr. CRISLIP: I understood your question to be just that go on to college.

Mr. LEGG: What was alluded to earlier in testimony was that there was something said about preparing people for college. I assumed that that was basketball players that they were talking about, if your recall Mr.

¹⁵ This acronym was never explained, but it is assumed the reference is either to a concept of individualized or integrated learning.

Luoni's. . . testimony, he said Mr. Clendenen informed the Board that, something to the effect that Charleston High School players were better prepared when they went to college because Stonewall's players had a tendency to drop out, something to that effect, and what I'm trying to ascertain is what players, what numbers of players have gone on to college and how well they do.

Mr. VENCILL: As players or as students?

Mr. CRISLIP: That's the problem. Are you talking about playing basketball in college, or being students in college?

Mr. LEGG: Well, I should think the emphasis should be on their ability to play basketball because that's the way they would go. Now, the other point is, you see, a coach is not the sole person that determines the ability, the abilities of students.

Mr. CRISLIP: I understand, Mr. Legg, I think you misunderstand my point. I'm directing it specifically to this question. I don't recall any previous testimony about playing basketball in college. If you want to argue that that's what they were talking about, then you're welcome to do so, and I may be corrected that there was such testimony but I just remember testimony about preparation for college and how well they do and if they drop out, period. Now if you want to ask Mr. Vencill about his players that play basketball in college, then you're welcome to do so, but again, I don't recall any specific testimony directed to that before. Again, you'd be welcome to argue on closing that that's what they intended or if you want to present other evidence on that you could do so. The only reason I interrupted you was to clarify that in my own mind. . . like I said, I'm not going to stop you from asking Mr. Vencill this question.

Mr. VENCILL: I think as far as the number of our kids that have gone on and gone to college, not specifically played basketball, I've been very proud of that. I know I've even mentioned to my wife how that when I first took over the basketball program at Charleston High I watched kids come through there and play and that was it. They were just on the streets and so forth and that's one thing I have been proud of is that our kids have gone on and gone to college. Many of them. And not necessarily played ball because I just don't feel that we have had the great athlete to go. And obviously we haven't because the coaches haven't come looking at them.

Legg expressed that he had "tried to leave the impression" that Grievant was concerned with all aspects of basketball players at SJHS¹⁶ and the fact that he had a guidance counselor as an assistant coach was indicative of this. No information was presented showing Grievant to have had any input into or control over the selection or maintenance of Scherr as his assistant, nor was there any evidence offered that playing basketball is "the [only] way they [students] would go [to college]," as suggested by Legg. Further, Luoni's pertinent testimony was clearly without reference to students playing basketball in college, as revealed by the following exchange at Level IV:

Mr. LEGG: Did you wonder about the relevancy of preparing students for college? Did you understand the meaning?

Mr. LUONI: Well, I thought it was kind of unfair, because you know, each student has many teachers that they have through school and of course parents, and I felt like it was kind of an unfair way to say a student does poorly, did poorly in college because Don Stover didn't do something properly. I think that lets the parents and the teachers and the individual student

16 As noted by the undersigned at the hearing, Grievant's representative seemed to be making conflicting arguments, to the effect that if SJHS basketball players did well in college, then that was to be credited to Grievant and his coaching staff; if they did poorly, the blame was to be shared with all SJHS teachers. When Legg was advised of this perception, his only reply was, "It is very difficult for me personally to understand how persons can arrive at a statement like that Mr. Clendenen made to the Board [of Education] members with regard to a better record on college preparation. . .[from] a fifteen-minute interview."

If Legg's intent was to seek comparison of Grievant's preparation of his students to play college basketball with Vencill's like preparation, his presentation was simply not substantive or clear enough to permit such analysis.

out of all their responsibility so I didn't weigh that that heavily, that how a student does in college relates to their high school basketball coach.

Carla Williamson, 1988-89 SJHS Acting Principal, and Alvin A. Anderson, 1985-88 SJHS Principal, offered testimony generally supportive of Grievant: his skills as a teacher, coach and worker with youth; and his application for the post in dispute. Both stated that no one had contacted them for a reference on Grievant. Williamson explained that, when Grievant was chosen to be a Capital teacher, she had not supervised or worked with him at all, and during the Coach selection process, she had not overseen his performance in basketball. Anderson said that while he was at SJHS either he or his vice-principal formally evaluated Grievant as a teacher but never specifically as a coach.

Tony Smedley, a staffer with the Professional Development Division of the West Virginia Department of Education, testified that a 1985 Opinion issued by the State Superintendent of Schools relates to the formal evaluation of coaches. A portion of a publication containing at least a synopsis of that Opin., as follows in pertinent part, was admitted as Grievant's Exhibit 4 (numerical footnote designations changed to asterisks):¹⁷

¹⁷ Grievant did not submit the actual Opin., even though he was advised that authority not readily available to the undersigned, such as State Superintendent of School's Opinions, should be provided when consideration thereof is desired.

August 15, 1985

Please interpret §§5310-5315 of the Policies, Rules and Regulations of the West Virginia Board of Education as they govern evaluation of coaches and other school personnel assigned to extra-curricular duties. For example:

(1) Do coaches have to be evaluated?
(2) If so, do they have to be evaluated according to Policy 5310?

. . . .
(4) If the answer[s]. . . [are] yes, what are the guidelines on which extracurricular activities must be evaluated. . . ?

1. Policy 5300 requires that all employees be evaluated regularly. To be effective, these evaluations must be more frequent than annual.* Though nothing in. . . [W.Va. Code] §18A-4-16 expressly requires regular evaluations of coaching assignments, it has been held in grievance appeal decisions** that a transfer from a coaching assignment for disciplinary reasons must be upon the basis of evaluations made in accordance with Policy 5300.

2. Yes.

. . . .
4. Policy 5310, Section D specifies that it includes all personnel employed by a county board of education; therefore, all extracurricular assignments for which contracts are executed pursuant to [§]18A-4-16 should be evaluated.

*Lipan v. Board of Education, 295 S.E.2d 44 (W.Va. 1982).

**Walsh v. Flanigan, September 27, 1984; Hosaflook v. Upshur County Board of Education, May 14, 1985.

Smedley said he was unaware of "any other interpretations or guidelines regarding the evaluation of coaches" except county guidelines. He stated that certain unspecified counties have received a "negative response" from accreditation officials for failure to formally review coaches'

performance.¹⁸ Grievant's attorney offered to submit an "accreditation instrument" for the undersigned's review, and Respondent's counsel made specific request that he do just that. Despite this, no such documentary evidence was provided the undersigned prior to the record's closing, or since.

Grievant testified that he has twenty-five years' experience as a head coach in school athletics and currently serves as AD as well as teacher and Head Basketball Coach, SJHS. His background includes a master's degree in physical education, plus thirty additional graduate hours and principal's certification; three years as a teacher/coach in Ohio; and four years in that capacity at Mullens, West Virginia, High School. He said "consolidation has been going on six or seven years and we were asked to make application for teaching positions [at Capital]. . .sometime last year." He made such application and was interviewed by Clendenen in Summer 1988. During the five- to ten-minute conference, he offered a resume' but Clendenen advised that it would not be necessary for him to receive it since he definitely intended to recommend Grievant's hiring as a social studies

¹⁸ Smedley apparently was making reference to accreditation guidelines either promulgated by individual counties or only applicable to certain counties. He did not report any county system to have lost or been denied accreditation due to failure to evaluate coaches.

instructor.¹⁹ At some point, Clendenen commented that Grievant was the most senior applicant with the exception of one other. According to Grievant, there was "talk about Capital High School and what it would be and how the building would be and the constructure [sic] and what a great teaching area it would be and several things were mentioned."

Thereafter, Grievant applied for the positions of Coach and AD at Capital. During Fall 1988, Clendenen conducted a thirty- to thirty-five minute interview of Grievant, at SJHS, for one or both of these jobs.²⁰ Grievant described this meeting, in part, as follows at Level IV:

We spent some time discussing. . .our glasses for several minutes. We talked about Capital High again and what the things would be up there. . .we got into a discussion of what I would want as far as assistant coaches if I were named head coach and he pointed out some things that related to football and I asked if I was head coach if I would have two assistants or one assistant. He felt like only one assistant was needed and he asked me what I looked for in an assistant and I basically told him that I wanted one that would work but one that wasn't looking for my job and that I had two men right there at Stonewall that fulfilled that and had done a good job for me.

We didn't get into my knowledge of athletic costs

¹⁹ Grievant cited this as an example of his being thwarted from presenting information to Respondent during the selection process; surprisingly, however, he did not offer this specific document into evidence at Level IV.

²⁰ Grievant stated he was never interviewed for the AD post; Clendenen said he considered this interview as covering both jobs.

* that I can recall, there was maybe a mention of it. . .it was going to be an enormous cost to supply Capital High School with all the areas that. . .there may have been something mentioned to that fact but I'm not even sure of that.

He opined that Clendenen did not ask any questions about Grievant's knowledge of the philosophy of Capital; his experience as a player or coach; his education, in child development or other areas; his demonstrated strengths as a classroom teacher; or his follow-up of former SJHS players in college. As to his participation in continuing education and/or clinics, Grievant did not recall any conversation "as that such" but stated "we talked about basketball. . .I mentioned [West Virginia University Assistant Basketball Coach] Gary McPherson had been down and I'd spent two or three hours with him [and that] I enjoyed getting with Gary, [Coach] Joe Retton, [Coach] Sonny Moran, and just discussing things." At Level IV, Grievant supplied that he has attended all basketball clinics the State of West Virginia has offered but that he feels "one-on-one talking" is more effective.

Grievant declared himself "somewhat" knowledgeable of the costs associated with all sports, since he is AD at SJHS, but especially with basketball. He mentioned busing, housing, food, laundry, equipment and other particulars over which he had coordinated expense coverage for "all twenty-nine years I've been in the school business." He stated that, in his experience, school coaches generally shop

around to get equipment and other items as inexpensively as possible and "get the order and the pay approved."

He continued he had never seen a "philosophy of Capital High School" in writing or heard one spoken of in any meeting, but that he thought he knew what it is. He explained he had attended a three-week Capital seminar during Summer 1988 "on how education will be and will be expected to be taught" at Capital.²¹ He described the seminar as including a discussion of Capital's curriculum, "what we would be doing," and the joint social studies-English instructional concept. He added he was familiar with integrated and team teaching since both had been pursued at SJHS for a number of years. Grievant presented an evaluation on the seminar leaders rendered by participants, Gr. Ex. 6, which purports to reveal an understanding of Capital's purpose although he admitted "I can't say that any of these statements are mine but I was involved in some of these meetings from which this document came."²²

Grievant related that he "found out he wouldn't get the job" about the third week in December 1988, when Clendenen came to SJHS and told him directly that the choice was John

²¹ A several-page seminar outline was admitted as Grievant's Exhibit 5. The seminar earned its attendees three hours of college credit.

²² Grievant's name does appear on the document as one of the evaluators.

Vencill. Grievant advised Clendenen to "be prepared to put it in writing" and the reply was, "I will when I have to." Grievant shortly thereafter penned an undated letter to Clendenen, asking for reasons for the decision and suggestions for improvement of his coaching qualifications. Gr. Ex. 16. By correspondence of January 5, 1989, Clendenen responded as follows:

This is in response to your recent letter wherein you requested a statement of reasons in connection with your unsuccessful application for the extracurricular head basketball coaching position at Capital High School. . . . [W.Va. Code §] 18A-4-8b[(a)] has no express application to extracurricular contract positions. I must, therefore, decline to comply with your request.

Gr. Ex. 17.²³

According to Gr. Ex. 18, Grievant, on January 17, 1989, requested a Level II hearing.²⁴ He testified that he wanted this conference "to prevent them from selecting John Vencill," but such was disallowed as premature. Id. On

²³ Although Grievant's letter was addressed to him, Clendenen's response thereto and its characterization of Grievant's application as unsuccessful, prior to Superintendent Trumble even having made his recommendation of Vencill to Respondent, was totally inappropriate. However, due to the outcome herein, the error is harmless and will not be further addressed.

At some point prior to Respondent's selection of Vencill, Clendenen's choice of him became public knowledge. This was certainly unfortunate and, if that knowledge was created outside the context of Grievant's case, quite possibly improper.

²⁴ At one point, Grievant said his desire was "to get a Level II or Level III hearing" prior to the Board of Education making its final decision. See statement attached to grievance at Level IV, as reproduced supra.

January 19, Legg appeared before Respondent on Grievant's behalf and with his knowledge and approval, as recorded in Appdx. 1. That same evening, Respondent selected John Vencill to be Coach, and Grievant was informed of this on the morning of January 20 and that a Level II hearing would be scheduled at his convenience. Gr. Ex. 20. Puzzlingly, on January 24, Grievant wrote Superintendent Trumble and asked for notification of "any adverse action taken by the Board [of Education] that would then make it possible for me to . . . receive a Level II. . . hearing." Gr. Ex. 19. He explained that he issued this correspondence in an attempt "to head off Board of Education action." Trumble promptly responded, Gr. Ex. 20, and iterated what Grievant had been advised on January 20.

Grievant admitted that he would have been embarrassed to present his coaching qualifications in detail to Clendenen.²⁵ He declared, "I think anyone that's been in the school system as Mr. Clendenen has as one of our opponents knows most everything that I could have put on there anyway." He explained that he did not have advance notice of his coaching interview, but, significantly, that, even if he had, he would not have approached it differently. He

²⁵ Grievant consistently complained that Clendenen had not "asked the right questions" during his coaching interview. As noted at Level IV, while job screeners unquestionably have certain facilitative responsibilities, applicants have a like obligation to submit pertinent information to them.

stated that he did not follow his interview by providing Clendenen with information or indicating his desire to do so. He said Clendenen neither cut him off or ask if there was anything further he would like to add. He did report the interview time was perhaps limited due to others waiting to see Clendenen.

Grievant also testified that he was unaware of any school board policy outlining qualifications for coaches or relating to evaluation of coaches and/or athletic directors. He said that, to his knowledge, he had never been evaluated as a coach or athletic director.

John Clendenen testified that he has worked over twenty years in school administration and that he has made hiring recommendations for that length of time. He explained that he was designated by Respondent and Superintendent Trumble to be the sole interviewer for Capital positions.²⁶ He recalled that during Grievant's coaching interview, he noted experience at Charleston's Woodrow Wilson Junior High School, Ohio and Mullens, and since 1968, again in Kanawha County. He also recollected discussion of Grievant's background in "all sports." He conceded that he had prepared Gr. Ex. 1, the Capital coaching vacancy notice, and

²⁶ Throughout Level IV, Grievant implicitly questioned the wisdom of this approach.

There was much evidence of the stress of the consolidation of SJHS and Charleston, and Clendenen most recently was Principal of one of those institutions.

explained that he had arrived at the listed qualifications after consultation with various colleges and high schools on their procedures for selecting coaches.²⁷

Clendenen stated that athletic costs were discussed and that Grievant said he did not like or need booster clubs and instead wished to raise funds by solicitation of businesses. Clendenen considered this a weakness since, in his view, spiraling expenses and the ten-year birth-pangs of consolidation necessitate immediate parent involvement as athletic sponsors. He continued that Grievant told him that he did not like basketball clinics, preferring instead informal conversation with college coaches. This was likewise noted as a weakness, inasmuch as Capital's philosophy includes a search for innovation more readily measurable, in his opinion, through formalized training. He said Grievant made no mention of having attended any clinic whatsoever. He professed specific memory of inquiring into Grievant's knowledge of that philosophy during the coaching interview. He admitted not inquiring about follow-up with former pupils, but denied memory of reporting Vencill's success in this area to Respondent. He said that he usually ended each interview by inviting the applicant to provide him with any additional information desired, even post-meeting, although

²⁷ He stated he found no set guidelines and fashioned the qualifications after teacher selection criteria on the theory that "coaching is teaching."

he had no specific remembrance of doing this with Grievant. He continued that information he obtained via classroom teacher interviews and personnel file perusals were included in his consideration of coaching applicants. Based on all this data, Clendenen arrived at the conclusion that John Vencill was the most qualified of the three candidates for Coach.

On cross-examination, Clendenen extrapolated that Grievant had mentioned personal conflicts with and questionable conduct of SJHS booster club members as the root of at least some of the problems in that regard. Clendenen stated that he did not approve of public solicitation because of the problem of coordinating fundraising among all organizations within a given school. He said that athletic costs were further covered during the interview in the context of discussing how all Capital equipment had to be new and therefore it would be impractical to expect each sport to have anything beyond necessities at first. Clendenen also testified that he had reviewed the status of sports finances for the previous four years at both Charleston and SJHS and found them to be "basically the same. . .very barebones budget[s]."

Clendenen confessed that no written philosophy of Capital will be available until the school's handbook is printed. He expressed the gist of that philosophy as a search for innovation, adding that Capital was to be a student-centered school with a focus on teaching critical

thinking and not mere memorization. He offered that this philosophy was taken into account when Capital's teachers were chosen, but explained that Grievant was successful there primarily because he had many years with Respondent and was one of only eight social studies teachers who had requested administrative transfer to one of ten vacancies.

He opined Vencill topped Grievant, in his view, based upon a "tabulation from the two interviews."²⁸ He considered them roughly equal by formal evaluation, as he did all or most applicants.²⁹ He added that he did not consider relative win-loss ratios as pertinent to the measure of coaching ability. He conceded that Grievant's seminar attendance should have given him "a leg up on the philosophy of Capital," but pointed out that the meeting was only for social studies and English faculty and Vencill was thus not permitted to participate. He denied that his past professional relationship with Vencill, as his principal, colored his choice for Coach in any way. He reported he had recommended the hiring of over twenty-five coaches for Capital, "well over half" from SJHS, although head coaches in football, basketball and baseball were all from Charleston.³⁰

²⁸ No application or interview scores of any kind were presented at Level IV.

²⁹ Grievant did not supply Vencill's evaluations or evidence thereon beyond Clendenen's general comments.

³⁰ Clendenen viewed his task staffing Capital as
(Footnote Continued)

Clendenen was unsure whether he agreed with Grievant's statement that he was aware of anything Grievant could have presented in support of his application, but stated that he had known Grievant twice as long as he had known Vencill; he was principal "next door to" SJHS for five years; he had attended basketball games coached by both Grievant and Vencill for years and had "heard the locker room stories" of both; he read the papers and was well aware of each man's win-loss record, Grievant's victory streaks, and other information. He claimed that he did his absolute best to be totally objective and make his recommendation for Coach based on his assessment of the applicants' qualifications for the position, and nothing more.

He concluded by denying recollection of "natural" or "street" players, or anything to that effect, being mentioned in Respondent's January 19 executive session. He explained that he was there to answer Respondent's questions and nothing more; he related that he was quizzed, particularly by Luoni, and that some of the inquiries were related to Legg's presentation to Respondent earlier that evening. He admitted that each of his recommendations for Capital coaching positions was adopted by the Superintendent and in turn by Respondent.

(Footnote Continued)

"putting the total thing into focus" and "unifying a community divided for ten years by the consolidation process." It is presumed that these factors were included in the "philosophy of Capital High" requirement.

Grievant presented rebuttal concerning the booster club testimony. He explained that he had removed a player from his team for smoking and "other things," and the boy's father, then president of the organization, was disgruntled. He also had complained of the practice of giving players gifts worth more than values set by the West Virginia Secondary Schools Activities Commission, and raising money by holding bingo games in smoke- and alcohol-filled rooms. He averred that booster club meeting minutes would verify some of his concerns; however, he did not produce such minutes. He finished by declaring that he did not recall discussing sponsors at all during his interview, and that his problems were not with such groups per se, but with certain individuals associated therewith.

One of Respondent's primary arguments is that the education employees grievance procedure, W.Va. Code §§18-29-1 et seq., was never designed to be a "super-interview" for unsuccessful job applicants, to the exclusion of other candidates; rather, it was to provide a review of hiring decisions based on the information available to the county board of education at the time. Grievant has countered that he was unfairly prevented from providing adequate information on his qualifications and from having a "due

process" hearing, and that the selection process was accordingly flawed.³¹

FINDINGS OF FACT

1. Carl Clark, John Vencill and Grievant Don Stover were the three applicants for the position of Head Basketball Coach (Coach), Capital High School (Capital), Grievant being the most senior candidate. Previously, all three men had been chosen, during Summer 1988, as classroom teachers at Capital for its first year of existence, 1989-90. Capital is the product of the consolidation of Stonewall Jackson High School (SJHS) and Charleston High School (Charleston).

2. Capital Principal John Clendenen conducted interviews for all teaching and coaching positions at Capital. The coaching interviews were fairly conducted and Clendenen's conclusion that Vencill was more qualified to be Coach than Grievant or Clark was based on a comparison of the six "qualifications" advertised on the vacancy notice with the information gleaned on each applicant from those interviews, the earlier teacher interviews, personnel files,

³¹ Certain exhibits presented by Grievant were excluded from the record by the undersigned. However, even if this information had been admitted and considered, the outcome herein would not have changed.

and other appropriate sources, e.g., recent financial reports on sports programs at SJHS and Charleston.

3. After the coaching interviews in late fall-early winter 1988, Clendenen suggested to Respondent's Superintendent Dr. Richard Trumble he recommend Respondent hire Vencill as Coach. Grievant learned of this advice from Clendenen on or around December 21, 1988.

4. Grievant immediately filed a Level I grievance per W.Va. Code §18-29-4, which was denied on January 10, 1989. On January 17, Grievant requested a "Level II" hearing before the Board of Education, which he has since characterized as a "due process" hearing, but was advised that such request was premature.

5. On January 19, 1989, Grievant's representative appeared before Respondent and provided a lengthy recitation of Grievant's accomplishments. See Appendix 1. He did not provide any written information on that occasion. Later that evening, Respondent voted to adopt the Superintendent's recommendation that Vencill be Coach. After this date, Grievant's claim was processed and advanced to Level IV.

CONCLUSIONS OF LAW

1. A county board of education is obligated to fill a vacant professional position with the most qualified applicant therefor. W.Va. Code §18A-4-8b(a); Dillon v. Bd. of Educ. for the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

This requirement applies fully to an extracurricular assignment, such as coach. Smith v. Jefferson Co. Bd. of Educ., Docket No. 19-88-082 (Nov. 29, 1988).³²

2. Grievant was not entitled to consideration of his grievance prior to Respondent's hiring of Vencill on January 19, 1989. W.Va. Code §18-29-2(a) (definition of "grievance"). However, any "due process" rights he may claim in this regard were satisfied by his representative's oral presentation and opportunity to submit written information to Respondent.

3. The grievance procedure, Code §§18-29-1 et seq., is not intended to be a "super-interview" for unsuccessful job applicants; rather, in this context, it allows analysis of the legal sufficiency of the selection process at the time it occurred. If the decision was proper based on the information then available to the board of education, and the process was not flawed to the point that the outcome might reasonably have been different otherwise, the hiring will be

³² The undersigned feels compelled to comment on the Level II Decision. Conclusion of Law 20 thereof provided, in part:

Notwithstanding certain Level IV grievance opinions rendered by the West Virginia Education [and State] Employees Grievance Board, . . . [W.Va. Code §] 18A-4-8b has no application with respect to the selection of persons to perform under extracurricular contracts.

The evaluator clearly erred. Just as this Grievance Board may not ignore on-point rulings of higher authorities, lower level decision-makers do not have the luxury of discounting salient, non-distinguishable precedent created at Level IV.

upheld. See Skinner v. Harrison Co. Bd. of Educ., Docket No. 17-88-114 (Sept. 30, 1988); Strickland v. Kanawha Co. Bd. of Educ., Docket No. 20-86-013 (July 24, 1986).

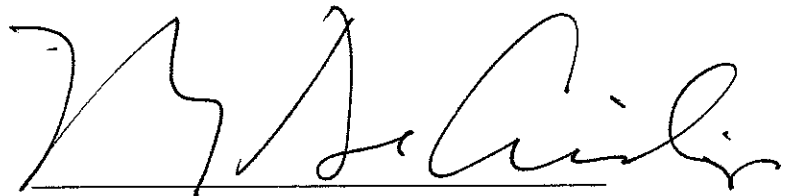
4. Grievant has not proven, by a preponderance of the evidence, see Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989), that Respondent erred in its January 19, 1989, determination that both he and Clark were less qualified than Vencill. Nor has he established any significant other flaw in the selection process, see Conclusion of Law 3. Respondent made a reasoned decision based on the information presented to it by Superintendent Trumble, Grievant's representative Legg, and, in reply to its queries, Clendenen.³³ Compare Milam v. Kanawha Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988)

³³ Any error on Respondent's part in not evaluating Grievant as a coach apparently applies equally to Vencill and Clark. At any rate, there was no probative evidence that negative statements about Grievant's actual coaching performance had any significant impact whatsoever on Respondent's decision; rather, it seems Respondent was well-advised of the positive aspects of Grievant's work as a coach. Furthermore, at Level IV Grievant offered testimonial evidence from his two most recent Principals on their evaluation of him as a coach, although he withdrew the pertinent question from Ms. Williamson prior to her answer.

Also, at Level IV Respondent's counsel argued that Grievant had failed to present Vencill's qualifications in a manner suitable for comparison with his own, and as such, he failed to meet the standard of Johnson v. Cabell Co. Bd. of Educ., Docket No. 06-87-248-1 (July 20, 1988). While Grievant did ensure that evidence of Vencill's education and experience were of record it is true that he gave particularized information of his own accomplishments to a much greater degree.

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7 Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

A handwritten signature in black ink, appearing to read "M. Drew Crislip", written over a horizontal line.

M. DREW CRISLIP
HEARING EXAMINER

Dated: June 26, 1989

APPENDIX A

(Respondent's Exhibit 2 - Approximation)

Dr. Trumble and members of the Board, I'm Ken Legg. I'm here to speak in behalf of Don Stover who is an applicant for the head coach's job at Capital High School. Don does not really understand the technical procedures that are entailed in a matter of this kind. He's busy teaching his classes and coaching his team, so he asked me to interceded for him on the matter. That's why I'm here.

The job was posed as prescribed by law under §18A-4-8b and in the provision of the law it says that they must list all of the particulars of the job so that the applicant will know all he possibly can about the job so he can then decide whether or not he wants to apply.

On this notice, they listed six things. One was knowledge of athletic costs. Having been a coach and a teacher for nearly 30 years, certainly Don Stover would know the cost of equipment and travel and other things that it takes to participate in the game of basketball. I ask him about this particular item and he says our basketball program does so well in earning funds for our school that it subsidizes other athletic programs.

Another criteria that they listed for this job was to be knowledgeable of the philosophy of Capital High School. I do not know why I could say that would qualify Don in that area when the high school has not even been built. However, if you'll give me some cue then I can coach him a little bit as how to respond to that one.

The third one was experience as a player and a coach. And this is vital. I've been a coach. And I've been a player. And the fundamentals that you learn about the game is what you can teach. Anybody that has been a doer can be a better teacher.

But let me give you a little background. Don Stover was a regular on his high school team and started every game all the three years that he was a sophomore, junior and senior. He made all-state two years. He was captain of that all-state team his senior year. He played on a state champion basketball team that had only a hundred seventy students in the whole school, including the seventh and eighth grade.

From there Coach Brown at West Virginia University gave him a full scholarship and he went there and made their starting team as a freshman and was one of the leading scorers. From

there he transferred to Morris Harvey so he could play with his brother. Every game in which he dressed, he started for Morris Harvey and was one of the leading scorers, made all-conference twice and Morris Harvey recently saw fit to put him in the Hall of Fame as one of the most outstanding basketball players that they had ever had.

From there he went to school and then went to work in Mansfield, Ohio. As a junior high coach he had a sixteen win, two loss record with the boys. He had a sixteen win, zero loss with the girls.

He then came to Mullens High School for four years. Up to that time for many seasons Mullens had never had a winning team. During those four years he came to the state tournament twice and was runner-up one of those years.

From there he came to Stonewall Jackson in 1968 as head basketball coach. While there he has won 311 games. Throughout his career he has won 381 games for a winning percentage of about 70%. That's seven out of every ten games that he has coached. He has won at least a half dozen Kanawha Valley Conferences, he holds the record of successive conference wins at 58. He has won 13 sectional tournaments, 9 regionals and been to the state tournament 9 times and won 3 AAA championships. Recently as an honor, the sportswriters of this state voted Don Stover as the Outstanding High School Coach in West Virginia. Just last year, the National High School Athletic Coaches' Association named him as the Regional Coach of the Year. That takes in six states and Washington, D.C. Contiguous states as states bordering the eastern seaboard.

Education background and courses of study related to child development. Don Stover has an A.B. degree, a Masters degree, and 45 hours beyond a Masters degree. He majored in physical education which is coach-related. His Masters degree is in School Administration. Certainly anybody, any of you, that have been exposed to college training to be a teacher or to be especially a school administrator understands the numerous courses that you have to take in child development. So the record is there. How children behave. Recent continuing education, coaching clinics in relevant sport. On the football and a basketball official myself, I don't officiate for Stonewall Jackson High School basketball or football, by the way. Many coaches will not agree that's what I am, but I am one of those people and I've been around sports all of my life because it's something I just like to do. And every clinic that I've been to, Don Stover has been there. State clinic that has been put on by the activities commission. I'm a witness to that one myself.

Has demonstrated strengths as a classroom teacher. He was interviewed for the classroom teaching job at Captial and he

didn't even have to give his resume as that I know what you are, you have the job as a teacher. So, he's demonstrated his strength as a classroom teacher. Now along with that, Mr. President, twice he has been asked to be the vice principal, interim vice principal at Stonewall Jackson High School cause they recognized his strength as a person that could deal in matters of this kind.

In finishing, perhaps I personally have been more impressed with Don Stover as a person in all of his achievements. In a day, and you know what I'm talking about when to ally oneself with what is ethical. We find many people like him in this regard. Don Stover absolutely has an impeccable record for honesty and integrity. In fact, when he enters the room deceit and dishonesty vacate the premises.

He follows up on his students. At one time he had ten former players playing on the college level at one particular year. And the eleventh one was playing football at West Virginia University.

Now, the Dillon v. Wyoming case says that all classroom teacher jobs must be based and given on the basis of qualifications. This is a classroom teacher job because the Activities Commission has said no one may coach unless it's a faculty member or a substitute teacher. A person that's connected directly with the school system.

So in that vein, if you have to consider qualifications as a coach -- coach in qualifications -- if there's someone else, and there were only three applicants, if there is someone else who applied that can equal what I've presented here to you people, I would like for them to come forward.

I felt like that ought to be said because Don did file a grievance and went to the first level. And second level administration is supposed to provide a hearing for the employee within five days and that was denied. That is breaking the law.

So that's why we are here now so that before any superintendent and before any five-member board can make the right decision, they should know these particulars that I have pointed out before it makes that decision.

Thank you.

Mrs. Markham: Mr. President, in that future I would like you to adhere very strictly to the five minute rule, otherwise it's not going to be fair because some delegations are not going to have their point of view represented.

[Statement duration--10 min. & 30 sec.]