WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JERRY MICHAEL RANSON,
Grievant,

v. **Docket No. 2009-0761-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Jerry Michael Ranson ("Grievant") initiated grievance actions against the Kanawha County Board of Education on December 4, 2008. The grievance statement provides:

> "The Grievant, a licensed 5202 teacher, applied for the Head Basketball Coach. The grievant was informed by personnel that he would be employed in position as the only licensed teacher applicant. W. VA. CODE § 18A-4-16. Grievant went through entire employment process including training and drug screen. Board rejected recommendation of Superintendent and employed volunteer.

The stated relief sought is "The job that was bid, any and all wage and benefit loss, attorneys fees and costs."

Grievant, by legal Counsel, filed notice on intent on December 19, 2008 to pursue default relief. Respondent filed a Motion to Dismiss the grievance on February 5, 2009. The undersigned Administrative Law Judge ("ALJ") conducted a phone status conference on March 26, 2009. Following the phone conference, both parties filed written argument regarding the issue(s) highlighted and presented by the dismissal motion. A default hearing was held in the Grievance Board's Charleston office on April 23, 2009. At this hearing Grievant's Counsel made motion and withdrew his intent to pursue default action. Grievant appeared in person and by counsel, George B. Morrone III, Esquire, Ranson Law

Offices. Respondent was represented by its counsel, James W. Withrow. After oral presentation, the parties were given liberty to present additional written argument addressing the pending Motion to Dismiss. The Motion to Dismiss became mature for decision on May 8, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was not hired for a coaching position that was awarded to a citizen coach in 2008. Respondent asserted that Grievant was not an "employee" within the meaning of the Grievance Procedure [W. VA. CODE § 6C -2 *et seq.*(2008)], and thus has no standing to dispute the hiring result by filing a grievance. Respondent proved this affirmative defense, and accordingly the grievance is denied.

Findings of Fact

1. KCBOE, Respondent posted an extracurricular assignment for the position of Head Basketball Coach at Horace Mann Middle School on October 29, 2008.

2. Grievant applied for the position on or about November 4, 2008.

3. The application deadline date for the position was November 7, 2008. Ultimately, there were two applicants for the job: Grievant and the successful applicant.

4. Subsequent to the application process, Grievant was recommended for the position by Superintendent Ronald Duerring to the KCBOE.

5. KCBOE, Respondent is empowered to hire an applicant for the coaching position. The determination of which applicant is awarded the position is vested with

Respondent. The Superintendent is not vested with the ability to grant the position to an applicant.

6. On November 20, 2008, Respondent conducted its regularly scheduled meeting where, among other activity, the KCBOE rejected the Superintendent's recommendation and approved a non-teacher applicant for the coaching position.

7. Grievant filed this grievance on December 4, 2008.

8. Grievant holds a certificate from the West Virginia Department of Education to act as a substitute teacher.

9. At the time this grievance was filed Grievant was not employed by Respondent but held a license as a long term substitute teacher with the Jackson County Board of Education.

10. At no time relevant to this grievance did Grievant hold a position of employment with Kanawha County Schools.

11. As a result of the grievance actions initiated on December 4, 2008, Respondent scheduled a level one hearing for December 23, 2008. Grievant filed a notice of default on December 19, 2008 and thereafter the hearing scheduled for December 23, 2008, never took place.[1]

Discussion

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. Grievant's

[1]During the 2008 legislative session, W. VA. CODE § 6C-2-4 was amended to provide that a level one hearing was to occur within fifteen (working) days of receiving a grievance. December 23, 2008, is within fifteen working days from December 4, 2008.

Counsel argues that Grievant is licensed by the West Virginia Department of Education as a long term substitute teacher (employed by Jackson County Board of Education) and as such, he is entitled to avail himself of the public employee grievance procedure. 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). An affirmative defense is one that, "assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY (8th ed. 2004).

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY (8th ed. 2004). 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).

West Virginia Code § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

In turn, the same statute, in subsection (e)(1), defines "[e]mployee" as "any person hired for permanent employment by an employer for a probationary, full- or part-time position." Such Code section further provides "[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 related to the substitute." W. VA. CODE § 6C-2-2(e)(2).

A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-4(a)(1).

Grievant is not an employee of Kanawha County Schools. He was not an employee prior to, nor on December 4, 2008, the date he filed the instant grievance. The Grievance Board has held that the grievance board statute "provides that the purpose of the statutory grievance procedure is to allow education employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships." *Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

Grievant, by Counsel, purports a number of theories to support the position that Grievant is entitled to avail himself of the grievance procedure. First, Grievant contends he is a licensed substitute teacher and is authorized to bring a grievance involving "a violation, misapplication or misinterpretation of statute." Grievant alleges that Respondent violated the provision of W. VA. CODE § 18A-4-16, by rejecting a teacher applicant and hiring a non-teacher applicant; Second, Counsel contends Grievant is not required to be an employee of KCBOE for a grievance to arise regarding an extracurricular assignment, citing *Holmes v. Berkeley County Bd. of Educ.*, 526 S.E.2d 310, 206 W.Va. 534 (1999) and *Hanlon v. Logan County BOE*, 201 W.Va. 305, 496 S.E.2d 447 (1997); Lastly, Grievant

proposes judicial economy would and/or should provide standing to file this grievance in the instant forum.

Grievant is not employed as a substitute by Kanawha County. The original grievance is a non-selection issue. Grievant's interpretation of W. VA. CODE § 6C-2-2(e)(2) is a unique approach to the instant matter. In the fact pattern of this case, Counsel's suggested conceptual application would create a basis for Grievant to allege wrong doing by a potential employer for not granting him an employee preference. The undersigned is not convinced the definitions of terms provided by W. VA. CODE § 6C-2-2 creates the entitlement Grievant seeks [the ability to file an employee grievance]. This ALJ is not persuaded by Grievant's application of W. VA. CODE § 6C-2-2(e)(2) to this matter. The fact that an individual may be an employee of one county school board does not empower said employee to file a grievance against a separate and distinct county school board as an employee.

It is true that W. VA. CODE § 18A-4-16 does not preclude a county board of education from entering into an extracurricular coaching assignment agreement with an individual employed by another county's board of education, provided that both county boards agree to the proposed agreement. However, this ALJ has not found anything in the cases of *Holmes v. Berkeley County Bd. of Educ.*, *supra*,[2] or *Hanlon v. Logan County Bd.*

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[2] In *Holmes* the issue was the definition of teacher as it related to a policy of the Berkeley County BOE. Berkeley County BOE had adopted a policy which stated that "all coaches shall be teachers either full time or substitute." Mr. Holmes was the principal at a middle school and applied for a position as head basketball coach at Martinsburg High School. Holmes was denied the position because he was not a teacher. The Supreme Court held that under W. Va. Code § 18-1-1 the definition of teacher included a principal. *See* Respondent's May 7, 2009 response document, argument regarding *Holmes v. Berkeley County Bd. of Educ.*, 526 S.E.2d 310, 206 W.Va. 534 (1999).

of Educ., *supra*,[3] which supports the contention that someone not currently employed by a particular county board of education would have the right to initiate a non-selection grievance against that county board of education via the public employees grievance procedure. A number of recent Grievance Board decisions have addressed this issue. *Marsicano v. Marion County Bd. of Educ.*, Docket No. 2009-0500-MrnED (April 23, 2009); *Marcaro v. Marion County Bd. of Educ.*, Docket No. 2008-0299-MrnED (Nov. 24, 2008); *Chang v. Berkeley County Bd. of Educ.*, Docket No. 2008-0174-BerED (April 28, 2008); *Mills v. Wayne County Bd. of Educ.*, Docket No. 06-50-415 (Mar. 5, 2007). Respondent has proven by a preponderance of the evidence that Grievant does not fall under the definition of "employee" contained in WEST VIRGINIA CODE §§ 6C-2-1 *et seq.*, therefore, he has no standing to pursue his claim through the grievance procedure. Accordingly, this grievance must be dismissed.

The following conclusions of law support this ruling:

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

[3] In *Hanlon*, the Logan County BOE hired an individual who was not employed by the county as the head basketball coach at Logan High School. The successful applicant was employed by Upshur County BOE at the time the position was offered to him and was hired as a physical education teacher by Logan County BOE at the same meeting he was hired as the coach. The Court held that an individual need not be an employee of the BOE before being hired under an extracurricular contract so long as the individual meets the basic qualifications for the position. The Court noted that the successful applicant was a certified teacher and therefore met the requirements for the position. *See* Respondent's May 7, 2009 response document, argument regarding *Hanlon v. Logan County BOE*, 201 W.Va. 305, 496 S.E.2d 447 (1997).

(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. For the purposes of the grievance procedure, an "employer" is the "agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee." W. VA. CODE § 6C-2-2(g).

3. "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).

4. 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).

5. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY (8th ed. 2004). 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).

6. Respondent met its burden of proving Grievant was not an employee within the meaning of West Virginia Public Employees Grievance Procedure, W. VA. CODE §§ 6C-2-1 *et seq*.

7. Grievant's connection with the Respondent in November and/or December 2008 was not an employer - employee relationship. Further, Grievant was NOT an employee when he initiated this grievance on December 4, 2008; thus, he lacks standing to pursue this grievance pursuant to West Virginia Public Employees Grievance Procedure. *Marsicano v. Marion County Bd. of Educ.*, Docket No. 2009-0500-MrnED (April 23, 2009); *Marcaro v. Marion County Bd. of Educ.*, Docket No. 2008-0299-MrnED (Nov. 24, 2008); *Chang v. Berkeley County Bd. of Educ.*, Docket No. 2008-0174-BerED (April 28, 2008); *Mills v. Wayne County Bd. of Educ.*, Docket No. 06-50-415 (Mar. 5, 2007).

Accordingly, this grievance is **DISMISSED** from the docket of this Grievance Board.

This Order is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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).

Date: May 19, 2009

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LANDON R. BROWN
ADMINISTRATIVE LAW JUDGE