IOWA DEPARTMENT
OF EDUCATION
(Cite as 22 D.o.E. App. Dec. 194)

In re Andrew Ulrich	:	
Andrew Ulrich, Appellant,	:	
vs.	:	DECISION
East Greene Community School District, Appellee.	:	[Admin. Doc. 4758]

The above-captioned matter was heard on December 15, 2003, before designated administrative law judge Carol J. Greta. The Appellant, Andrew Ulrich ["Andy"], was not personally present at the hearing. He was represented by legal counsel, Marc T. Beltrame of Whitfield & Eddy, Des Moines. Andy's parents, Dennis and Sharon Ulrich, were present on behalf of their son. The Appellee, the East Greene Community School District ["the District"], was represented by legal counsel, Andrew J. Bracken, Ahlers & Cooney,[1] Des Moines. Also appearing on behalf of the Appellee were Superintendent G. Mike Harter, Board President Katherine Neese, and football team co-coaches Tony Beger and Tim Bardole. Coach Beger is also the Activities Director of the District. Coach Bardole is also a Board member.

An evidentiary hearing was held pursuant to agency rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for the appeal are found in Iowa Code § 290.1(2003). The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the appeal before them.

Andy seeks reversal of the decision of the local Board of Directors of the District made on October 21, 2003,[2] to uphold the administration's punishment of him for an admitted violation of the good conduct policy. His father filed a timely appeal to this agency. At the hearing before this Board it was ascertained that Andy is 18 years of age, and therefore, the proper party Appellant. Without objection from the District or his father, Andy was substituted for Dennis Ulrich as the Appellant herein.

[1] It was disclosed on the record in this hearing that the spouse of A.L.J. Greta is an attorney employed by Ahlers & Cooney; that her spouse has no connection with this matter and no personal financial interest in the outcome; and that Judge Greta has no personal bias or prejudice herein. The Appellants had no objection to Judge Greta presiding over this matter.

[2] Coach Bardole took no part as a Board member in the meeting of October 21, to avoid any conflict of interest.

I.
FINDINGS OF FACT

The pertinent facts are undisputed. Andy, an 18-year-old senior student of the District, was co-captain of the East Greene football team, and is a member of the basketball team, class vice president, and honor roll student. In short, Andy epitomizes the "standout student" who is "looked up to and emulated" by his peers, and, therefore, of whom more can be demanded by his school as to eligibility to participate in extracurricular activities. *See, Bunger v. Iowa High School Athletic Association,* 197 N.W.2d 555, 564 (Iowa 1972).

The District's high school enrollment is small enough that the District may, and has elected to, play 8-player football. In fact, a total of only 24 students, including freshmen and sophomores, competed for the football team at the start of this past fall. The four senior members of the team were designated as co-captains.

Some time during the evening of September 20, 2003, in the middle of the football season, Andy violated the District's good conduct rule by illegally consuming alcohol. He and two other senior members of the football team were in a vehicle that was stopped by a Perry police officer. Because Andy's breath sample did not register any alcohol content, he was not issued a citation for either possession of alcohol or underage drinking. At the following Monday's practice (September 22), Andy denied that he had been drinking when directly asked by Coach Beger about the incident. However, after practice Andy told his parents the truth of the matter. Andy and his father drove to Coach Beger's residence yet that evening, where Andy confessed to the football co-coach that he had in fact been drinking. This was Andy's first offense of the District's good conduct policy.

At the beginning of the football season, as has been their custom, the co-coaches held a team meeting that was mandatory for the players and to which parents were invited, but not required, to attend. Neither Mr. nor Mrs. Ulrich chose to attend the meeting; Andy was present. Part of the meeting is for the purpose of discussing team rules. None of the team rules are in writing, and none are endorsed or adopted by the local Board through formal board action. The uncontroverted evidence is that the local Board and both the past and present superintendents were made aware of the team rules by the co-coaches. The coaches were told that the rules were acceptable as long as they did not impose less severe punishment than the Board-adopted good conduct policy and as long as the punishment imposed did not affect the student once football season was over. That is, as explained by Superintendent Mike Harter in his testimony, the football team rules could not employ a punishment that would impact any activity other than football.

The bulk of the team rules deal with conduct specific to the football team – e.g., proper respect for teammates and opposing players, showing up on time for practices and games, where to park for practices and games – and breaches carry football-specific punishments, such as extra conditioning drills. Two exceptions existed. If a player had more than two unexcused absences he would be dropped from the team. And any player who consumed alcohol during the season would be ineligible to compete for the rest of the football season.

According to the testimony of Coach Bardole, the players were also informed at the team meeting that these team rules were in addition to the District's good conduct policy with the exception of the alcohol rule. The players were told that the team rule about not using alcohol, not the Board's policy, applied to the football players during football season. He added that there is no team rule regarding the possession or use of tobacco or steroids.

The Ulrichs acknowledged that Andy knew of the unwritten team rule about alcohol. When Andy and Mr. Ulrich left Coach Beger's house the night of September 22, Andy was aware that he was no longer on the team, and he wished the coach good luck for the rest of the season.

Andy's ineligibility for the rest of the football season was conditionally withdrawn by the co-coaches two days later. On Wednesday, September 24, Andy was presented with a written contract that limited his punishment to ineligibility for the next two football games, one of which was the District's Homecoming game, if he would agree to the following terms:

1. Apologize to his teammates for his conduct that led to his two-game suspension;

2. Surrender his position as co-captain of the team;

3. Forego participation in certain Homecoming activities, including the pep assembly, parade, Powder Puff football game, and bonfire; and

4. Perform 20 hours of community service to the District.

When asked why Andy was being given this second chance, Coach Beger testified that the reason was in part not to lose senior leadership from the team,[3] but also as a "goodwill gesture" to acknowledge that Andy self-reported his culpability and that Andy had not been issued a citation by the Perry police when the vehicle he was riding in was stopped. To the surprise of the co-coaches, the other football players were "disappointed" that the team rule was not going to be strictly enforced against Andy and

[3] As a result of the September 20 incident, only one senior remained on the District's football team.

the other two seniors. In any event, Andy declined to sign the contract. Accordingly, the coaches renewed their initial decision that he was ineligible to compete in all remaining football games.

The local Board has adopted a lengthy (4-1/2 pages) and detailed good conduct rule in Policy No. 503.9. As do most good conduct policies, the District's rule reaches such out-of-school conduct as possession or consumption of alcohol, possession or use of any form of tobacco, use or possession of a controlled substance, or the commission of a delinquent act or crime other than a minor traffic violation. Policy 503.9 also specifically provides for the punishments, activity by activity, for a first offense. For a student participating in football, the penalty is ineligibility for two games; however, self-reporting a violation within 48 hours, reduces the given penalty by one-half (to one game for a football player who self-reports, for example). The reduction of penalty appears by the language of the Board's policy to be mandatory, not permissive.[4]

Nowhere in the written board policy is there any reference to penalties that may or may not be imposed by individual coaches or sponsors of extracurricular activities. However, one full page of the four-and-a-half page policy is devoted to detailing the procedure to be used by the administration, Board, and parents or guardians when a violation or penalty is disputed. Presumably, Andy and his parents used the procedure in Policy No. 503.9 to appeal his dismissal from the football team to the local Board. In a special meeting on October 21, the local Board met for over three-and-a-half hours before voting to uphold the co-coaches' punishment of Andy.

II.
CONCLUSIONS OF LAW

The Iowa Legislature has directed that the State Board, in regard to appeals to this body, make decisions that are "just and equitable." Iowa Code § 290.3(2003). The administrative rules adopted by the State Board for appeals before it also state that the "decision shall be based on the laws of the United States, the state of Iowa and the regulations and policies of the department of education and shall be in the best interest of education." 281—IAC 6.17(2). Therefore, the standard of review as first articulated in *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363 (1996), requires that a local board decision not be overturned by the State Board unless the local decision is "unreasonable and contrary to the best interest of education." *Id*. at 369.

Both parties agree that local *boards of education* may punish students who run afoul of good conduct rules. (A good conduct rule is one that reaches out-of-school

[4] The pertinent language is, "If a student self-reports a first or second offense violation within 48 hours to an administrator activities director, or sponsor of the activity, the penalty will be reduced by ½." District Code No. 503.9(III)(C).

conduct by a student, and the consequences address the student's eligibility to participate in extracurricular activities.) In addition, the District proposes that coaches and other sponsors of extracurricular activities may impose their own rules and punishments that impact eligibility for those activities. Thus, the issue before this Board is whether Andy's ineligibility could be imposed by Coaches Bardole and Beger pursuant to their unwritten football team rules.

HISTORY OF GOOD CONDUCT RULES

It has been settled for over 30 years in Iowa that local boards of education have authority to adopt and enforce good conduct policies. *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555 (Iowa 1972). Indeed, the *Bunger* Court specifically stated that "school authorities may make a football player ineligible if he drinks beer during football season. No doubt such authorities may do likewise if the player drinks beer at other times during the school year… ." *Id.* at 564. The rationale of the Court was that such conduct has a "direct bearing on the operation of the school." *Id.* "We cannot fault a school board for expecting somewhat more of them [students involved in extracurricular activities] as to eligibility for their particular extracurricular activities." *Id.*

The statute relied upon by the *Bunger* Court, Iowa Code section 279.8, authorizes local boards of education to "make rules for its … pupils … ." Another statute specifies that these "rules shall prohibit the … use or possession of alcoholic liquor, wine, or beer … and the board may suspend or expel a student for a violation of a rule under this section." Iowa Code section 279.9. [Emphasis added.] In so acting, our General Assembly first mandated that local boards of education enact rules against the use or possession of alcohol and then gave sole disciplinary authority regarding violations of these rules to the local boards.[5]

This Board has made it part of accreditation requirements for local boards to adopt student responsibility and discipline rules. 281—IAC 12.3(6). This Board has

[5] We note that Iowa Code subsection 282.4(1), states in part that the "[local] board may confer upon any teacher, principal, or superintendent the power temporarily to suspend a student… ." We conclude that this section is not applicable here. This law limits such delegation of power to teachers and administrators; it does not include coaches, many of whom – like Coach Bardole – are non-teacher coaches. Because the General Assembly is aware that not all coaches are also employed by school districts as teachers (*see, e.g.*, Iowa Code §§ 279.19A and 279.19B), we are bound by the rule of statutory construction that legislative intent is expressed by omission of certain words as well as by inclusion. *State v. Beach*, 630 N.W.2d 598, 600 (Iowa 2001); *Wiebenga v. Iowa Department of Transportation, Motor Vehicle Div'n*, 530 N.W.2d 732, 735 (Iowa 1995).

also adopted a rule specific to *eligibility requirements* for participation in interscholastic athletics, which states as follows:

> Local boards of education may impose additional eligibility requirements not in conflict with these rules. Nothing herein shall be construed to prevent a local school board from declaring a student ineligible to participate in interscholastic competition by reason of the student's violation of rules adopted by the school pursuant to Iowa Code sections 279.8 and 279.9.

281—IAC 36.15(1).

We do not mean to imply or state that a local board must prohibit the use or possession of alcohol as part of a good conduct rule. Iowa Code sections 279.8 and 279.9 have consistently been viewed as applying to the regulation by a local board of a student's in-school conduct, while good conduct rules are used to reach a student's out-of-school conduct. However, inasmuch as the Board of the East Greene District has determined that it wishes to address the use or possession of alcohol in its good conduct policy, an individual school employee may not contravene or supersede the Board's policy.

As a matter of fundamental fairness, a student and his parents must be able to rely upon the written and duly enacted policies of the governing body of their public school district. What little process is due to a student who seeks to participate in extracurricular school activities must include the right to have the school follow its own written policy. A school must follow its own disciplinary rules in declaring a student ineligible. *Brands v. Sheldon Community School*, 671 F.Supp. 631 (N.D. Iowa 1987). Here, as in *Brands*, any property interest involved was created by the District Board's own policies. These policies "can create a property right which is deprived if those regulations are not followed." 671 F.Supp. at 631.

The East Greene Board has adopted a rule prohibiting the out-of-school use or possession of alcohol, and prescribing the punishment therefor. There is no questioning the authority of the Board to do so. The District argues that its Board lawfully has delegated part of its rulemaking authority to Coaches Beger and Bardole. The District also argues that its Board, at that body's meeting of October 21, ratified the coaches' decision. Neither of the District's arguments is consistent with Iowa case law.

RATIFICATION

The doctrine of ratification is recognized in Iowa. However, it is available only when the first action taken was a lawful action. That is, the first action had to be one permitted under the law, but was irregularly performed, thus requiring a further act to

correct the previous mistake. Ratification is not permitted to validate an unlawful act or to cure a contract that is not merely voidable but void. *Madrid Lumber Co. v. Boone County*, 255 Iowa 380, 121 N.W.2d 523, 525 (1963). The East Greene Board, at its October 21st meeting, did not merely correct irregularities. It attempted to give validity to unlawful actions by its employees. Ratification is not intended to contravene the Legislature's policy decision pursuant to section 279.8 that the centralized authority for student discipline rests with local boards of education.[6]

DELEGATION

Regarding the delegation of rulemaking authority, Iowa follows the general rule, as stated in 78 C.J.S. Schools and School Districts § 122 at 910:

> [A] board of education … cannot lawfully delegate to others, whether to one or more of its members, or to any school officer, or to any other board, the exercise of any discretionary power conferred on it by law.

This general rule appears to have been first recognized in a school context by the Iowa Supreme Court in *Kinney v. Howard*, 133 Iowa 94, 110 N.W. 282 (1907), where a local school board's delegation of certain details of letting a construction contract was successfully challenged. The board in *Kinney* tried to delegate to a committee the power to determine the site of new construction, as well as plans and specifications of the building prior to the letting of bids. In noting that these decisions involved matters of discretion, the Supreme Court explained that there would be nothing wrong with delegating certain supervisory duties to a person or committee once the contract was let because the board may "do its ministerial work by agents or committees. … [However,] where the act to be done involves judgment or discretion, it cannot be delegated to an agent or committee." *Kinney*, 133 Iowa at 104-105, 110 N.W. at 286.

The validity of this rule was re-affirmed by the Iowa Supreme Court in *Bunger v. Iowa High School Athletic Association, supra*. As recognized above, *Bunger* is still the seminal case in this state regarding student conduct and eligibility rules. That Court clearly, unambiguously stated, "since promulgation of eligibility rules involves judgment and discretion, we think the State Board cannot re-delegate its rule-making authority under § 257.25(10) any more than a school board can re-delegate its rule-making authority under § 279.8." 197 N.W.2d at 563.

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[6] In addition to the proper use of ratification as a means of correcting mere irregularities, the doctrine is also intended to protect the innocent beneficiary of the ratified act. For instance, in *First National Bank v. City of Emmetsburg*, 157 Iowa 555, 138 N.W. 451 (1912), the Iowa Supreme Court held that the city had ratified contracts irregularly entered into, and thus had waived any right to object thereto.

In reliance upon these authorities, this Board has already ruled that "local boards cannot re-delegate their rulemaking authority to individual coaches." *In re Jason Chaffin*, 21 D.o.E. App. Dec. 155, 164 (2002). This Board forewarned school districts in that appeal that "local boards may be subject to reversal in future appeals if they rely on good conduct provisions that they have not formally adopted. We further emphasize that inconsistent good conduct rules within the same district, which vary depending on which activities a student participates in, foster confusion and encourage arbitrary enforcement." *Id.*

The District criticizes the dicta quoted above from our earlier decision, *In re Jason Chaffin*, and claims that it is based on a single case from another jurisdiction. That case, *Manico v. South Colonie Cent. School District*, 584 N.Y.S.2d 519 (Sup. 1992), involved a wrestler who committed a minor theft (a package of muffins) from his school's cafeteria. The student was duly suspended from educational programs for two days, as per school policy. However, the athletic director of the school imposed an additional punishment of ineligibility for the remainder of the wrestling season without authority to do so, resulting in the state court's decision to overturn the ineligibility ruling. This case does not stand alone. In *Davis v. Central Dauphin Sch. Dist. Sch. Bd.*, 466 F.Supp. 1259 (M.D.Pa. 1979), a superintendent disciplined a student who had assaulted a teammate pursuant to that school's good conduct rule. The rule provided for enforcement by other persons. Accordingly, the federal district court stated that the superintendent had no authority to punish the student.

We stand by the *Chaffin* dicta, but recognize that the time has come to further explain what authority local boards have vis-à-vis that of individual coaches.

AUTHORITY OF COACHES

Coaches are not bereft of authority to impose team rules. Of course, coaches must have some decision-making authority to act in the best interests of the team. Accordingly, coaches have final authority as to team membership, starting line-ups, health and training rules, practice sessions, etc. These rules are a "legitimate means of building team morale, discipline and team spirit." *Neuhaus v. Torrey*, 310 F.Supp. 192, 194 (N.D. Ca. 1970). In this regard, coaches may implement a wide variety of team rules, as long as these rules do not impact a player's eligibility. A coach has every right to tell a student that the coach <u>willingly chooses</u> not to play the student in an athletic competition. This is different from telling the student that the coach <u>cannot</u> play the student because he is ineligible to compete for the team. Eligibility is the province solely of a local board of education.

[The District cites *Wooten v. Pleasant Hope R-VI School District*, 139 F.Supp.2d 835 (W.D.Mo. 2000) and its appellate decision, *Wooten v. Pleasant Hope R-VI School District*, 270 F.3d 549 (8th Cir. 2001), in support of its contention that a coach has the inherent right to suspend a player from his or her team. It is not accurate to frame the issue before this Board as whether a coach has authority to take appropriate disciplinary

actions. That coaches have some amount of authority regarding their students is a given; the extent of that authority is the issue before us. Neither *Wooten* court addresses the issue of the extent of a coach's authority. The student plaintiff in those cases argued that she had a property interest in participating in extracurricular activities. As no such interest has been recognized in Iowa (*see, Brands v. Sheldon Community School*, 671 F.Supp. 627 (N.D. Iowa 1987), the *Wooten* cases are immaterial to this appeal.]

Contrary to the assertion of the District in its brief, it is the Iowa Athletic Council ("IAC") – not the Iowa High School Athletic Association – that has adopted a Code of Conduct for Coaches. The IAC is a non-governmental entity that was established in 1998 to improve communication among its participating organizations, which are the Iowa High School Athletic Association, the Iowa Girls High School Athletic Union, the Iowa High School Athletic Directors Association, and associations of officials and/or coaches of track, basketball, football, cheerleading, baseball, swimming, wrestling, and soccer. The main focus of the organization is the development of sportsmanship, citizenship and character. To that end, the Council has proposed Codes of Conduct for coaches, parents, and officials. Abstinence from alcohol is a part of the conduct codes for coaches and parents.

May a coach promulgate an anti-alcohol rule for students on his or her team? Certainly. Such a rule is appropriate as a team rule or training rule, but the consequences of a violation must defer to the local board's good conduct policy with respect to eligibility. The coach may order that the student run additional wind sprints, may bench the student, and may even kick the student off the team. If the decision is to remove the student from the team, however, it cannot be because the coach (or any person other than the local board) has determined that a student is *ineligible* to compete. Whereas a coach may – but does not have to – play a student who is still eligible to compete, a coach has no choice but to bench an ineligible student or suffer the consequences for allowing an ineligible student to compete.[7]

The District argues that the team alcohol rule has been an effective deterrent. While this may be true, we have no way of separating the effectiveness of the team rule prohibiting the use of alcohol from the District's prohibition in its good conduct rule. And, as the District point out in its brief, Andy's parents knew only of the written policy of the board. Appellee's Brief, page 5. Thus, the only rule they could reinforce with their son was the written and adopted good conduct policy of the District.

Indeed, this case is a prime example of the pitfalls of trying to enforce directly competing sets of rules. First, Andy and his parents concluded quite reasonably that they could rely upon the formally adopted policy of the local Board. Mr. and Mrs. Ulrich then discovered that the coaches told the students on the football team that the

[7] This Board's administrative rule, 281—IAC 36.14(7), states that a school that permits a student to compete "in violation of the eligibility rules shall be subject to sanctions the executive board [of either the Iowa High School Athletic Association or the Iowa Girls High School Athletic Union] may…impose… ."

team's alcohol rule superseded the written policy of the local Board. Adding to the confusion, the coaches – although well-meaning – deviated from their own unwritten team rules in setting a different penalty for Andy than what the football team understood to be the penalty. This deviation resulted in what Coach Beger characterized as "disappointment" among Andy's teammates.

Inasmuch as the legislative body of Iowa has, as a matter of state policy, recognized the need for a centralized authority regarding the most serious matters of student discipline, and has placed that authority with local boards of education, we cannot allow the actions of individual coaches to override local board policies.

III.
DECISION

For the foregoing reasons, it is recommended that the decision of the Board of Directors of the East Greene Community School District made on October 21, 2003, upholding the imposition of a good conduct penalty against Andrew Ulrich, be REVERSED. The finding that Andrew Ulrich was in violation of the District's good conduct policy, which was not contested, is not disturbed. If Andy commits another violation of the District's good conduct policy, that violation would be his second offense. There are no costs of this appeal to be assigned.

_____ _____

Date Carol J. Greta, J.D.
Administrative Law Judge

It is so ordered.

_____ _____

Date Gene E. Vincent, President
State Board of Education