THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATRICK MASCARO,

Grievant,

v. DOCKET NO. 2008-0299-MrnED

MARION COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Patrick Mascaro filed this grievance on August 15, 2007, stating, “I was one of 2 candidates who applied for the [East Fairmont High School (hereinafter “EFHS”)] Baseball assistant coaching position. After both candidates went thru [sic] the interview process and our credentials evaluated I was not chosen for the position even though, by Marion Counties [sic] standards I was the higher ranking candidate. Even after the other candidate turned down the job, I was still denied it.” His stated relief sought is “To be placed in the position of EFHS assistant Baseball coach.”

A level three hearing was held in the Grievance Board's Westover office on September 16, 2008. Grievant appeared in person and by representative Frank Caputo and Respondent was represented by counsel, Stephen R. Brooks. The matter became mature for decision on October 10, 2008, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant, a substitute employee, was not hired for a coaching position that was given to a citizen coach. Respondent asserted that Grievant was not an “employee” within the meaning of the Grievance Procedure, and so had no standing to dispute the hiringresult by filing a grievance. Respondent proved this affirmative defense, and so the grievance is denied.

Findings of Fact

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

1. On January 24, 2007, Respondent posted a position opening for Assistant Baseball Coach at East Fairmont High School.

2. There were two applicants for the job: Grievant and Robert Barrett.

3. At the time, Grievant was employed by Respondent as a substitute teacher on a RESA substitute teaching permit. He has no professional teaching certification.

4. At the time, Robert Barrett was not employed by Respondent, but held a Secondary Schools Athletic Commission (SSAC) citizen coaching permit.

5. Contrary to Grievant's assertion that he turned down the job, Mr. Barrett was selected and instated in the position, but then became ill and was unable to complete the season.

Discussion

Before addressing the merits of Grievant's claim, Respondent's affirmative defense must be addressed. Respondent asserts that Grievant is not an “employee” within the meaning of West Virginia Code § 6C-2-2, and therefore has no standing to file a grievance. When the employer asserts an affirmative defense, it must be established bya preponderance of the evidence. (See footnote 1) An affirmative defense is one that, "assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary, 8th Ed. (2004).

"Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position. A substitute educational employee is considered an "employee" only on matters related to days worked or when there is a violation, misapplication or misinterpretation of a statute, policy, rule or written agreement relating to the substitute. W. Va. Code § 6C-2-2(e). A “Grievance” is “a claim by an employee.” W. Va. Code § 6C-2-2(l). Only an employee may file a grievance. *See* W. Va. Code § 6C- 2-4(a)(1). In this case, Grievant was employed by Respondent as a substitute teacher only, working under a RESA permit instead of a professional teaching certificate. He had not been hired as a permanent employee, and he does not allege a violation of statute, policy, or rule, unless a broad interpretation is given to “I was not chosen for the position even though, by Marion Counties [sic] standards I was the higher ranking candidate.”

Grievant presented no evidence of the standards to which he was referring. He did argue that,

because the successful applicant was a citizen coach and Grievant was a substitute teacher on a RESA permit, he should have been chosen regardless of other qualifications. However, Grievant did not cite to any statute, rule or policy that supports his argument and that had been violated by Respondent's action. Even if he had alleged such a violation, it would not have been a statute, rule or policy relating to his substitute position,but would instead necessarily be something applicable to the hiring process for coaches. Based on this set of circumstances, Grievant does not fall under the definition of “Employee” contained in W. Va. Code §§ 6C-2-1 *et seq.*, so he has no standing to pursue his claim through the grievance procedure. Respondent has met its burden of proving its affirmative defense, so this grievance must be denied.

The following conclusions of law support this discussion:

Conclusions of Law

1. 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).

2. "Employee" means any person hired for permanent employment by an employer for a probationary, full- or part-time position. A substitute education employee is considered an "employee" only on matters related to days worked or when there is a violation, misapplication or misinterpretation of a statute, policy, rule or written agreement relating to the substitute. W. Va. Code § 6C-2-2(e).

3. A “Grievance” is “a claim by an employee.” W. Va. Code § 6C-2-2(I). Only an employee may file a grievance. *See* W. Va. Code § 6C-2-4(a)(1).

4. Respondent met its burden of proving Grievant was not an employee within the meaning of the grievance procedure. For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. 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. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

November 24, 2008

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

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).