VICTOR HOLMES,

Grievant,

v. DOCKET NO. 96-02-070

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent,

and,

DAVE ROGERS,

Intervenor.

DECISION

Dave Rogers (Intervenor) appealed the Level II decision in this grievance involving Victor Holmes (Grievant) and the Berkeley County Board of Education (Respondent or Board) directly to Level IV on February 15, 1996. Intervenor alleged that the Level II Grievance Evaluator's decision wrongfully instated Grievant as basketball coach. As relief, Intervenor seeks to be placed in the position in question, attorney fees and costs. (See footnote 1)

Following an Order by the undersigned granting Grievant's motion to dismiss Intervenor's appeal to Level IV, the Circuit Court of Berkeley County remanded this case to Level IV by Order dated November 21, 1996. A Level IV evidentiary hearing was held on May 12, 1997. The case became mature for decision on July 1, 1997, with receipt of Grievant's reply post-hearing submission.

In a case where an Intervenor appeals a lower level decisionto Level IV, the burden is on the Intervenor to prove his case by a preponderance of the evidence, and the scope of appeal is not based on W. Va. Code §18-29-3(t) because that Code Section only applies to "[a]ny chief administrator or governing board of an institution in which a grievance was filed ... ." See Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997). Neither Grievant or Respondent

appealed the Level II decision, therefore only issues Intervenor appealed will be examined in this decision.

FINDINGS OF FACT

1. Intervenor currently serves as Principal at South Middle School (SMS) which is across the street from Martinsburg High School (MHS). When he was Boys' Basketball Head Coach and Assistant Principal at MHS (which had twelve hundred students), he performed well in both positions. Level IV, Tr. at 55-56, and 228- 229.

2. At the conclusion of the 1993-94 school year, Intervenor voluntarily resigned as Head Basketball Coach at MHS (after a discussion with the Superintendent of Schools for Berkeley County, Mr. James Bennett). The Superintendent would not recommend

Intervenor for the Principal position at SMS unless Intervenor resigned his coaching position (the position in question).

3. The Boys' Basketball Head Coaching position at MHS was then posted for competitive bid on or about September 6, 1994. On or about September 19, 1994, the September 6, 1994 posting waswithdrawn and replaced by a second posting which changed the term of employment for the position in question from indeterminate to interim for the 1994-95 school year only.

4. Grievant was awarded the interim Boys' Basketball Head Coaching position for the 1994-95 school year. No grievance was filed challenging the delay in filling the Boys' Basketball Head Coaching position at MHS at this time, or the posting of the position as interim. The Level II Grievance Evaluator ruled that Grievant filed his grievance too late to succeed on any theory relating to his one year contract. (See footnote 2)

5. On or about May 15, 1995, Respondent again posted the position in question for the 1995-96 school year. The position was not filled as a result of this posting, and no grievances were filed challenging the May 15, 1995 posting or the failure of the Board to fill the position.

6. On or about September 21, 1995, Respondent again posted the Boys' Basketball Head Coaching position at MHS. The only two applicants were Intervenor and Grievant.

7. Intervenor had 19 years of experience at MHS as Boys' Basketball Head Coach prior to resigning from that position. Intervenor had led MHS to a State Boys' Basketball Championship, and was selected as Coach of the Year (an award which covered all sports in the State of West

Virginia). 8. Grievant is a Physical Education and Health teacher holding a continuing contract, and is assigned to MHS. Grievant has been teaching at MHS since 1984. He has coached baseball at MHS for sixteen years, and has won three State Championships. As Head Coach he has also coached Varsity Football for ten years, Girls' Softball for one year, Girls' basketball for three years, and Junior Varsity Boys' Basketball for nineteen years. As an Assistant Coach he coached Baseball for four years, and Varsity Basketball for one year.

9. After the September 21, 1995 posting closed, an Interview Committee was created by MHS Principal David Deuell, in accordance with past practices, to assist him in making a recommendation for the position in question. The Interview Committee was instructed about the provisions of W. Va. Code §18A-4-7a, and were directed to focus on experience, background, knowledge of the game, philosophy and education related to basketball (e.g., clinics, etc.). Principal Deuell was also a member of the Interview Committee.

10. The Interview Committee voted 5-4 to recommend Intervenor.

11. Later, after speaking with the Superintendent, Principal Deuell withdrew his vote as a member of the Interview Committee, making the Committee's vote a 4-4 tie. However, Principal Deuell still recommended Intervenor to the Superintendent, in his capacity of Principal, believing him to be the most qualified applicant for the position of head basketball coach.

12. After the Interview Committee had made its recommendationto Principal Deuell, some of its members were contacted by certain board members, who received information concerning its process, and particulars of each applicant's qualifications.

13. Grievant and Intervenor were interviewed by Superintendent Bennett for the position in question. During Intervenor's interview, the Superintendent told him he would not be recommended for the position because he was a principal. (See footnote 3)

14. Grievant was recommended by the Superintendent for the position, even though the Superintendent thought Intervenor was “probably” the best qualified applicant.

15. This was the first time the Superintendent did not accept the recommendation of a Principal. This was also the first time that Board members could remember where the Board did not accept a recommendation of the Superintendent. (See footnote 4)

16. The Superintendent believed that a principal should not be a coach because of the duties and requirements associated with being a principal. He also believed that Intervenor would be unable

to be both the principal of SMS and Boys' Basketball Head Coach at MHS.

17. Respondent did not agree with the Superintendent's philosophy fostered that a principal should not also be a coach. Respondent voted 2-3 to reject the recommendation of Grievant forthe position in question, and asked the Superintendent to make another recommendation. The Superintendent recommended Intervenor. Respondent voted 5-0 to hire Intervenor as Head Basketball Coach at MHS.

18. The Level II decision granted Grievant's grievance, and placed him in the position in question.

DISCUSSION

It is well-settled that the provisions of W. Va. Code §18A-4- 7a do not apply to the selection of coaches. Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). County boards of education are authorized to hire coaches under extracurricular contracts pursuant to W. Va. Code §18A-4-16, which does not designate how, or under what standard, extracurricular assignments to professional personnel for coaching positions are to be made. Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997); Ramey v. Mingo County Bd. of Educ., Docket No. 95-29-483 (Apr. 30, 1996). Nevertheless, it has been determined that the standard of review for filling coaching positions is to assess whether the board abused its discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of County of

Wyoming, 351 S.E.2d 58 (W. Va. 1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Smith, supra.

Further, the grievance procedure is not intended to be a “super interview” for unsuccessful applicants; rather, in this context, it allows an analysis of the legal sufficiency of theselection process at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Finally, an agency's decision by appropriate personnel as to which applicant is the most qualified for a vacancy will be upheld unless shown to be arbitrary and capricious, or clearly wrong. Sloan v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1988).

In this case, the undersigned cannot find that the Board's decision to hire Intervenor over Grievant was arbitrary and capricious, or clearly wrong. Analysis of this case will begin by examining the actions of the Board. Generally, an agency's action is determined to be arbitrary and capricious if the

agency did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). Although the arbitrary and capricious standard of review of administrative agency decisions requires a searching and careful inquiry into the facts, the ultimate scope of review is narrow, and the undersigned may not substitute his judgement for that of a county board of education. Goodwin v. Kanawha County Bd. of Educ., Docket No. 93-20-260 (Mar. 14, 1994). See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

Each Board member expressed a valid rationale or reasons for his or her respective vote in this case. Board member BerniceCollis (who voted for Grievant during the first vote by the Board) testified at Level II that she had heard high praises of both applicants, and had heard other Board members discuss their reasons as to why they believed Intervenor was the better basketball coach. She also testified it was her understanding that the Interview Committee had voted originally 5-4 in favor of Intervenor, that Principal Deuell had evaluated both applicants, that the Superintendent had asked Principal Deuell to withdraw his vote, that the Superintendent and the Principal disagreed over who should coach the Boys' Basketball team, and that the Superintendent's opposition to Intervenor was because of his philosophy that a principal should not also be a coach. However, she voted for Grievant because that was the Superintendent's recommendation, and because she did not have any reason to vote against Grievant. After the 3-2 vote rejecting Grievant, the Superintendent was asked for a second recommendation. He recommended Intervenor, and Ms. Collis voted for Intervenor. Level II, Tr. at 132-145.

Board member Jane Miller (who also voted for Grievant during the first vote by the Board) testified at Level II that her son has played for both Grievant and Intervenor, that Grievant is a qualified coach, that she received five to seven calls in support of Intervenor and none in favor of Grievant, that Principal Deuell had evaluated both applicants, that Principal Deuell thought Intervenor was the best applicant for the position, that the Superintendent's opposition to Intervenor was because of his philosophy that a principal should not also be a coach, and thatshe agreed with that philosophy. However, she also voted for Intervenor when he was recommended by the Superintendent.

Board member John McGowan Miller, III (who voted against Grievant during the first vote by the

Board), testified at Level II that he was aware of some instances the year before when “some of the boys were out of control when they went on the road.” Level II, Tr. at 116. He also testified that both applicants had their “merits”, that he was not influenced by calls in support of either applicant (however, he failed to state the number of calls he received, or which applicant the calls favored), and that he did not decide for whom he was going to vote for until the night of the Board meeting.

Board member George William Sonnick, II (who voted against Grievant during the first vote by the Board), during the Level II hearing cited community support as only one of the reasons he supported Intervenor. He also testified that he thought Intervenor was a better coach, that Grievant's team lacked discipline, that he had personally heard a player curse during a basketball game and Grievant failed to remove the player from the “floor”, and that team demeanor (when traveling) was unsatisfactory. Level II, Tr. at 82- 83. Mr. Sonnick was also aware that Principal Deuell had considered each applicant's qualifications, and had recommended Intervenor to the Superintendent.

Board member Todd M. Beckwith testified that he is a life-long resident of Berkeley County, that he used to be a teacher and a coach, that he knows both Grievant and Intervenor, that he wasgenerally aware of their basketball qualifications, that he was concerned about why the Interview Committee's vote went from 5-4 in favor of Intervenor to 4-4 the next day, that the Board does not have a policy prohibiting a principal from being a coach, and that because there is no such policy “the next best person to make the decision is the person who is [in] charge of the building at [MHS], which is Mr. Deuell.” Level II, Tr. at 104. During the Level IV hearing the following colloquy occurred:

> Intervenor's Counsel: And you're familiar with their [Grievant's and Intervenor's] records and careers as coaches?
>
> Mr. Beckwith: Yes.
>
> Intervenor's Counsel: All right. Were you aware, before you cast the vote in favor of [Intervenor], of [his] abilities with regard to juggling more than one set of responsibilities at a time?
>
> Mr. Beckwith: I've been aware of [Intervenor] as a person and administrator and coach for a long time, and I felt that he had the ability to do that. Yes.

> Intervenor's Counsel: Did you understand the objection that the Superintendent was making, that, basically, one person could not handle both jobs, both principal and coach?
>
> Mr. Beckwith: Yes, I understood. That was the philosophical difference in my mind all along, that Mr. Bennett, our Superintendent, felt like a building principal should not also be a head coach.

Level IV, Tr. at 203-4.

Based upon the narrow scope of review, and a review of the record, the undersigned cannot find that the board abused its discretion in the selection or acted in an arbitrary and capricious manner. The Board did not “rel[y] almost exclusively on community input as their reason for rejecting Grievant” as the Level IIGrievance Evaluator concluded, and the record does not support such a finding.

However, the Level II Grievance Evaluator was correct in finding that the Superintendent “did not review the relative coaching qualifications of the two applicants as outlined in Surber [v. Greenbrier County Bd. of Educ., Docket No. 89-13-233 (Nov. 20, 1989)]”. The Superintendent should have conducted a meaningful review of Intervenor's qualifications.

In this case, the undersigned finds that the best and most reliable evidence of the Superintendent's reasons for recommending Grievant were set forth in his memorandum to the Board dated August 24, 1995. In that memorandum the Superintendent listed six reasons why he felt Grievant was the best applicant for the position in question.

Reasons number one, three, four, and five concern Intervenor being able to handle both the SMS Principal position and the MHS Boys' Basketball Head Coach position. However, when the Superintendent was asked by Intervenor's counsel what evidence he had to support his position that Intervenor could not be a Principal and Coach, the Superintendent replied, “none”.

Reason number two dealt with what the Superintendent called “equity in pay”. However, what it addressed was Grievant's salary, and that if Intervenor received the coaching position in question then he would be the second highest paid employee in the Berkeley County School system and earning only “$8.90 less per day than theSuperintendent”. Level IV, Intervenor's Ex. #1. Reason number two is not a valid reason to preclude Intervenor from consideration.

As reason six, the Superintendent asserted that Grievant would “have a better than average

possibility of prevailing" if he filed a grievance. If this assertion was based on a belief that Grievant's 1994-95 coaching contract for the position in question was unlawful, then the issue of timeliness was overlooked, just like the qualifications of Intervenor for the position.

None of the reasons discussed by the Superintendent had anything to do with Grievant's qualifications, or Intervenor's lack of qualifications. Other than the Superintendent's belief that Grievant would prevail in a grievance, and the Intervenor's salary would be too high if he was granted the coaching position, the remaining four reasons concerned whether a principal should be a coach.

A difference in philosophy (concerning whether a principal should also be allowed to coach) does not mean that the Superintendent was "under duress" (as the Level II Grievance Evaluator concluded when the Superintendent recommended Intervenor for the position in question), that a Superintendent can unilaterally make Board policy, that it is unlawful for the Board to reject the Superintendent's recommendation, or that the Board did not consider what was in the best interest of SMS, MHS, and the entire school system when it voted 5-0 in favor of hiring Intervenor. In summary, a majority of the Board knew that the Superintendent did not properly review the qualifications of thetwo applicants, and instead based his decision on philosophical grounds with which a majority of the Board did not agree. A majority of the Board also knew that the original vote of the Interview Committee was 5-4 in favor of Intervenor, and that Principal Deuell's recommendation was based upon an assessment of both applicants qualifications. Moreover, each Board member had his or her own reasons for his or her respective vote which cannot be found to be arbitrary and capricious, or clearly wrong.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. Normally, in a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). However, in a case where an Intervenor appeals a lower level decision to Level IV, the burden is on the Intervenor to prove his case by a preponderance of the evidence, and the scope of appeal is not based on W. Va. Code §18-29-3(t) because that Code Section only applies to "[a]ny chief administrator or governing board of an institution in which a grievance was filed ... ." See Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997).

2. The Level II Grievance Evaluator was correct in finding that the Superintendent "did not review the relative coaching qualifications of the two applicants as outlined in Surber [v. Greenbrier County Bd. of Educ., Docket No. 89-13-233 (Nov. 20,1989)]". Level II decision.

3. It is well-settled that the provisions of W. Va. Code §18A-4-7a do not apply to the selection of coaches. Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991).

4. County boards of education are authorized to hire coaches under extracurricular contracts pursuant to W. Va. Code §18A-4-16, which does not designate how, or under what standard, extracurricular assignments to professional personnel for coaching positions are to be made. Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997); Ramey v. Mingo County Bd. of Educ., Docket No. 95-29-483 (Apr. 30, 1996).

5. The standard of review for filling coaching positions is to assess whether the board abused its discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Smith, supra.

6. The grievance procedure is not intended to be a "super interview" for unsuccessful applicants; rather, in this context, it allows an analysis of the legal sufficiency of the selection process at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

7. An agency's decision by appropriate personnel as to which applicant is the most qualified for a vacancy will be upheld unless shown to be arbitrary and capricious, or clearly wrong. Sloan v. W. Va. Univ., Docket No. BOR-88-109 (Sept. 30, 1988). 8. Generally, an agency's action is determined to be arbitrary and capricious if the agency did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

9. Although the arbitrary and capricious standard of review of administrative agency decisions requires a searching and careful inquiry into the facts, the ultimate scope of review is narrow, and the undersigned may not substitute his judgement for that of a county board of education. Goodwin v. Kanawha County Bd. of Educ., Docket No. 93-20-260 (Mar. 14, 1994). See generally, Harrison v.

Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

10. The selection of Intervenor as the Boys' Basketball Head Coach at Martinsburg High School was not arbitrary and capricious, or clearly wrong.

11. Given that back pay damages essentially are wages which Grievant would have received, and that the goal is to place the prevailing party (Intervenor) in the same position he would have been, had he not been deprived of the sum owed him, and had benefitted from the full use of the money during the period of deprivation, full reimbursement is not accomplished unless prejudgment interest is received. See Gribben v. Kirk, 195 W.Va. 488, 466 S.E.2d 147 (1995); Weimer-Godwin v. Bd. of Educ. UpshurCounty, 179 W.Va. 423, 369 S.E.2d 726 (1988).

Accordingly, Intervenor Dave Rogers' appeal is **GRANTED**. Respondent is **ORDERED** to place Intervenor in the position of Boys' Basketball Head Coach at Martinsburg High School, and to award him all benefits provided for by law as if he had been awarded the position following the Board's 5-0 vote, plus interest.

Any party may appeal this **DECISION** to the Circuit Court of Kanawha County or to the Circuit Court of Berkeley 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.

DATED: January 13, 1998. _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 The Grievance Board is without statutory authority to award legal fees. Smith v. Board of Trustees, Docket No. 96-BOT-242 (Oct. 7, 1997).

Footnote: 2 The undersigned does not find it necessary to revisit this issue or any issues consistent with this decision which were not appealed by the parties.

Footnote: 3 The Level II Grievance Evaluator also reached this conclusion in the Analysis section of his Level II decision, although he failed to make such a finding in either the findings of fact or conclusions of law sections. Grievant failed to

appeal the above issue.

Footnote: 4 Mr. Bennett became Superintendent in the summer of 1993.