PERRY ESTEP,

Grievant,

v. **DOCKET NO. 06-40-031**

PUTNAM COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On March 23, 2006, a level four hearing (See footnote 1) was held in the matter of a grievance filed by Perry Estep, the Football Coach at Hurricane Middle School. He alleged that his employer, the Putnam County Board of Education, violated W. Va. Code §§ 18A-4-16(1) (2) and (3) "with regard to the additional week of football practice and make-up of game previously cancelled." As relief, Grievant is seeking "compensation for the additional days worked plus any benefits due."

Issues and Arguments

Grievant alleges Respondent violated W. Va. Code § 18A-4-16, which governs extracurricular assignments, when it required him to work the last week of football season, usually an "off" week, to practice for and make up a game that was missed when the opposing team was unable to come on the previously-arranged date. The cited Codesections require a mutually-agreed, written contract for extracurricular assignments that defines the maximum number of hours for each assignment. Respondent avers such a contract existed, and it did not provide for additional compensation when games are rescheduled within the regular season.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Physical Education Teacher and as Head Football Coach at Hurricane Middle School. He has coached football there for thirteen of his twenty-five years working for Respondent.

2. Grievant and Respondent entered into a "Contract of Employment for Athletic Extra-Duty

Assignment" that, despite its erroneous title, stated it was "for the performance of athletic extracurricular duties." Among the express terms of the contract was the clause,

> The period of this assignment shall be for the 2005-2006 school year and, if applicable, may include out-of-season practice, related activities or summer camps during the Weeks 50-52 of the previous school year as approved by the building principal under the WVSSAC rule and regulations.

The contract specifically identified the duty as "Football Coach", but under "Minimum hours" and "Compensation," the contract simply specified "As Per Policy." There are no other terms in the contract dealing with pay or hours.

3. The 2005-2006 football season was nine weeks long. Under the Secondary Schools Activities Commission (SSAC) rules, a school may use one of those weeks as an "off" week during which no practices are held and no game is played. At Hurricane MiddleSchool, the off week has traditionally been the ninth week, and Grievant in his entire career has never had to coach all nine weeks of the season.

4. A football game was scheduled to be played at home against Beckley-Stratton Middle School on September 1, 2005, at the end of the eighth week. At the last minute, the visiting team asked to reschedule the game because it could not get transportation to Hurricane.

5. Hurricane Middle School Principal Greg LeMaster discussed the problem with the principal of the Beckley school, who called and asked to reschedule the game at about 1:30 p.m. on the day of the game, a Thursday. Without consulting Grievant, Principal LeMaster agreed with the Beckley principal to hold the game the following week.

6. Grievant conducted several more practices for his team, prepared the field, and then coached the game against Beckley-Stratton on October 27, 2005.

7. Occasionally, regularly-scheduled games are cancelled and never played. In those instances, Grievant still receives full pay.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *(See footnote 2)* The factual basis of the grievance is not in dispute: Grievant had to coach all nine weeks of a nine-week

season, when he normally would only have to coach for eight. Coaching is an extracurricular assignment. (See footnote 3) Where the parties differ is in their application of these facts tothe law on extracurricular contracts and assignments, which is contained in W. Va. Code § 18A-4-16, which in pertinent part states:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval.
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> . . .
>
> (2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.
>
> (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.

The contract entered into by the parties does not comply with the law, in that it does not specify the maximum number of hours covered under the contract. Compensation and hours are fixed “as per policy,” but no particular policy or policies is referred to. It is plain that neither party anticipated the situation that brought on this grievance, and their differing interpretations of the vague contract indicate there was no “meeting of the minds” with respect to its terms. Just as Respondent argues, there is nothing in the contract that allows for extra pay for the days required to prepare for a rescheduled game. However, neither is there anything in the contract that clearly defines Grievant's rate of pay and how it is calculated.

The policy apparently used by Respondent to calculate coaches' pay in these situations was made a part of the record at level two as Respondent's Exhibit No. 2. (See footnote 4) Although, like the contract, the policy confuses extra-duty assignments with extracurricularassignments, section P.7.5., Extra-Duty Pay, states that the rate of pay for covered assignments is $100 per point, where

> 1. Hours assigned for practice, preparation, and travel shall be compensated at the rate of one (1) point for each thirty (30) hours in excess of twenty (20) hours.

> 2. Hours assigned for performance shall be compensated at the rate of one (1) point for each ten (10) hours
>
> . . .
>
> Job descriptions, designated hours, points and pay schedule for specific positions are established in the Putnam County Extra-Duty Handbook as adopted.
>
> Employees accepting extra-duty assignments under the above formula are not required to work hours in excess of the number specified by the job description.

The policy further provides a point schedule which “shall be used to calculate pay,” and assigns 27 points to middle school head football coach assignments, and extra pay for post-season practice and play. The Putnam County Extra-Duty Handbook referred to in the policy was not made a part of the record and is not available online. However, it is apparent that the intent of the policy is for the board to assign a certain number of “points” to coaching assignments, based on its determination of the amount of work that goes into each, and it has determined that middle school football coaching assignments are worth $2,700 for the regular season.

Needless to say, greater specificity in the contract, as required by law, would have eliminated the need for this grievance, and had Principal LeMaster consulted with Grievant prior to rescheduling the game, more than likely an understanding could have been reached then. There does not seem to have been any great urgency in the matter of rescheduling. However, in the end it comes down to Grievant's burden of proof, which he attempts to meetby reliance on the plain fact that he has always received full pay for the nine-week football season although he has always only coached for eight of the nine weeks. He urges the inference that the pay contemplated by the terms of the contract is for eight weeks worth of work, so nine weeks of work would merit greater pay. This inference is not supported by the record.

The contract does not specify the maximum number of hours upon which the pay is based, and the handbook which may have clarified the issue was not offered in evidence. However, the policy that is in the record clearly indicates that extra pay for coaching is only granted in the case of post-

season play. This case does not involve post-season play. In summary, the evidence only supports a conclusion that the contract entered into by the parties does not provide for extra compensation for the “off” week of the regular season, when that week is used for practice and a make-up game.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. West Virginia Code § 18A-4-16 requires extracurricular assignments, such as coaching, to be made pursuant to a mutually-agreed, written contract between the boardand the employee, and requires that the contract specify the maximum number of hours for the assignment.

3. “Coaching positions are considered to be extracurricular assignments, which are governed by the provisions of W. Va. Code § 18A-4-16, which sets forth the legal requirements for the employment of persons in these types of positions.” *Spillers v. Brooke County Bd. of Educ.* Docket No. 95-05-329 (Sept. 18, 1995). *See Ramey v. Mingo County Bd. of Educ.*, Docket No. 93-29-470 (May 12, 1994).

4. Grievant did not meet his burden of proving entitlement to compensation for work performed under his extracurricular contract during the regular football season, even though that work was additional when compared to previous football seasons.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County. Any such appeal must be filed within thirty 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.

March 31, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant was represented by Susan Hubbard of the West Virginia Education Association and Respondent was represented by counsel, Gregory Bailey of Bowles Rice McDavid Graff & Love, LLP. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Footnote: 2

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 3

Spillers v. Brooke County Bd. of Educ. Docket No. 95-05-329 (Sept. 18, 1995).

Footnote: 4

Because the reproduction quality of this exhibit was so poor and large parts were illegible, the undersigned accessed the document online at http://www.putnamschools.com/admin/docu- ments/Policy-1-23-06.pdf (March 29, 2006).