CHRISTINA A. STUCIN,

Grievant,

v. **Docket No. 06-05-201**

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Christina Stucin ("Grievant"), employed by the Brooke County Board of Education ("BCBE") as a teacher, filed a level one grievance on May 18, 2006, in which she challenged her non-selection for the position of dance team sponsor. For relief, Grievant seeks the position of sponsor. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(c), and advanced her appeal to level four. Grievant's representative, Owens Brown, West Virginia Education Association Consultant, and BCBE counsel David F. Cross, agreed to submit the grievance for decision based upon the level two record. The grievance was subsequently transferred to the undersigned for administrative reasons, and became mature for decision on July 7, 2006. Neither party exercised their right to submit proposed findings of fact and conclusions of law.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level two.

Findings of Fact

1. Grievant has been employed by BCBE for approximately thirty-three years, and has been assigned as a full-time kindergarten teacher at Jefferson Primary School at all times pertinent to this grievance. 2. In addition to teaching, Grievant has been employed by BCBE as Cheerleading Coach at Brooke High School for the past twelve years.

3. On February 15, 2006, BCBE posted a vacancy for the extracurricular position of Dance Team Sponsor at Brooke High School. The position was to be compensated consistent with the extracurricular salary schedule.

4. The BCBE job description for "Club Sponsor/Class Sponsor/Extracurricular Director or

Sponsor" lists one qualification, certification or licensure as required by the West Virginia Board of Education.

5. Three individuals applied for the position of Dance Team Sponsor; however, one individual withdrew her application, leaving only Grievant and Christine Elson to be considered.

6. The applicants were interviewed by a committee composed of Brooke High School Principal Diane Watt, Assistant Principal Kathy Kidder-Wilkerson, and Athletic Director Dave Cucarese.

7. The committee recommended Ms. Elson for the position based on her experience, availability, and vision for the club. BCBE approved the recommendation on April 24, 2006.

8. Ms. Elson is a certified teacher employed by Grandma's House, a pre- school/daycare center. BCBE is unable to provide pre-school services for all the children in the county, and contracts with Grandma's House to provide the services to the overflow.

9. Ms. Elson served as Assistant Sponsor for the Dance Team during the previous school year, and teaches dance at a private school. 10. Grievant coaches the varsity cheerleading team from August until March, averaging four hours of practice per day, five days a week.

11. The Dance Team practices all twelve months of the year.

Issues and Arguments

___Grievant argues that as the only applicant employed by BCBE she is entitled to the position. BCBE asserts that the assignment was for a sponsor, not a coach, and it was not required to post or fill the position under the extracurricular statutes. In any event, BCBE denies any wrongdoing in awarding the position to Ms. Elson.

Discussion

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2004); *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ*., Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). *See also, W. Va. Code* § 18-29-6. "The grievance procedure . . . allows for 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).

The Dance Team Sponsor is an extracurricular assignment, defined by *W. Va. Code* § 18A-4-16, to mean:but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

The standard of review for filling extracurricular positions is to assess whether the board abused its broad discretion in the selection, or acted in an arbitrary or capricious manner. *Dillon v. Bd. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Chaffin v. Wayne County Bd. of Educ*., Docket No. 92-50-398 (July 27, 1993). The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and an administrative law judge may not substitute her judgment for that of the board of education. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). An action is arbitrary or capricious if it does not rely on factors intended to be considered, entirely ignores important aspects of the problem, is explained in a manner contrary to the evidence before the board of education, or is a decision 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); *Yokum v. W. Va. Schools for theDeaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

Both Principal Watt and Athletic Director Cucarese testified at level two that Grievant is an excellent coach, and would undoubtedly be a good sponsor for the dance team. However, they also voiced a concern whether Grievant's coaching duties for the cheerleading team would allow her time to fulfill both roles. They additionally cited Ms. Elson's experience with the dance team, and her work as a private dance instructor as factors which would make her better qualified for the assignment. Grievant insisted that she could schedule both activities. Although Grievant's enthusiasm is admirable, the concern regarding scheduling practices is valid. Grievant stated that having the students go home and come back later for a practice, allowing them to eat and rest, is a benefit. While that may be true, during the period of August through February Grievant is scheduled with the cheerleading team until as late as 9:00 p.m. The concern that Grievant simply did not have enough time to devote her full attention to both groups was not unreasonable. Further, there is no evidence in the record to establish that Grievant had any experience in dance. To the contrary, she seemed somewhat vague about the team's activities. In conclusion, BCBE's decision regarding the Dance Team Sponsor was neither an abuse of discretion, nor was it arbitrary and capricious.

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

Conclusions of Law

1. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2004); *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ*., Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). *See also, W. Va. Code* § 18-29-6. 2. The standard of review for filling extracurricular positions is to assess whether the Board abused its broad discretion in the selection or acted in an arbitrary or capriciousmanner. *Dillon v. Bd. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Chaffin v. Wayne County Bd. of Educ*., Docket No. 92-50-398 (July 27, 1993). 3. Grievant has failed to prove that BCBE abused its discretion or acted in an arbitrary and capricious manner when it selected another applicant for the position of Dance Team Sponsor.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Brooke County. Any 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. However, the appealing party is required by *W. Va. Code* § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JULY 20, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE