JOHN M. VENCILL,

Grievant,

v. DOCKET NO. 93-20-196

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant John M. Vencill (Grievant) is an employee of the Kanawha County Board of Education (Board), assigned as a classroom teacher to Capital High School. Grievant agreed to coach a girl's softball team at Capital High on a volunteer basis for the 1992-93 school year. He now wishes to be compensated for his coaching services. The Level I supervisor was without authority to decide the grievance, which was appealed to Level II. A Level II hearing was held on May 17, 1993, and a decision rendered on May 27, 1993, which Grievant appealed to Level IV. A hearing was held on July 13, 1993 before Administrative Law Judge Sunya Anderson.

At that time, Grievant and his attorney requested time to decide whether to pursue this matter in another, perhaps more appropriate, forum. Administrative Law Judge Lewis Brewer wrote to Grievant's attorney on November 4, 1993, inquiring how he wished to proceed. No response was received to that letter. Judge Brewerwrote the parties again on January 7, 1994, indicating that a decision would be rendered on the record and the parties were given an opportunity to present briefs in support of their respective positions. (See footnote 1) The Board responded and relies upon the Level II findings and conclusions. There has been no response from Grievant or his attorney, therefore the undersigned concludes that Grievant intends to rely upon his testimony at Level IV and the record developed below.

The facts are not in dispute and are summarized as follows:

Findings of Fact

1. The Board, upon request from several parent groups, sanctioned a high school girl's softball team and a junior high wrestling team at its regular meeting on October 18, 1990, "with the understanding that the booster clubs will absorb the costs for these programs." Board Minutes, October 18, 1990, marked as KCS Exhibit 1 at the Level II hearing.

2. A group of parents approached Grievant and asked if he would coach the girl's softball team. He consulted with John Clendenen, Principal at Capital High, who advised Grievant that he could coach the team, but there would be no compensation provided by the Board.

3. Grievant volunteered to coach the team during the 1992-93 school year, and understood that there would be no compensation for his efforts. Level II Tr., p. 30.

4. Grievant coached the girl's softball team for the 1992-93 season.

Discussion

Grievant filed his grievance on June 1, 1993, stating as follows:

> I am girls [sic] softball Coach at Capital High. The coach receives no pay. The Boy's Baseball Coach receives $900. I am requesting the same pay ($900). This is discrimination of girls [sic] athletics.

Grievant presented several legal theories at the Level IV hearing to support his grievance. Grievant alleges the Board has violated the West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq., and Title IX of the Educational Amendments of 1974, 20 U.S.C.A. § 1681, et seq., through disparate treatment of girls' and boys' sports. (See footnote 2) He also appears to be claiming that he has been discriminated against individually for not being compensated for coaching girls' softball.

This Grievance Board lacks jurisdiction over claims alleging a violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq. Norton v. W. Va. Northern Comm. Coll./Finnegan v. West Liberty State Coll., Docket Nos. 89-BOR-503/539 (Apr. 28, 1993). Further, this Grievance Board has no authority to hear a claim brought under the Federal Title IX statute. Appropriate avenues for redress are provided for in the Federal statute, which include Federal administrative and court proceedings.

This Grievance Board also does not have jurisdiction to hear claims brought pursuant to the Provision of Equal Opportunity in West Virginia Public Schools, Policy 4200, the State Board of

Education's equivalent of the Federal Title IX statute. The State Board of Education has promulgated "Rules of Procedure For Administrative Hearings" (Policy 1340), which govern

> the disposition of all administrative proceedings, as well as the hearing of appeals and the adjudication of controversies and disputes arising under school laws by the State Superintendent of Schools . . . .

While it can be argued that an employee of a county school system may be affected by a county's violation of Policy 4200 within the broad definition of "grievance", it is unlikely that the Legislature, in approving Policy 4200, intended for claims of alleged violations of equal education opportunity to be litigated before the Grievance Board when specifically defined and more superior forums are available. See Norton, supra. An alleged equal education opportunity violation affects more than just one employee; it affects the entire school system, employees, students, and the public alike. Therefore, the procedure under Policy 1340 is the more appropriate administrative forum for claims of equal education opportunity violations. A claim of gender discrimination can also be brought before the Human Rights Commission or the State courts, and as stated above, this Grievance Board cannot hear claims which are appropriately within the jurisdiction of the Human Rights Commission.

Even if this Grievance Board did have jurisdiction to hear claims brought under Policy 4200, the record in the instant case iswoefully inadequate to support Grievant's claims. The evidence necessary to support a Title IX violation was discussed in Cohen v. Brown University, 991 F.2d 888 (lst Cir. 1993):

> To establish a case of gender discrimination in education institution's provisions for athletic activities, claimant must show disparity between gender composition of institution's student body and its athletic program, so as to establish underrepresented gender, and must then prove that underrepresented gender has not been 'fully and effectively accommodated by present program'; if claimant carries devoir of persuasion on those elements, claimant has proved case unless institution can show, as affirmative defense, history and continuing practice of program expansion demonstrably responsive to developing interests and ability of members of underrepresented gender.

Cohen, 991 F.2d at 901.

Stated more succinctly, the obligation of an education institution in complying with the requirements of Title IX cannot be measured simply by comparing the number of teams available to

each sex, but instead must turn on whether disparities of a substantial and unjustified nature exist and the benefits, treatment, services, or opportunities for its male and female athletes in the institution's program as a whole. Williams v. School Dist. of Bethlehem, Pa., 998 F.2d 168 (3d Cir. 1993).

There has been no evidence presented in this case which meets even the basic criterion established above, i.e., the showing of underrepresented gender. The only evidence which has been presented is that Grievant received no compensation for coaching girls' softball, while another individual received compensation for coaching boys' baseball. It does not even appear on its face that female students were discriminated against: They had theopportunity to play and did play softball. Grievant testified that the girls were provided equipment, practice time on the playing fields, and all of the benefits afforded the boys' baseball team.

This grievance boils down to Grievant's claim that he was discriminated against for not being compensated for coaching girls' softball. The matter of requesting compensation after completing an assignment undertaken voluntarily has been previously addressed by this Grievance Board. See Eastham v. Tyler County Bd. of Educ., Docket No. 91-48-519 (June 30, 1992); Bennett/Dean v. Fayette County Bd. of Educ., Docket Nos. 91-10-231/235 (May 13, 1992); Wear v. West Libery State Coll., Docket No. BOR-88-159 (Apr. 30, 1992); Hysel v. Mason County Bd. of Educ., Docket No. 26-86-159-1 (June 1, 1987). Absent some promise to pay made by the person receiving the services, there is no entitlement to receive compensation by the person who volunteered the service. Grievant volunteered to coach the girls' softball team. There was no promise on the part of the Board, express or implied, that he would be paid by the Board for his services. Accordingly, Grievant has failed to demonstrate entitlement to compensation from the Board for services he performed voluntarily.

Conclusions of Law

1. In order to prevail, a grievant must establish the truth of his allegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

2. Grievances based upon an alleged violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq., areoutside the jurisdiction of the Grievance Board and are not grievable. Norton v. West Virginia Northern Comm. Coll./Finnegan v. West Liberty State Coll., Docket Nos. 89-BOR-503/539 (April 28, 1993).

3. The State Board of Education has promulgated Policy 1340, Rules of Procedure for Administrative Hearings and Appeals, which provides for the adjudication of controversies and disputes arising under school laws by the State Superintendent of Schools. The State Board of Education is a more appropriate administrative forum for claims alleging violations of Policy 4200 in a county school system.

4. Grievant did not establish that he performed the duties of a girls' softball coach for the 1992-93 school year with any expectation that he would be paid for those duties. See Bennett/Dean v. Fayette County Bd. of Educ., Docket Nos. 91-10-231/235 (May 13, 1992).

6. Grievant has not presented any theory upon which he would be entitled to receive compensation for duties he undertook voluntarily.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO ALLEN

Administrative Law Judge

Date: May 26, 1994

Footnote: 1 *This case has been assigned for administrative reasons to the undersigned.*

Footnote: 2 *The State counterpart of Title IX is Policy 4200 of the Legislative Rules of the Board of Education.*