DAVID P. HANLON,

Grievant,

v. **Docket No. 93-23-502**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent,

and

TIM MURPHY,

Intervenor.

D E C I S I O N

Grievant, Dave Hanlon, filed this grievance because he was not selected for the head basketball coaching position at Logan County High School ("LCHS") by the Logan County Board of Education ("LCBOE") (See footnote 1). At Levels I and II of the grievance, Grievant argued he was the most qualified candidate for the position and his nonselection was a violation of W. Va. Code §18A-4-7a. At Level IV, the Grievant argued the LCBOE's decision not to hire him was an abuse of the arbitrary and capricious standard set out in Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). Four days of hearing at Level IV were held on June 9, 1994 (See footnote 2), July 17, 1994, July 29, 1994, and August 15, 1994. This case became mature for decision on October 3, 1994 following submission of findings of fact and conclusions of law. (See footnote 3)

Issues

During the process of the Level IV hearings Grievant raised many issues. In his post-hearing Memorandum of Law, Grievant spoke to two main issues. (See footnote 4) First, that the LCBOE violated W. Va. Code §18A-4-16 (See footnote 5) when it awarded the coaching position to an individualwho was not currently employed by LCBOE when a Logan County teacher had applied for the position. Second, Grievant argued the selection of Tim Murphy, the successful applicant, for the

coaching position was arbitrary and capricious and an abuse of discretion.

Respondent argued that pursuant to recent West Virginia Education and State Employees Grievance Board cases, W. Va. Code §18A-4-7a did not apply, (See footnote 6) and that the correct standard of review for the selection of a coach was whether the decision was arbitrary and capricious or an abuse of discretion. Respondent is correct in this statement of the law. LCBOE also argued no violation of W. Va. Code §18A-3-2a(4) occurred because the successful applicant was a certified teacher and employed in another West Virginia county at the time of his hiring. Additionally, LCBOE pointed out that the successful applicant was hired as a teacher at the same time he was hired as a coach.

Findings of Fact

1. On March 25, 1993, Coach Vic Herbert resigned as Head Basketball Coach at LCHS.

2. Grievant had served as Coach Herbert's assistant basketball coach for approximately seven years. He had also served as assistant football coach for approximately eight years. Grievant had been head basketball coach in Boone County from 1973 to 1978.

3. After Coach Herbert resigned, Assistant Superintendent Willie Akers, in charge of Athletics, approached Superintendent John Myers about selecting a committee composed of both school personnel and community leaders to recommend a coach to fill the position. This process had been used infrequently in the past to recommend coaches and supervisors. Superintendent Myers approved Assistant Superintendent Akers' proposal. Some time later Mr. Akers told Mr. Myers the names of the individuals who had agreed to serve on the committee, and Mr. Myers had no objection to these individuals.

4. The head basketball coaching position was posted on May 17, 1993 and read as follows:

LOGAN COUNTY SCHOOLS

An Equal Opportunity Employer

ATHLETIC VACANCY - MAY 17 - MAY 28, 1993

ATHLETIC POSITION for 1993-94

Logan High Schools - Head Basketball Coach

TERMS OF EMPLOYMENT: Salary/work year as established by Logan County Schools

ACCOUNTABLE TO: Principal and Athletic Director

RESPONSIBILITIES: (condensed) prepare athletes physically for basketball program; visit middle schools/junior high schools to brief them on the high school program; update eligibility list; keep in contact with parents of players; explain to athletes the regulations of the school and SSAC eligibility rules.

APPLICATION DEADLINE: Friday, May 28, 1993 4 p.m.

Anyone interested in applying for this position should submit An application for Employment to Brenda Skibo, Assistant Superintendent; Logan County Schools; PO Box 477; Logan, WV 25601

DISCRIMINATION PROHIBITED: As required by Federal law and regulations, Logan County Schools does not discriminate on the basis of age, sex, race, color, religion, handicapping conditions, marital status, or national origin in employment.

5. After reviewing numerous applications for the position, the Committee, composed of three community leaders, plus the LCHS Principal, the Athletic Director, and Mr. Akers, drafted a list of questions to ask the candidates and set up an interview schedule. Superintendent Myers reviewed all the initial resumes. The Athletic Director, Mr. Jack Stone, was the father of one of the community committee members. This committee member, Mr. Mike Stone, had played high school basketball at Logan County, had attended college on a basketball scholarship, started all four years, and had won numerous awards.

6. During the interview, all candidates were asked the standard questions as well as follow-up ones. Many candidates brought typed booklets which outlined their resumes, coaching experience, basketball philosophy, and off-season training programs. Mr. Murphy presented booklets with this information. Grievant submitted a one-page resume.

7. All candidates were told there may not be a full-time teaching position available due to a recent reduction-in-force, but that they could apply for a substitute position.

8. After interviewing all the candidates, the group met and individually ranked the candidates.

From these rankings three candidates were selected for a second interview. Grievant was notamong these three. The top candidates were all from outside the Logan County School system.

9. After conducting the second set of interviews and checking the applicants' references, the committee recommended Superintendent Myers hire Mr. Murphy for the position. Superintendent Myers then called several people, including Mr. Murphy's Principal and Mr. Jo Jo Retten, a well-known college coach and educator, to discuss Mr. Murphy's teaching credentials, coaching ability, demeanor, and interactional ability with students. He received very positive responses. Mr. Myers then directed Mr. Akers to call Mr. Murphy and offer him the position, conditioned upon the approval of Mr. Marockie. Mr. Murphy indicated he would accept. About two weeks later Mr. Murphy discussed the position with Superintendent Myers and asked him if there would be a full-time teaching position. No promises were made at this time.

10. Mr. Jack Stone, the Athletic Director, did not vote on the final decision. He stated he did not want people in Logan to say his family had selected the coach as both he and his son were on the committee. When the selection committee was questioned about why the Athletic Director chose not to vote as opposed to his son, testimony revealed Mr. Jack Stone suffered from numerous medical problems one of which was sleep apnea, diagnosed in January, 1994. Although no extensive details were given, it appears that Mr. Jack Stone, although present, was not awake for aportion of the interviews. Mr. Akers did not disagree with Mr. Jack Stone's decision.

11. Testimony was unclear as to whether Mr. Robert Lonker, the LCHS Principal, actually voted for Mr. Murphy or told Mr. Akers that either of the two remaining candidates (See footnote 7), of which Mr. Murphy was one, were very acceptable to him.

12. About the time the coaching position was offered to Mr. Murphy, LCBOE learned that additional music and itinerant PE positions would be needed in order to give teachers the required planning periods during the school day. Mr. Murphy applied for and received an itinerant PE position.

13. Prior to Mr. Murphy's hiring, all appropriately certified RIF'd employees were given the opportunity to fill the positions. Several other itinerant PE positions were filled prior to Mr. Murphy's.

14. Mr. Murphy received a Baccalaureate of Arts in Education from Fairmont State College in 1985. He is certified in Physical Education K through 12 and Social Studies 7 through 12. He received a Master's in Education, with specialization in Physical Education in October, 1992 from Salem Teikyo University. He played basketball both at the high school and collegiate level and

received numerous awards including being named an NAIA Basketball All-American. Mr. Murphy was the Buckhannon-Upshur High School ("B-UHS") Freshman Basketball Coach from 1985 to 1986 and his team was the North Central West Virginia Freshman Tournament Champions. He was the girl's head basketball coach at B-UHS from 1989 to 1992 with a four-year record of 51-31. From 1986 to 1991 he was assistant boys' basketball coach at B-UHS with a five-year record of 79-29. He became head coach of this team at B-UHS in mid-season, 1992, and coached the 1992-93 season as well with a 15-8 record. Additionally, this team was the Wendy's Holiday Tournament Champion and finished the season ranked 15th out of 148 schools in the West Virginia Metro Index Poll. Mr. Murphy finished the regular season ranked 13 in the West Virginia Coaches' Poll. Also Mr. Murphy has participated in numerous camps, clinics and has directed a summer basketball program.

15. Grievant received his AB Degree from Marshall University in 1973 and a Master of Science Degree in Occupational Safety and Health from Marshall University in 1978. He taught English and Physical Education at Boone County from 1973 to 1978. He was the head basketball coach, head track coach and the assistant football coach at Sherman High School. It was unclear from the record what the Grievant did from 1978 to 1984. In 1984 he was hired as an English and Literature teacher at Logan Junior High School, and in 1988 he became Dean of Students there. In 1990 he became Dean of Students at LCHS and is still in this position. Mr. Lonker was the Grievant's principal and was aware he had good to excellent evaluations in both the teaching and coaching positions.

16. In addition to the previously stated coaching positions the Grievant also coached the Junior Varsity Basketball teams and was in charge of defense in the Varsity games. The Varsitywin/loss record under Coach Herbert was 130-42 and the Junior Varsity record was 94-40. LCHS went to the state tournament five of seven years during this time. The 1991-92 and 1992-93 seasons show a decrease in the winning percentage resulting in 14-9 and 12-11 win/loss records, respectively.

17. In response to questioning during the interviews, Grievant was asked why he "hollered" so much at his players and appeared to belittle them. Grievant responded that J.V. basketball was "just a show" and sometimes you had to publicly embarrass a kid to get your point across.

18. Multiple witnesses testified that even though the team was winning there was a drop in attendance at the games. Members of the selection committee thought that the team showed a lack of discipline, a lack of respect, and poor conditioning. Members of the committee, as well as Superintendent Myers, were concerned about the image the team projected and were especially

concerned about the increase in technical fouls and the publicity surrounding the "trashing" of a motel room during the 1989 state tournament. Of particular concern to the committee was what they saw as a lack of response by the coach to these behaviors.

19. Superintendent Myers recommended the hiring of Mr. Murphy for an itinerant PE teaching position and head basketball coaching position at LCHS to State Superintendent Hank Marockie on July 7, 1994. The Superintendent approved these recommendations and the LCBOE "voted" to hire Mr. Murphy on July 8, 1994.

Discussion

Grievant's first argument is that LCBOE violated W. Va. Code §18A-3-2a(4) when it awarded Mr. Murphy the coaching position at LCHS when he was not employed as a teacher, and Grievant, an LCHS employee, had applied for the position. W. Va. Code §18A-3-2a deals with the authority of State Superintendent to issue certificates and the kinds of certificates he may issue. W. Va. Code §18A-3-2a(4) discusses other certificates and permits, and states:

Other certificates; permits. - Other certificates and permits may be issued, subject to the approval of the state board, to persons who do not qualify for the professional or paraprofessional certificate. Such certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation, unless the state board declares certain of these certificates to be the equivalent of the professional certificate.

Within the category of other certificates and permits, the state superintendent may issue certificates for persons to serve in the public schools as athletic coaches or other extracurricular activities coaches whose duties may include the supervision of students, subject to the following limitations: (A) Such person shall be employed under a contract with the county board of education which specifies the duties to be performed, which specifies a rate of pay equivalent to the rate of pay for professional educators in the district who accept similar duties as extra duty assignments and which provides for liability insurance associated with the activity: Provided, That such persons shall not be considered employees of the board for salary and benefit purposes other than as specified in the contract; (B) a currently employed certified professional educator has not applied for the position; and (C) such person completes an orientation program designed and approved in accordance with state

board rules which shall be adopted no later than the first day of January, one thousand nine hundred ninety-one. (1990, 3rd Ex. Sess., c. 4; 1992, c. 63.)

Grievant states the code section was violated in two ways. One, LCBOE violated this code section when it did not hire Grievant who was "[a] currently employed certified professional educator who had applied for the position." Two, this statute was violated because Mr. Murphy did not have the special coaching certificate required by a non-employee. The major problem with Grievant's argument is that, although Mr. Murphy was offered the coaching position before he was selected for the itinerant PE position, he was hired for both positions at the same board meeting. Thus, the Board did not hire a non-employee as a coach but hired an employee.

Additionally, a close reading of W. Va. Code §18A-3-2a(4) demonstrates that certificates in this section are for "persons who do not qualify for professional or paraprofessional certification." Mr. Murphy qualified for certification, possessed a teaching certificate, and was an employee of Buckhannon-Upshur High School at the time this position was offered to him.

Grievant's second argument is that LCBOE's failure to select Grievant for the position was "arbitrary and capricious and an abuse of discretion." First, Grievant argues the Board and Superintendent improperly delegated the responsibility of selecting a basketball coach by allowing an ad-hoc committee, made up of community leaders and school personnel, to conduct the interviews and make a recommendation. Additionally, Grievant argues the Committee acted in an arbitrary and capricious manner.

Superintendent Myers delegated to Assistant Superintendent Akers the task of interviewing the candidates and making arecommendation based on the results of these interviews. Superintendent Myers was aware of the committee and did not object to its makeup. To Superintendent Myers it was essential that the LCHS principal, Mr. Lonker, be on the committee, and he was.

Superintendent Myers reviewed all of the candidates' resumés in the early stages, and was informed when the committee called the top three candidates back for the second interview. When Mr. Akers informed Superintendent Myers of the committee's choice, Superintendent Myers then called numerous people to conduct his own review. Further, Superintendent Myers had seen Mr. Murphy coach in the past, and had heard positive things about him before the interview process began. After Mr. Myers received additional positive responses, Mr. Akers was delegated the task of offering the position to Mr. Murphy. Superintendent Myers discussed the position with Mr. Murphy

approximately two weeks later. On July 7, 1993 Superintendent Myers recommended the hiring of Mr. Murphy to State Superintendent Marockie and this recommendation was approved on July 8, 1993. As previously noted, this decision was subsequently approved at the Board Meeting that evening.

Obviously, Superintendent Myers was involved throughout the process. Additionally, Superintendent Myers testified he would not have automatically approved the committee recommendation if he disagreed with their choice. He stated he would have been reluctant to hire Grievant. While the utilization of an initial interview committee composed of community leaders and schoolpersonnel (See footnote 8) is unusual, it is clear Superintendent Myers made his own independent review, and although he considered what the committee advised, made his own decision to hire Mr. Murphy as coach. Thus, Superintendent Myers did not improperly delegate his responsibility. Collier and Hewitt v. Randolph County Bd. of Educ., Docket No. 94-42-269 (Dec. 27, 1993).

A review of the committee's action does not reveal that they acted in an arbitrary and capricious manner. The committee interviewed all applicants asking the same questions (See footnote 9) and giving them the same amount of time for the interview. They reviewed all materials submitted to them. The top three candidates were chosen through discussion and voting, and Principal Lonker's opinion was given great weight. The evidence does not show the committee acted in an arbitrary and capricious manner.

Further, the standard of review when comparing the overall qualifications of these two candidates is:

> [g]enerally an agency action is arbitrary and capricious if the agency did not rely on the factors that were included to be considered, entirely ignored important aspects of the problem, explained the decision in a matter contrary to the evidence before it, or reached a decision that is implausible that it can not be ascribed to a difference of views.

Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). This record does not support a finding that Superintendent Myers acted in an arbitrary and capricious manner, relied upon improper factors, ignored important aspects of the candidates or their background, expressed the decision in a manner contrary to the findings, or reached an implausible decision. Mr. Murphy was

clearly qualified to be Head Basketball Coach at LCHS. He had played basketball at both high school and collegiate levels and had won numerous awards in the process. His degrees and certifications are related to physical education. He has been a freshman, assistant and head basketball coach at Buckhannon-Upshur and his teams had winning records. Although reasonable minds may differ, and perhaps frequently do when it comes to selecting coaches, the decision to hire Mr. Murphy was not an abuse of discretion.

The above findings of fact and discussion are supplemented with the following conclusions of law.

Conclusions of Law

1. The Grievant has the burden of proof in a non-disciplinary case such as nonselection. Tenney v. Barbour County Bd. of Educ., Docket No. 89-01-576 (May 30, 1990).

2. W. Va. Code §18A-3-2a(4) is not applicable to the facts of this case.

3. The standard of review for filling a coaching position is to assess whether the Board abused its discretion in the selection or acted in an arbitrary and capricious manner. Dillon v. Bd. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Chaffin, supra; Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991).

4. "The grievance procedure, W. Va. Code §18-29-2 et seq., is not intended to be 'super interview' for unsuccessful job applicants; rather, in this context, it allows an analysis of 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).

5. An agency's decision by "appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong." Sloane v. W. Va. University, Docket No. BOR-88-109 (Sept. 30, 1988).

6. "[I]f the grievant can demonstrate that the selection process was so significantly flawed that he/she might reasonably have been the successful applicant if the process had beenconducted in a proper fashion," this Board will require the employer to reevaluate the qualifications of the grievant and the successful applicant. Jones v. Board of Trustees/W. Va. University, Docket No. 90-BOT-283 (Mar. 28, 1991).

7. Grievant did not demonstrate that the selection process was so flawed that he might have been selected as the successful candidate.

8. "Although the arbitrary and capricious standard of review of agency decisions requires searching and careful inquiry into the facts, the ultimate scope of the review is narrow, and [an ALJ] may not substitute [her] judgement for that of the Board." Harper, supra.

9. If a hiring decision was proper based on the available information, and the hiring process and decision was not flawed to the point that the outcome might have reasonably been different, then the hiring will be upheld. Stover at Concl. of Law 3.

10. The Grievant has not met his burden of proof and demonstrated that either the selection process was flawed or that LCBOE's decision to hire Mr. Murphy was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 29, 1994

Footnote: 1Although the LCBOE approved the selection of the successful applicant, Tim Murphy, at its July 8, 1993 board meeting, the actual approval of Mr. Murphy for this position came from State Superintendent, Henry Marockie because of the State Department of Education's takeover of certain positions within the Logan County School system.

Footnote: 2The successful applicant, Tim Murphy, requested to intervene on this date. Pursuant to W. Va. Code §18-29-3(u) he was allowed to do so over Grievant's objection.

Footnote: 3Respondent chose not to submit this material.

Footnote: 4The other issues raised by the Grievant have been found to be without merit. These issues include:

> *1) Failure of the LCBOE to obtain written consent when the Level II hearing was continued twice, once on Grievant's request and the second (three days later) at the LCBOE's request. Grievant did not object to either continuance.*

2) Failure of the LCBOE to provide Grievant with a statement of reasons pursuant to W. Va. Code §18A-4-7a. Testimony revealed Grievant was not the most senior applicant.

3) Failure of LCBOE to post the position within twenty days of the prior coach's resignation dated March 25, 1993. The position was posted May 17, 1993 for the 1993-94 school year. No harm was identified by the Grievant as the result of LCBOE's failure to post. Additionally, testimony revealed LCBOE viewed the coaching position and its duties as extending beyond "game playing" season.

4) Failure of LCBOE to receive written consent of parties to extend time lines for issuing a Level II decision. The parties had agreed to this extension verbally.

Footnote: 5The Grievant's brief argued the violation of W. Va. Code §18A-4-16 with reference to W. Va. Code §18A-3-2a(4) which appears to be the more pertinent code section.

Footnote: 6See, Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991).

Footnote: 7One of the top three candidates withdrew.

Footnote: 8Grievant repeatedly complained that the voting committee ended up with the majority of community members. While this is true, reasons given for Jack Stone's not voting are valid and, after interviews had begun, it was not feasible to add a member.

Footnote: 9The seven questions were as follows:

1.

Why do you want to be the Head Basketball Coach at Logan High School?

2.

What are your offensive and defensive philosphies [sic] and how do you implement these philosphies [sic] in your coaching?

3.

What do you feel are your responsibilities to the players concerning their education and how or what policies, procedures or guidelines would you use to insure your responsibilites [sic] are met?

4.

How important do you feel peripheral programs, (such as buddy league, Jr High, AAU) are and what contact and/or involvement would you have in these programs?

5.

Where do you see yourself 5 years from now.