WALTER B. CATRON,

Grievant,

v. DOCKET NO. 95-29-060

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Walter B. Catron, filed this grievance on December 7, 1994, as follows:

> Lone applicant for vacancy for assistant football coach at Tug Valley High School vacated by Frank Curnutte. I worked as an assistant to Head Coach Barry Scraggs from August 3, thru [sic] Nov. 11, which included ten regular games and one playoff game.
>
> Seeking relief as an assistant football coach.

Following an adverse decision at Level II dated February 2, 1995, Grievant appealed to Level IV on February 6, 1995. Hearing was set, and following several continuances, the parties agreed to submit the matter on the record developed below, which includes the transcript of the Level II hearing, with exhibits, and the Level II decision. The parties were given the opportunity to file written submissions, and proposed findings of fact and conclusions of law were submitted by Grievant on May 31, 1995. Respondent elected to adopt the findings of the Level II evaluator as its proposedfindings of fact and conclusions of law, whereafter this case became mature on June 9, 1995.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant is employed by Respondent as a teacher at Burch High School.

2. In 1993-94, Tug Valley High School employed a Head Football Coach and two Assistant Football Coaches. Frank Curnutte vacated his Assistant Coach position sometime after the end of the season. Don Spence remained as the other Assistant Coach.

3. Respondent decided that, due to budgetary constraints, only one Assistant Coach was needed at Tug Valley High and did not post the position vacated by Frank Curnutte. Level II Tr., p. 10. 4. Sometime in late summer of 1994, Assistant Superintendent Johnny Fullen learned from Head Coach Barry Scragg, that Don Spence might not be returning to coach in the Fall due to personal problems.

5. As a precaution, on August 3, 1994, Respondent posted a vacancy for Assistant Football Coach at Tug Valley High School. Bd. Ex. 1.

6. Head Coach Scragg informed Grievant of the possible need for an Assistant Coach and Grievant hand-delivered his application for the position to Mr. Fullen on August 8, 1994. Grievant never actually saw the posting. Level II Tr., pp. 2, 5.

7. Grievant called Mr. Fullen within the next week and was informed that he was the only applicant for the position. During this or another conversation, Mr. Fullen informed Grievant that he was not sure if the position would be filled, depending upon whether Mr. Spence resigned from the Assistant Coach position.

8. Grievant, nevertheless, assumed he had the position, and began performing coaching duties on or about August 3, 1994. Level II Tr., p. 3.

9. Grievant and Respondent did not enter into an extracurricular contract for the Assistant Coach position at any time during the Fall 1994 football season.

10. Don Spence did not resign from his position as Assistant Coach and, in fact, returned to coach for the Fall 1994 football season.

11. Respondent did not need a second Assistant Coach and rescinded the posting, with a notation on the posting that the position was not to be filled. Bd. Ex. 1.

12. Grievant continued to perform coaching duties during the entire Fall 1994 football season, until the last game on November 11, 1994. Level II Tr., p. 3.

13. It is the practice of Respondent to compensate the girls' basketball and boys' football coaches on November 30, 1994, at the end of their respective seasons.

14. Grievant did not receive any compensation at that time and initiated this grievance.

Discussion

Grievant contends in his grievance form that he was the lone applicant for a "vacancy for assistant football coach at Tug Valley High School vacated by Frank Curnutte." However, Respondent never intended to fill that vacancy. Respondent determined the position was not needed, and budgetary constraints dictated that the position not be filled. W. Va. Code § 18A-4-7a states that "nothing herein shall prevent the county board of education from eliminating a position due to lack of need." (See footnote 1) School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 18, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987). County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

The position which was posted, and for which Grievant applied, was the position held by Don Spence. Once it became clear that DonSpence would not be resigning as Assistant Coach, Respondent rescinded the posting. Therefore, there was no Assistant Coach position available for Grievant to fill in the Fall of 1994.

W. Va. Code § 18A-4-16 specifies that coaching is among those duties considered to be an extracurricular assignment of educational personnel and as such "shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval," and shall be contracted separately from the employee's contract of employment. See Soohy v. Wetzel County Bd. of Educ., Docket No. 32-86-138-2 (Sept. 4, 1986). Grievant and Respondent did not enter into a written "mutual" agreement for an extracurricular coaching assignment for the Fall of 1994.

While it is somewhat "unbelievable that nobody in a position of authority with Respondent . . . noticed that Grievant served as the TVHS Assistant Coach for 11 games" (Grievant's Fact/Law Proposals, p. 2), it is equally unbelievable that Grievant continued to perform those duties after being

told by Assistant Superintendent Fullen that the coaching position would not be filled if Mr. Spence returned to coach, or at the least, believed that he would be compensated for such service. Grievant's performance of coaching duties in the Fall of 1994, in the absence of a written mutual agreement, and under the circumstances of this case, must be viewed as a volunteer service, for which he is not entitled to compensation. See Vencill v. Kanawha County Bd. of Educ., Docket No. 93-20-196 (May 26, 1994).

Conclusions of Law

1. In order to prevail, Grievant must establish the truth of his allegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

2. School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 18, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987).

3. Extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval, and shall be contracted separately from the employee's contract of employment. W. Va. Code § 18A-4-16.

4. Grievant has not presented any theory upon which he would be entitled to receive compensation for duties he undertook voluntarily. Vencill, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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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MARY JO SWARTZ

Administrative Law Judge

Dated: July 11, 1995

Footnote: 1 *The testimony at Level II regarding this matter came from Assistant Superintendent Johnny Fullen. No other testimony or documentation was submitted into evidence demonstrating board action to eliminate the Assistant Coach position. However, the burden of proof in this matter is on the Grievant, and no testimony or evidence was presented to rebut this assertion.*