THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JASON MATHIS,

Grievant,

v. **Docket No. 2008-1127-MnrED**

MONROE COUNTY BOARD

OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievant, Jason Mathis, was employed by Monroe County Board of Education ("MCBOE") as both a teacher and basketball coach. His coaching position was terminated in January 2008. He filed the following Statement of Grievance with the Grievance Board on February 1, 2008:

> **Dismissed from position as head basketball coach at James Monroe High. This action was arbitrary and capricious.**

The relief sought was:

> **Reinstatement of position as James Monroe High head basketball coach; and any all applicable compensation and benefits retroactive to dismissal date; to be made whole; and any other relief the hearing examiner deems appropriate.**

This grievance was filed directly to level three. (See footnote 1) **On February 11, 2008, Respondent filed a Motion to Dismiss, noting Grievant had filed a Writ of Certiorari with the Monroe County Circuit Court on the same issue. Grievant's response to this Motion to Dismiss wasreceived on March 26, 2008. Accordingly, this issue is ripe for decision. Grievant**

was represented Mark Carbone, Esq., and MCBOE was represented by Greg Bailey, Esq.

Synopsis

Respondent's Motion to Dismiss is based on the assertion that Grievant cannot pursue this grievance on the same issues in two separate forums. Grievant asserts the case should be put in abeyance until the Monroe County Circuit Court renders its decision, and then Grievant can pursue any issues not addressed by the Circuit Court through the grievance procedure.

The undersigned Administrative Law Judge notes the issues and relief sought are clearly defined. It is difficult to believe the Circuit Court would not address all the matters raised by this grievance. Further, the relief available from the Circuit Court is more extensive than the limited remedies available at the Grievance Board. Grievant has elected his forum, and this grievance should be DISMISSED from the docket of the Grievance Board.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by MCBOE as a teacher. Grievant also had an extracurricular contract as the head basketball coach at James Monroe High School.

2. On January 29, 2008, MCBOE terminated Grievant's extracurricular contract for giving a master key to the high school to some high school students so they could practice unsupervised on the weekends. 3. On a date unclear from the record, but before he filed this grievance, Grievant filed a Writ of Certiorari with the Monroe County Circuit Court. The grievance was filed on February 1, 2008.

4. By Order dated February 26, 2008, the Monroe County Circuit Court granted Grievant's "Petition for Writ of Certiorari" noting Grievant had a right to appeal "the unfavorable decision directly to the circuit court," *citing Adkins v. West Virginia Department of Education*, 210 W. Va. 105 (2001). The Court directed the parties to attend a scheduling conference on March 3, 2008, and to set a date for hearing to present evidence "to determine whether or not the decision of the Monroe County Board of Education was arbitrary, capricious, or not supported by the evidence."

Discussion

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The issue before the undersigned Administrative Law Judge is Respondent's Motion to Dismiss. Accordingly, the burden of proof is on Respondent to demonstrate the Motion should be granted by a preponderance of the evidence. *Robinson v. W. Va. Univ.*, Docket No. 06-HE-416 (Mar. 31, 2008); *Goodall/Phillips v. Workforce W. Va.*, Docket No. 06- WWV-246 (Aug. 30, 2007).

The West Virginia Supreme Court of Appeals has discussed this question and held at Syllabus Point 6 of *Ewing v. The Board of Education of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998):

> When an individual is adversely affected by an educational employment decision rendered pursuant to W. Va. Code § 18A-4-7a (1993) (Reprisal. Vol. 1997), he/she may obtain relief from the adverse decision in one of two ways. First, he/she may request relief by mandamus as permitted by W. Va. Code § 18A-4-7a. In the alternative, he/she may seek redress through theeducational employees' grievance procedure described in W. Va. Code §§ 18-29-1 to 18-29-11 (1992) (Reprisal. Vol. 1994). Once an employee chooses one of these courses of relief, though, he/she is constrained to follow that course to its finality.

(Emphasis added).

Additionally, the West Virginia Supreme Court of Appeals stated later in that same decision:

> Stated otherwise, once an employee elects to seek relief from an adverse employment decision made in accordance with W. Va. Code § 18A-4-7a via the statutory educational employees' grievance procedure, he/she is precluded from seeking a writ of mandamus pursuant to W. Va. Code § 18A-4-7a, with respect to the same employment decision that is the subject of the previously initiated grievance, during the pendency of such grievance.

Although this case does not deal with the provisions of W. Va. Code § 18A-4-7a, which specifically states the right to mandamus in a non-selection issue, the situation in *Ewing* is analogous to the situation before the undersigned Administrative Law Judge. Circuit Court Judge Robert Irons, in ruling Grievant had the right to file a Writ of Certiorari on this issue, stated in his decision:

> The Court believes that the West Virginia Supreme Court of Appeals has

established via a series of cases that a school employee who is unsatisfied with a decision by a Board of Education has two avenues to choose from when appealing the decision in that the Petitioner may either seek: (1) administrative review through the grievance procedure; or (2) judicial review by the circuit court in the county where the board who made the adverse decision rests.

Judge Irons directed the parties to set the case for hearing to present evidence to determine if the actions by the board of education in dismissing Grievant from his coaching position were arbitrary and capricious. Accordingly, Grievant has the right to elect the procedure he wishes to utilize in resolving an adverse action by a board of education, but once this election is made, the other remedy is no longer available. This election prevents a grievant from taking the issue to another forum if he does not like the results received in the first forum, or as frequently stated "having two bites of the apple." Recent statutory changes to the grievance statutes have not altered this West Virginia Supreme Court of Appeals' ruling.

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

Conclusions of Law

1. When the issue is a respondent's Motion to Dismiss, the burden of proof is on the respondent to demonstrate this Motion to Dismiss should be granted by a preponderance of the evidence. *Goodall/Phillips v. Workforce W. Va.*, Docket No. 06- WWV-246 (Aug. 30, 2007).

2. As Grievant has elected to address his adverse employment action in the circuit court, the circuit court has granted that election, and a scheduling conference has been held to set the date for the hearing on the same issues before the Grievance Board, Grievant cannot continue his grievance in this forum, and his grievance must be dismissed. Syl. Pt. 6, *Ewing v. The Bd. of Educ. of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998).

Accordingly, this grievance is DISMISSED.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automaticallystayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should

not be so named.

JANIS I. REYNOLDS

ACTING CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 31, 2008

Footnote: 1

It should be noted, that as a termination of an extracurricular contract, this grievance cannot be filed directly to level three without an agreement of all the parties. Due to the outcome of the Motion to Dismiss, this issue will not be addressed further.