THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

TENA WEBB, et al.,

Grievants,

v. Docket No. 06-03-075

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants are fourteen teachers employed by the Boone County Board of Education ("BCBOE") at Scott High School. They filed this grievance on January 27, 2006. Their Statement of Grievance alleges, "There is a coaching position currently held by Eric Harper, a non-teacher certified individual who is not employed as a professional educator in Boone County. This is a violation of WV Code § 18A-3-3a(4), WV Code § 18A-4-7a and WV Board of Education Violation Policy 5202." The relief sought was for "the coaching position be posted for the 2006 season." (See footnote 1)

The grievance was denied at Levels I and II, and Level III was bypassed. Grievants appealed to Level IV on February 28, 2006, and on March 14, 2006, a pre-hearing conference was held to assess Grievants' standing to pursue the grievance and to clarify issues. The parties agreed to submit the case on the record developed below with additional stipulations and submissions. Respondent filed a Motion to Dismiss on April 10, 2006, and the parties were informed that issue would be addressed in this Decision as well. Grievants were represented by Rosemary Jenkins from American Teachers Federation West Virginia ("ATF"), and BCBOE was represented by Timothy Conaway, Esq. This case became mature for

decision on May 3, 2006, after receipt of the parties' proposed findings of fact and conclusions of law and submissions.

Issues and Arguments

Grievants assert the position of Head Baseball Coach should be posted for the 2006 season because the position was posted for one year only, the current coach is not a certified professional educator, and the current coach is no longer employed as a substitute by BCBOE and is not employed by any other West Virginia school system. Grievants note individuals who serve as "citizen coaches" serve for only one year at a time, and the position must be reposted yearly.

Respondent makes a plethora of arguments, many of which are not supported by evidence, statutes, or regulations. Respondent assert Grievants do not have standing to grieve, the Donald R. Kuhn Juvenile Diagnostic and Detention Center is a school, Mr. Harper is employed as a teacher or an educational diagnostician at the Donald R. Kuhn Juvenile Diagnostic and Detention Center, this action is the same or similar to another action filed in circuit court in 2005, (See footnote 2) **and BCBOE has delegated control, supervision, and regulation of interscholastic events to the Secondary Schools Athletic Commission ("SSAC").** (See footnote 3) **After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. It should be noted that Mr. Harper did not testify, and his information was given by affidavit dated April 11, 2005.** (See footnote 4)

Findings of Fact

1. Grievants are all teachers at Scott High School.

2. At some point in time, unclear from the record, Mr. Harper was a substitute for BCBOE, who worked on a permit pursuant to W. Va. Code § 18A-3-2a and 126 C.S.R. 136 § 11.6.3. A "long-term substitute" does not have to meet the same standards and qualifications and is not a professional certified educator, but is required to have a bachelor's degree and 18 hours of training, as well as a minimum GPA of 2.0 and a background check. (See footnote 5) **See § 11.6.3. A long-term substitute is defined at § 4.39 as "[a] licensed educator who**

temporarily replaces, for more than 30 consecutive instructional days, the person assigned to an educator position."

3. Mr. Harper served as an Assistant Head Baseball Coach during the 2003 - 2004 school year. He has not worked as a substitute since approximately November or December of 2004. Test. Adkins, Level IV Hearing. His substitute permit expired on June 30, 2005, and as of February 7, 2006, he had not renewed it. Grt. No. 2 at Level II. 4. An individual, who is not a certified teacher, but has met the necessary requirements as outlined in W. Va. Code § 18A-3-2a, is called a "citizen coach." (See footnote 6)

5. Mr. Harper began work as a full-time, state employee of the Donald R. Kuhn Juvenile Diagnostic and Detention Center on November 16, 2004, apparently as a Correctional Counselor 1. See Affidavits, Harper and Andrews.

6. On December 3, 2004, the head baseball coaching position was posted for one year only. (See footnote 7)

7. On January 13, 2005, Mr. Harper was selected as the Head Baseball Coach "Pending Certification." Resp. No. 1 at Level II.

8. Mr. Harper was not and never has been a certified professional educator, and at the time of his hiring, he was employed by the State of West Virginia by the Division of Juvenile Services at the Donald R. Kuhn Juvenile Diagnostic and Detention Center.

9. On January 31, 2005, Brian Withrow and the American Federation of Teachers filed a Verified Petition for a Writ of Mandamus with the Boone County Circuit Court. Mr. Withrow was a certified professional educator with coaching experience, and he had applied for the head baseball coaching position. His prayer for relief asked that BCBOE be mandated to follow statutory law in filling the coaching position, and that he be awarded the position. Although this Petition was filed approximately eighteen months ago, there has been no response from the court. Resp. No. 2 at Level II; Test. Adkins. 10. Mr. Withrow is not a party to this grievance.

11. The Donald R. Kuhn Juvenile Diagnostic and Detention Center is one of several facilities under the Division of Juvenile Services. Contrary to Respondent's assertions, this Center is not a school, but educational opportunities are provided by the West Virginia Board of Education.

12. The affidavit of Frank Andrews, Superintendent of the West Virginia Department of Education's Office of Institutional Education Programs, states the Donald R. Kuhn Juvenile Diagnostic and Detention Center is a correctional institution, and the West Virginia Department of Education is responsible for providing "adequate and appropriate education opportunities" in all nine juvenile detention centers. To be a professional educator in these juvenile centers the individual must hold a valid teaching license with endorsements in areas such as special education or behavioral disorders. To be employed as a school counselor the individual must possess a specialized graduate degree and a West Virginia certificate as a school counselor. Mr. Harper is not a teacher or a school counselor at the Donald R. Kuhn Juvenile Diagnostic and Detention Center, he is not qualified to be either a teacher or a school counselor, and he does not serve in either of these positions at this facility. Affidavit Andrews.

13. Although in his affidavit, Mr. Harper identified himself as a Diagnostic Counselor 1, this cannot be his class specification as this is not a state class specification. Mr. Harper is employed as a Correctional Counselor 1, and his duties do not include teaching. (See Affidavit of Andrews.) His job duties include intake and orientation of new residents and conducting group meetings. He is to "assist in gathering information requiredfor a comprehensive diagnostic report." (See footnote 8) **(Emphasis added). Respondent. No. 6 at Level II.**

14. Mr. Harper is not qualified to be an Educational Diagnostician, as that term is defined by the West Virginia Supreme Court of Appeals and statute. (See discussions in Putnam County Board of Education v. Andrews, 198 W. Va. 403, 481 S.E.2d 498 (1996); and Swope v. Putnam County Board of Education, Docket No. 97-40-065 (Apr. 21, 1998), as well as W. Va. Code § 18A-1-1 which note an educational diagnostician can be either a classroom teacher which is a certified professional educator or an "other professional employee." An "other professional employee" is a "person from another profession who is properly licensed and is employed to serve the public school." W. Va. Code § 18A-1-1(d).)

15. Lead Grievant, Tina Webb, is not interested in applying for the position herself, but feels strongly that the position should be posted so a certified professional educator can apply for the position, and having a board of education employee and certified professional educator in the position is in the best interest of the students. There are thirteen other

Grievants, who are certified professional educators, and they have not indicated they do not want the position.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of theW. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Standing

Because standing is an affirmative defense, it will be the first issue to address. If Grievants do not have standing, they could not pursue the grievance. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See Lewis v. Kanawha County Bd. of Educ., Docket No. 97-20-554 (May 27, 1998); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Cremeans v. Board of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992).

In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). Grievants are certified professional educators, and BCBOE has not met its burden of proof and demonstrated the thirteen other Grievants do not want the position. As such they have standing to grieve the failure to post the position. Further, Shobe, supra, indicates a third party may have standing to pursue an issue even without a personal injury, if the interest to be protected is "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." This Grievance Board has ruled that grievants, who have an interest in a violation of a statute which directly affects their workplace and the education of students, have a right to grieve the failure of a board of education to post a position. Dixon and Johnson v. Monroe County Bd. of Educ. , Docket No. 01-31-599 (Feb. 28, 2002). Certainly the proper posting and filling of a position with a certified professional educator is withinthe Grievants' "zone of interest." Accordingly, Grievants have standing to pursue this grievance. Shobe, supra; Dixon & Johnson, supra.

II. Merits

Grievants' argument that as a "citizen coach," (See footnote 9) **Mr. Harper could only have received a one-year contract, and the position must be reposted for the succeeding school year is correct. While it appears Mr. Harper did have a permit to teach as a substitute until June of 2005, he no longer has this permit. When this permit expired, his only status would be that of a citizen coach.**

As discussed in VanMeter v. Grant County Board of Education, Docket No. 04-12- 270 (July 7, 2003) and Reed v. Harrison County Board of Education, Docket No. 03-17-075 (July 7, 2003), citizen coaches are granted coaching certificates pursuant to the provisions of W. Va.

Code § 18A-3-2a, and these certificates are valid only for one-year periods, pursuant to West Virginia Board of Education Policy 5202. Moreover, these certificates may only be renewed if no currently employed, certified professional educators apply for the position. Accordingly, the position should have been posted for the 2005-2006 school year, as all extracurricular coaching assignments filled by citizen couches must be posted on a yearly basis. This holding was clearly stated in the State Superintendent Opinion dated June 2, 2003, which states, in pertinent part:

> **[C]oaching positions held by individuals who are not currently employed certified professional educators should be posted every year. In implementing the provisions of West Virginia Code §18A-3-2a(4), West Virginia Board of Education Policy 5202 . . . provides that a coaching authorization cannot be renewed unless the applicant for the authorizationreceives the recommendation of the county superintendent verifying that no currently employed certified professional educator has applied for the position. If the position were not posted on an annual basis, the coaching authorizations of individuals who do not hold teacher licensure could not be renewed because these renewal requirements set forth in Policy 5202 could not be met.**

(Emphasis added).

The State Supervisor's Opinion cites to W. Va. Code §18A-3-2a. This Code Section discusses the authority of a state superintendent to issue various certificates, and the relationship of professional teaching certificates to the filling and posting of coaching positions. W. Va. Code § 18A-3-2a(4) states:

> **Other certificates and permits may be issued, subject to the approval of the state board, 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 provided by law and by regulation, unless the state board declares certain of these certificates to be the equivalent of the professional certificate.**
>
> **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 the county board of education which specifies the duties to be performed, which specifies a rate of pay equivalent to the rate of pay for professional educators in the district who**

> **accept similar duties as extra duty assignments and which provides for liability insurance associated with the activity: Provided, That such persons shall not be considered employees of the board for salary and benefit purposes other than as specified in the contract;**
>
> **(B) a currently employed certified professional educator has not applied for the position; and**
>
> **(C) such person completes an orientation program designed and approved in accordance with state board rules which shall be adopted no later than the first day of January, one thousand nine hundred ninety-one.**

(Emphasis added). As clearly stated by this Code Section, a citizen coach cannot be employed in a coaching position if a "certified professional educator has applied for the position." It would appear Mr. Harper should never have been hired to fill the position, but that issue is not before this Grievance Board. While he did hold the position for the 2004 - 2005 school year, the position must now be reposted. Of course, Mr. Harper can apply, and if no certified professional educator applies for the position, he could be selected to fill the position for another school year.

BCBOE cites to the WVSSAC Certification Requirements for coaches for support of its position. WVSSAC Rule 127-3-6 does not support Respondent's contention as it closely mirrors the above cited Code Section and states:

> **A member of a school's faculty, a substitute teacher, or a student teacher within a public, private, or parochial school system shall be allowed to coach an athletic team. An authorized certified individual may coach if he or she meets all of the following requirements:**
>
> **. . .**
>
> **The coach has completed approved training: NFHS Coaches Education Program Successful Coaching (Coaching Principles), Sport First Aid, and WV Rules and Regulations (13 hours of instruction and 3 tests).**
>
> **The authorized certified coach may be contracted to coach only if an employed certified professional educator within the county has not applied for**

and accepted the coaching position.

Coaching authorizations are for one year. They may be reissued on request if a certified professional educator within a county is not available.

A member of a faculty shall be considered one who is a full-time teacher as defined by the WV Department of Education. A member of a faculty in one school may coach in another school provided that it meets with the approval of the said County Board of Education or two different Boards of Education.

A substitute teacher is defined as a person who has met the licensure requirements as specified by the WV State Board of Education and has beenapproved as a substitute teacher of that county board of education, private, or parochial school.

(Emphasis added).

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, Grievants have the burden of proving their 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 (2004); 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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievants must have been

harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253S.E.2d 54 (1979). Without some allegation of personal injury, a grievant is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

4. Grievants have standing to grieve the failure to post this positions on a personal injury basis, as they are qualified to fill the position as certified professional educator and have not been offered the opportunity to apply. Shobe, supra.

5. A third party may have standing to pursue an issue without a personal injury, if the interest to be protected is "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Shobe, supra; Dixon and Johnson v. Monroe County Bd. of Educ. , Docket No. 01-31-599 (Feb. 28, 2002).

6. In this incident, where there is a clear violation of a school-related statute, Grievants have standing to pursue this grievance.

7. A citizen coach may be granted a coaching certificate for one-year only, which may only be renewed after the position has been reposted and only if no certified professional educators apply. W. Va. Code § 18A-3-2a; VanMeter v. Grant County Board of Education, Docket No. 04-12-270 (July 7, 2003); Reed v. Harrison County Board of Education, Docket No. 03-17-075 (July 7, 2003); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994).

8. "[C]oaching positions held by individuals who are not currently employed certified professional educators should be posted every year." State Superintendent Opinion dated June 2, 2003. 9. Grievants have met their burden of proof and demonstrated the coaching position at issue must be posted, as it is currently filled by a citizen coach, and these positions must be posted on a yearly basis.

Accordingly, this grievance is GRANTED. Respondent is directed to post the position at issue and to fill it in accordance with the law.

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

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: June 30, 2006

Footnote: 1

W. Va. Code § 18A-4-7a does not apply to the selection of coaches.

Footnote: 2

This issue will not be addressed further, as it is clear from the evidence that these two actions are over different issues and the key plaintiff in the circuit court case is not involved in this grievance.

Footnote: 3

This argument by Respondent is perplexing because while the SSAC does regulate events, many issues governing the employment of coaches are controlled by statutory law. Additionally, SSAC regulations on the issue of citizen coaches closely mirror the statutory laws.

Footnote: 4

This was no information on Mr. Harper's current duties and classification.

Footnote: 5

From Assistant Superintendent's Richard Adkins testimony, it appears Mr. Harper may not have had this required training or may not have taken the required training for the following 2005 - 2006 school year.

Footnote: 6

It is unclear from the record that Mr. Harper met the qualifications to hold this position.

Footnote: 7

This data is gained from the testimony of Grievant Webb, as BCBOE objected to the admission of this document.

Footnote: 8

Because there is no evidence to support that Mr. Harper is licensed psychologist or diagnostician, the undersigned Administrative Law Judge finds he is not one. Again, the requirement for the title of Educational Diagnostician should be reviewed. See Finding of Fact 14, infra.

Footnote: 9

Pursuant to the provisions of W. Va. Code § 18A-3-2a, infra, special certificates are issued to non-employees and service personnel who are placed in coaching positions. These individuals do not possess professional teaching certificates.