STEPHEN M. REED, SR.,

Grievant,

v. **Docket No. 03-17-075**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Stephen M. Reed, Sr., ("Grievant") initiated this proceeding on November 6, 2002, alleging entitlement to extracurricular coaching assignments he held during the 2001-2002 school year. He seeks reinstatement to the assignments, with retroactive wages and benefits, plus interest. The grievance was denied at level one on November 13, 2002. A level two hearing was held on December 19, 2002, and the grievance denied in a written decision dated January 27, 2003. Level three consideration was waived, and Grievant appealed to level four on March 12, 2003. A hearing was held in the Grievance Board's office in Westover, West Virginia, on May 21, 2003. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Basil R. Legg, Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 30, 2003.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as a bus operator. 2. For the 2001-2002 school year, Grievant was employed pursuant to extracurricular contracts as the assistant boys' basketball coach and as the head girls' basketball coach at Salem Middle School.

3. Grievant was licensed by the Secondary Schools Activity Commission, and received a one-year certificate for coaching for the 2001-2002 school year.

4. Respondent posted the basketball coaching positions previously held by Grievant at the

beginning of the 2002-2003 school year. The posting period was September 19-25, 2002. Grievant applied for the positions.

5. On October 14, 2002, Respondent awarded the assistant boys' basketball coach position to John Byrer, a regularly employed, certified teacher. On the same date, it awarded the head girls' basketball coaching position to Phyllis Pilewski, also a regularly employed, certified teacher. For each position, Grievant was the only other applicant.

6. Grievant was not notified in writing of the filling of the two coaching positions.

7. When he had not heard anything from the central office regarding whether he had been selected for the positions, Grievant telephoned in early November. This was when he was first informed that he was not selected.

8. Grievant initiated this grievance proceeding on November 6, 2002.

9. Respondent did not compare the relative qualifications of Grievant and the successful applicants, due to the belief that certified teachers were entitled to the positions over a service employee.

Discussion

Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State EmployeesGrievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

As a preliminary issue, Respondent contends that this grievance is untimely. Since the successful applicants for the positions at issue were officially hired on October 14, 2002, and Grievant did not initiate his grievance until November 6, Respondent argues that he clearly did not file within the 15-day time limit set forth in W. Va. Code §18-29-4(a). The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). Code § 18-29-4(a) 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 or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, 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.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler , supra . See Rose v. Raleigh County Bd. of Educ. , 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n , 180 W. Va. 634, 378 S.E.2d 843 (1989). Spahr v. Preston County Board of Education , 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4, stating in Syllabus Point 1 that "the time in which to invoke thegrievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Grievant testified that, over the several years he had served as a coach for Respondent, it was not unusual for him to find out that he had been selected for the position just shortly before the season started, which could be several months after the application process had concluded. Not only did Respondent not refute this testimony with any evidence of its own, its personnel administrator testified that the Board does not notify unsuccessful applicants for positions that they have not been selected. Accordingly, the credible evidence of record establishes that Grievant did not know he had not been selected until he phoned the central office the first week of November, and he timely filed his grievance on November 6.

Neither party in this case has made any attempt to compare the relative qualifications of Grievant versus the successful applicants for the coaching positions at Salem Middle School. Rather, both have based their positions entirely upon statutory provisions regarding extracurricular positions and the entitlement of certain employees to those positions. There is no dispute here that coaching positions are extracurricular, as defined by W. Va. Code § 18A-4-16. Rather, the outcome of this grievance hinges upon one's interpretation of a recently amended portion of that statute, which states “An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding year.” Grievant believes that, since he is regularly employed in a service personnel position, his coaching assignments must be considered “servicepersonnel extracurricular assignments”, giving him the right to retain those positions in the succeeding school year.

Respondent has a vastly different interpretation of the above provision, based in part upon an opinion given by the State Superintendent of Schools, which stated as follows:

> [T]his code section only applies to **service personnel** extracurricular assignments. Coaching assignments are not service personnel assignments even if they are held by service employees. These individuals are granted coaching authorizations pursuant to West Virginia Code § 18-A-3-2a, which provides that such certificates shall not be given permanent status and that the persons holding them must meet renewal requirements provided by law and regulation. West Virginia Board of Education Policy 5202 further provides that coaching authorizations are valid for a limited period of one year and can only be renewed if the county superintendent verifies that no currently employed, certified professional educator has applied for the position.

(Emphasis in original.) An opinion of the State Superintendent of Schools is entitled to great weight unless shown to be clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Leach v. Greenbrier County Bd. of Educ., Docket No. 97-13-480 (Jan. 30, 1998).

It appears that the Superintendent's opinion is based upon the following portion of W. Va. Code § 18A-3-2a:

> (4) *Other certificates; permits.* -- Other certificates and permits may be issued, . . . **to persons who do not qualify for the professional or paraprofessional certificate**. Such certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements . . .
>
> Within the category of other certificates and permits, the state superintendent may issue certificates for persons to serve in the public schools as athletic coaches or other extracurricular activities coaches whose duties may include the supervision of students, subject to the following limitations: (A) Such person shall be employed under a contract with thecounty board of education . . . which specifies a rate of pay **equivalent to the rate of pay for professional educators in the district who accept similar duties** . . . ; (B) **a currently employed certified professional educator has not applied for the position** . . . .

(Emphasis added.)

Under the in para materia rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the enactment. Manchin v. Dunfee, 174 W. Va. 532, 327 S.E.2d 710 (1984); Farley v. Zapata Coal Corp., 167 W. Va. 630, 281 S.E.2d 238 (1981); Eastham v. Cabell County Bd. of Educ., Docket No. 92-06-397 (Apr. 16, 1993). When the new amendment to W. Va. Code § 18A-4-16 is considered in conjunction with the above- cited portion of W. Va. Code § 18A-3-2a, it must be concluded that coaching positions are considered professional extracurricular assignments, and the right to retain a service personnel extracurricular position does not apply to these positions. Clearly,

State Policy 5202 and W. Va. Code § 18A-3-2a contemplate that some individuals who are not qualified as professional educators may become qualified to serve as coaches. Accordingly, certificates and permits for these individuals are provided for one-year periods only, and, pursuant to the statute, such persons can only serve as coaches *if no currently employed certified professional educators apply for the same position*. In the instant case, that is exactly what happened, so Respondent complied with the law when it selected certified teachers for the positions over a service personnel employee.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. This grievance was timely filed.

4. "An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding year." W. Va. Code § 18A-4-16(6) (2002).

5. Coaching positions are professional extracurricular assignments, and service employees may become qualified to serve in coaching positions for one-year periods, but only if no currently employed certified professional educators apply for the position. W. Va. Code § 18A-3-2a(4); West Virginia Board of Education Policy 5202.

6. Respondent's selection of certified professional educators over Grievant for the positions in question complied with the provisions of W. Va. Code § 18A-4-16(6) and W. Va. Code § 18A-3-2a(4).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court

of Harrison 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. 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 7, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge