REX TONEY,

Grievant,

v. Docket No. 99-22-046

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rex Toney, alleges the Lincoln County Board of Education ("LCBOE") violated W. Va. Code § 18-29-2 (m) & (n), engaging in discrimination and harassment when filling a basketball coaching position at Harts Junior High School ("HJHS"). This grievance was filed on January 6, 1999, and initially, Grievant sought placement into the coaching position. By the time this grievance reached Level IV, the basketball season had ended, and Grievant now requests he be paid the amount he would have earned as coach. This grievance was denied at all lower levels, and Grievant appealed to Level IV on February 1, 1999. A Level IV hearing was held on March 5, 1999, and this case became mature for decision on April 5, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant argues he has been discriminated against and harassed when he has applied for coaching positions, and believes the most recent decision not to hire him for a basketball coaching position is another step in that continuing pattern. Respondent argues the grievance was untimely filed, and also argues the decision to hire the successful applicant was not arbitrary and capricious, but was based on the valid and reasonable recommendation of the principal.

Findings of Fact

1. Grievant has been employed as a bus operator by LCBOE for 21 years.

2. On a date unclear from the record, but approximately in May of 1998, Grievant applied for a basketball coach position at HJHS. There was one other applicant for this position, a teacher. Pursuant to W. Va. Code § 18A-3-2a(4)(B), the professional educator, Dewayne "Pete" Lucas, was selected for the position. (See footnote 2)

3. Approximately three weeks before practice started, Mr. Lucas resigned from the position because he wished to spend more time with his family.

4. The position was reposted on November 4, 1998. Grievant and Gary Lambert applied for the position. (See footnote 3) Neither applicant was a professional educator. Mr.Lambert was not employed by LCBOE. (See footnote 4)

5. Principal Adkins was asked to give her recommendation between the two candidates. She was aware that both candidates had coached basketball in the past.

6. Principal Adkins selected Mr. Lambert for several reasons. The chief factor for Principal Adkins' recommendation of Mr. Lambert was his extensive volunteerism at the school. He had raised money, donated security services at dances, and had taken over as basketball coach during the final game or two of the 1997-1998 junior high boys basketball season. (See footnote 5) Principal Adkins also noted Mr. Lambert called her and told her he was applying for the position and hoped she would be able to recommend him for it.

7. Although Grievant had previously volunteered at HJHS, he had not volunteered during the past three years while Principal Adkins has been in charge. Principal Adkins was not aware of these volunteer activities.

8. LCBOE approved Principal Adkins recommendation on November 12, 1998, at a scheduled board meeting.

9. Grievant asked for a statement of reasons why he was not hired within a fewdays of finding out he did not receive the position.

10. Within a day after receiving this statement of reasons Grievant timely filed this grievance.

11. During the 1995-1996 basketball season, the HJHS boys' coach resigned just prior to

starting practice. Grievant, with the permission and approval of the then principal, David Lucas, but without the approval of the Board or a contract, started the practice season in November. Grievant also coached the team at some games. In January 1996, the Board voted not to fill the position. Grievant requested he be paid for the time he had given to coaching the team.

12. Grievant testified at Level II that he had filed a grievance over this matter and had won at Level IV. This statement was incorrect. No grievance was filed on this matter, and if Grievant received payment it was because the Board chose to pay him without a contract.

13. In August 1996, Grievant applied for and was awarded the HJHS boys' basketball coaching position. At the time Grievant was awarded the position, he was not certified to coach, but he received a temporary coaching permit on October 4, 1996, effective August 28, 1996. (See footnote 6) **Then Superintendent Dallas Kelly received several phonecalls, followed by a letter from the principal and assistant principal, expressing concern that the coaching assignment had been filled without input from the school's new principal. 14. On October 21, 1996, LCBOE voted to rescind Grievant's coaching contract without giving him any prior notice as is required by statute. At Level IV, Grievant's grievance was granted, and he was awarded back pay with interest. Toney v. Lincoln County Bd. of Educ., Docket No. 97-22-020 (July 7, 1996).**

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

The first issue to resolve is one of timeliness. LCBOE contends this grievance is barred from consideration at Level IV because it was not initiated in a timely manner. Thus, in order to proceed to the merits in this grievance, it must first be determined if the instant grievance was properly submitted under the timelines established by W. Va. Code §18-29-4.

Where an employer seeks to have a grievance dismissed on the basis it was not timely

filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance hasnot been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

That statute provides, in pertinent part:

> **Before a grievance is filed, and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant ..., the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. W. Va. Code §18-29-4(a)(1).**

See Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Grievant apparently knew shortly after the Board meeting on November 12, 1998, that he had not been selected for the position. On November 17, 1998, Grievant's representative requested the specific reasons why he was not hired to fill the position pursuant to W. Va. Code § 18A-4-8b. This Code Section states, "[i]f the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies." Grievant received this statement of reasons on or about December 9, 1998, and he filed this grievance with aletter to Director of Personnel Charles McCann dated December 9, 1998. A grievance form was not filled out until sometime in January 1999.

The West Virginia Supreme Court of Appeals noted in Duruttya v. Board of Education, 181 W. Va. 203, 382 S.E.2d 401 (1989), that the education grievance procedure is "intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." Id. at 42. The Duruttya court rejected a school board's defense of

untimely filing based upon a finding of "substantial compliance" with the grievance procedure time limits set forth in W. Va. Code §§18-29-1, et seq. Id. at 43. Similarly, our Supreme Court of Appeals stated in Spahr, supra, "We do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten. In many instances, the grievant will not have a lawyer; therefore the process should remain relatively simple." Id. at 743.

Consistent with Duruttya and Spahr, Grievant here substantially complied with W. Va. Code §18-29-4(a)(1) through Ms. Mitter's correspondence to Director McCann , which was submitted within 15 days of the date on which the "event" (in this case, selection by LCBOE of an individual not currently employed) became known to Grievant. See Indep. Fire Co. v. Human Rights Comm'n, 180 W. Va. 406, 376 S.E.2d 612 (1988); Moore v. Mason County Bd. of Educ., Docket No. 26-88-210 (Mar. 1, 1989). Moreover, consistent with Spahr, Ms. Mitter's correspondence to Director McCann effectively tolled the time limits for filing a grievance until the inquiry was answered. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994). See Spahr, supra, at 740, n. 2. Once Grievant received Principal Adkins' response letter, he immediately filed a grievance, albeitnot on a grievance form, with the letter of December 9, 1998. Thus, this grievance is timely filed.

The next issue to discuss is whether the failure to select Grievant for the basketball coaching position was the result of discrimination or harassment. This Grievance Board has previously discussed the selection of coaches and held the applicable standard of review is whether there has been an abuse of discretion. Hanlon v. Logan County Bd. of Educ., Docket No. 93-23-502 (Dec. 29, 1994), aff'd 201 W. Va. 305, 496 S.E.2d 447 (Nov. 20 1997); 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). "[T]his 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, 177 W. Va. 145, 351 S.E.2d 58 (1986). This standard of review makes it difficult for a grievant to prevail when contesting the filling of a coaching vacancy.

Grievant's allegation of discrimination must be reviewed against the above-identified standard. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of

employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).

Although Grievant was not chosen for the position, he has not demonstrated the selection recommended by Principal Adkins and approved by LCBOE constitutes discrimination or was arbitrary and capricious. Principal Adkins had valid job-related reasons for selecting Mr. Lambert. He had demonstrated a commitment to HJHS through his volunteer work, and she felt he demonstrated a concern for the welfare of the students. Although it appears Grievant had also engaged in volunteer work, he did not do so during Principal Adkins' tenure, and he did not prove she had knowledge of these activities. Principal Adkins stated Grievant had not done volunteer work while she has been principal, and this statement is accepted as true. Principal Adkins' decision that volunteer work and the commitment it showed to the school is a valid reason for selecting a coach with proven prior experience.

Grievant also argues LCBOE's failure to select him as coach constitutes a pattern of harassment. W. Va. Code §18-29-2(n) defines “harassment” as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” What constitutes harassment variesbased upon the factual situation in each individual grievance. Sellers v. Wetzel County Bd. of Educ., Docket

No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. See Moreland v. Bd. of Trustees, Docket No. 96- BOT-462 (Aug. 29, 1997)." Pauley v. Lincoln County Bd. of Educ., Docket No. 98-22-495 (Jan. 29, 1999). Similarly, repeated comments of a sexual nature by a supervisor have been found to constitute harassment. Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH- 433 (Sept. 12, 1997). A single incident does not constitute harassment. Id; Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998). Johnson v. Dep't of Health and Human Resources, Docket No. 98-HHR-302 (Mar. 18, 1999).

Although it is apparently true Grievant was not paid for some coaching duties he performed without a contract, a grievance was not filed on this matter, and the facts as to what actually happened were not given in enough detail for the undersigned Administrative Law Judge to find that LCBOE's actions were incorrect or merely due to a misunderstanding. As for rescinding the contract, it appears that LCBOE was responding to a complaint from the school's administration for failure to consult them on the hiring of a coach. The undersigned Administrative Law Judge takes administrative notice that principals are routinely consulted on the hiring of coaches for their schools. While LCBOE's method of dealing with the complaints was incorrect, and Grievant did not receive due process, there also did not appear to be any hostile motive in its action. It is alsonoted this incident occurred in 1996, that Superintendent Kelly is no longer with LCBOE, and there was no evidence that the principal who complained was Principal Adkins.

Grievant has not proven he has been harassed. He has not shown a pattern of repeated and continual treatment, or that he has been treated in a manner that is contrary to law or policy. The undersigned Administrative Law Judge finds LCBOE's decision to accept Principal Adkins' recommendation does not rise to the level of harassment, as it is defined by statute. Butler v. Gilmer County Bd. of Educ., Docket No. 98-11-214 (Sept. 28, 1998). As stated at the outset, selection of an individual to be a coach is within the discretion of a board of education, and as long as the decision has a reasonable basis and is not arbitrary and capricious it will stand.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. A request for a statement of reasons pursuant to W. Va. Code § 18A-4-8b can effectively toll the time limits for filing a grievance until this inquiry is answered. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994). See Spahr v. Preston County Bd. of Educ.,182 W. Va. 726, 391 S.E.2d 739 (1990) at 740, n. 2. 3. This grievance was timely filed.

4. The applicable standard of review in selecting an individual to fill a coaching position is whether there has been an abuse of discretion. Hanlon v. Logan County Bd. of Educ., Docket No. 93-23-502 (Dec. 29, 1994), aff'd 201 W. Va. 305, 496 S.E.2d 447 (Nov. 20 1997); 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). "[T]his 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, 177 W. Va. 145, 351 S.E.2d 58 (1986).

5. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if he can demonstrate the reason given by therespondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievant has not demonstrated he was discriminated against when he was not selected as the HJSH boys basketball coach, as the reasons given by Principal Adkins for her decision were valid and reasonable, and were not shown to be arbitrary and capricious.

7. W. Va. Code §18-29-2(n) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

8. What constitutes harassment varies based upon the factual situation in each individual grievance. Sellers v. Wetzel County Bd. of Educ., Docket No. 97-52-183 (Sept. 30, 1997).

9. A single incident does not constitute harassment. Hall v. W. Va. Dep't of Transp.; Docket No. 96-DOH-433 (Sept. 12, 1997); Metz v. Wood County Bd. of Educ., Docket No. 97-54-463 (July 6, 1998); Johnson v. Dep't of Health and Human Resources, Docket No. 98-HHR-302 (Mar. 18, 1999).

10. LCBOE's decision to accept Principal Adkins' recommendation does not rise to the level of harassment, as it is defined by statute. Butler v. Gilmer County Bd. of Educ., Docket No. 98-11-214 (Sept. 28, 1998).

11. Grievant has failed to demonstrate a pattern of harassment, as Grievant has not shown that he has been continually irritated, disturbed, or annoyed in a manner contrary to law or policy.

Accordingly, this grievance is DENIED. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Lincoln 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 23, 1999

Footnote: 1

Grievant was represented by Anita Mitter from the West Virginia Education Association, and Respondent was represented by Attorney James Gabehart.

Footnote: 2

Originally, Grievant had argued this selection was the result of a plot to keep him from receiving the position. Grievant believed HJHS's principal, Peggy Adkins, specifically asked Mr. Lucas to accept the position until the subsequent, successful applicant could obtain his coaching permit. Grievant later abandoned this conspiracy theory, and the parties stipulated the selection of Mr. Lucas was appropriate and above board.

Footnote: 3

According to the documents submitted by the parties, Grievant applied for the position on October 4, 1998, and Mr. Lambert applied on October 22, 1998. Noexplanation was offered by the parties to explain this discrepancy in dates. These facts were not raised as an issue by the parties.

Footnote: 4

Grievant's representative stated in her proposals, that Principal Adkins had said the past practice of LCBOE was to fill these types of positions with employees as opposed to people from outside the system. Principal Adkins did not say this. She indicated, in response to Ms. Mitter's question, that it probably was the practice, but she had no personal knowledge as to what had been done in the past.

Footnote: 5

Principal Adkins stated that Mr. Lambert did not have a coaching certificate when he coached for the last couple of games, but because she was in attendance this was not necessary as she is a professional educator as required by W. Va. Code § 18A-3-2a (4)(B).

Footnote: 6

It must be noted that Grievant testified that he had a permanent certificate to coach, and that once this certificate is received an individual need do nothing else to maintain this certification. This information is only partially correct as verified by the Secondary Schools Athletic Commission ("SSAC"). No further course work is required, but the head coach must attend a rules clinic each year or the school will be fined. Additionally, the individual must reapply every year to maintain his certification, which requires a yearly application and payment of fees in addition to the attendance at the rules clinic, if he is to be the head coach. This information was not presented by the parties and is not dispositive of thecase, but it does appear that Grievant was not in compliance with the SSAC rules and regulations, and this data is offered to assist the parties in the future.