WILLIAM DENNIS HARTLIEB

v. Docket No. 93-35-300

OHIO COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, a teacher employed by Respondent Ohio County Board of Education (OCBE), also served as Head Girls Basketball Coach at Wheeling Park High School (WPHS) until the end of the 1992-93 school year when his extracurricular contract was not renewed for the 1993-94 school year. Grievant alleges the nonrenewal of his extracurricular contract and his dismissal as coach was violative of W.Va. Code §§18A-2-8 and 18A-4-16. He requests reinstatement to the position and the recovery of all lost wages and benefits. (See footnote 1)

The basic facts in this matter are as follows. During the 1991-92 school year (1991 playing season), Grievant was placed on a plan of assistance relative to his basketball coaching duties, specifically due to his use of "inappropriate" comments to hisplayers and because of his "communications problems" with officials. Grievant did not file a grievance over this matter. He received a favorable evaluation following the completion of the plan in Spring 1992. However, according to WPHS Assistant Principal Eric Carder, during the 1992-93 school year, several students and parents complained about some past and more recent incidents concerning Grievant's behavior while performing his basketball coaching duties and while participating in a coaching-related activity.

According to Mr. Carder, he met with Grievant several times prior to January 1993 to discuss the incidents in question. Thereafter, Grievant received an overall rating of "Does Not Meet Standards" on his January 1993 coaching evaluation for Girls Basketball Head Coach. Following that, by letter dated March 12, 1993, Superintendent Lawrence Jones notified Grievant that, "[p]ursuant to [W.Va. Code §18A-2-2], you are hereby notified that the 1992-93 extracurricular contract for Head Girl's Basketball Coach issued as per [Code §18A-4-16] is being recommended for termination and non-renewal." Grievant was informed he could have a hearing before OCBE's members "prior to any action in this matter." A second letter, dated March 18, informed Grievant that the reasons for the nonrenewal were based on his most recent evaluation and failure to comply with the rules and regulations found in a WPHS handbook, specifically the "Code of Ethics for Coaches." At Grievant's request, he was afforded a record hearing before OCBE's members, on May 24, 1993. Following the

proceeding, OCBE decided not to renew Grievant's Head Girls Basketball Coach'scontract for the 1993-94 school term.

Both Grievant and Eric Carder, WPHS Assistant Principal, testified at the May 1993 hearing. According to Mr. Carder, in Fall 1992, he received a parent's complaint that Grievant made sexually inappropriate comments to a female player at a benefit rummage sale the previous season. Grievant supposedly remarked several times to one of his players that he would pay money, a quarter, if she would model an article of lingerie up for sale. Reportedly, he then flipped the coin in front of the player. A complaint was also made that, during a practice session in the season, Grievant told the players something to the effect that while their mothers tell them not to "spread their legs," they would have to do so when "rebounding" at basketball practice. At a later time, Grievant was additionally accused of neglecting his players during an overnight out-of-town tournament trip at the end of the 1992 season when he left the team members in a motel without another coach or a previously approved parent to chaperone them.

While Grievant did not deny that an incident occurred at the rummage sale which involved a female player, he did dispute portions of Mr. Carder's testimony about the matter. He said he recalled Mr. Carder discussing that matter with him a few weeks after it happened in October 1991. Grievant's version of the story was that the young lady had asked him if he thought someone would buy the "negligee" if she would model it. Grievant then stated that he would not describe the garment as a negligee since it was not really revealing, but that it looked like a short satin "slip." He continued that he joked right back with the player and told herhe would pay her a quarter to model it or a dime not to model it. He said he flipped a dime at that time. He also said the exchange of words occurred in full view of several other people in attendance and that he gave it no more thought. According to Grievant, when Mr. Carder brought the incident up again in Fall 1992, he was taken by surprise and told Mr. Carder so.

Grievant also stated that he did not intend for any remarks made during rebounding practice sessions to be offensive and that some of the girls even laughed at his comments. He admitted that he probably should not say such things and that he would not do so in the future. Finally, he admitted that he left the motel in the morning hours during the basketball tournament to watch the junior varsity basketball team playoff, which he should not have done, but that he had not left his varsity team unattended. The girls were probably still sleeping, he stated, and a parent had offered to keep

an eye on them. Again, he admitted to using bad judgement and promised not to do it again.

OCBE presented only one witness at level four, James W. Keefer, a girls' basketball "booster" and father of two WPHS students. Mr. Keefer testified that he had been present during the rummage sale incident in Fall 1991. He stated he had not thought much about it when Grievant made the modeling remark the first time, but became very uncomfortable after Grievant repeated the statement and flipped the coin several more times, three times in all, he guessed. He also related that he had been in attendance at the girls' basketball sports banquet at the end of the 1991 season, when Grievant, while speaking at the banquet, characterized aparticular loyal sports fan as an "athletic supporter." Mr. Keefer basically stated that the statement would not be "wrong" if made at an all-adult sports function, but that he had felt "uncomfortable" when Grievant made the remark in the presence of students.

The basic issue to be addressed in this grievance is whether OCBE's nonrenewal of Grievant's extracurricular contract and loss of his job as Head Coach was handled properly and in accordance with applicable laws. OCBE presents a variety of theories and defenses for its action in this matter. Grievant contends that OCBE failed to follow procedures for his removal as girls' head basketball coach at WPHS and that, because the process was fatally flawed, he is entitled to another chance to improve his performance.

OCBE essentially argues that according to W.Va. Code §18A-4-16, extracurricular employment is not per se continuing but is subject to yearly renewal based on the employer's and employee's agreement to terms. It concedes, however, that under present case law, the holder of an extracurricular contract is entitled to the due process requirements of timely and appropriate notice and an opportunity for a hearing prior to removal from the position and to remediation opportunities for deficient performance.

In this case, OCBE argues, its action under Code §18A-2-2 not to renew Grievant's coaching more than "adhered to the edicts of due process" afforded by Code §18A-2-7. (See footnote 2) It characterizedGrievant's continuing use of inappropriate comments to his players and leaving them improperly chaperoned as immoral and negligent pursuant to W.Va. Code §18A-2-8, (See footnote 3) and, as such, "allowed for immediate nonrenewal" of his extracurricular contract. OCBE reasons that Grievant was not entitled to another improvement period because he had been given an opportunity to correct deficiencies the prior season. Under the circumstances, OCBE argues, it could not agree to

reemploy Grievant and subject its female basketball players to "continued inappropriate comments containing unwelcome sexual innuendo and to deliberate neglect for their welfare."

Among other things, Grievant argues that the entire procedure to remove him as coach was flawed because the March 1993 nonrenewal/termination notices referred only to Code §18A-2-2. Grievant does not raise any issue with respect to mandated timelines for notice and hearing and final board actions. Rather, he argues that that particular statute deals only with thetermination of a teacher's contract for lack of need, and a "tenured" coach can only be dismissed from his coaching position for cause. He also claims that OCBE failed to follow its own coaching evaluation policy which calls for the submission of a "self evaluation." (See footnote 4) Additionally, OCBE may not resurrect incidents which happened in a prior evaluation year nor cite a deficiency in the present year without providing him with an opportunity to improve, according to Grievant.

Finally, Grievant strongly objects to the fact that OCBE did not charge him with immorality or mention the term "immoral" as justification for his dismissal until the time of his nonrenewal hearing. The very heart and soul of Grievant's position, though, is that he never intended to be insensitive to his female players or neglectful of their well-being. He concedes that the remarks he made in the past to his players and his decision to attend the junior varsity playoff without leaving a proper chaperone had been poor judgement on his part. In essence, he claims that the punishment does not fit the offense, indeed, amounts to "overkill," and that he deserves another opportunity to be girls' head basketball coach at WPHS.

OCBE's action to not renew Grievant's coaching contract must be upheld because it substantially complied with due process requirements and also justified its actions. At the outset, it is determined that OCBE failed to prove immorality or willful neglect of duty relative to Grievant's conduct while coaching. Notably,OCBE states that it was within its discretion to immediately dismiss Grievant for his conduct; however, according to this record, OCBE did not act pursuant to W.Va. Code §18A-2-8 to immediately dismiss him. Moreover, notwithstanding Mr. Keefer's testimony, the record simply does not support that Grievant acted in some manner not in conformity with the moral code of the community or accepted principles of right and wrong. Finally, Grievant's leaving his players without a proper chaperone during the 1992 tournaments does not quite approach the level of willful neglect of duty.

However, OCBE did demonstrate unsatisfactory performance as a coach on Grievant's part.

Grievant admitted to the cited infractions and essentially allowed that his coaching performance had been unsatisfactory. (See footnote 5) Without a doubt, the comments that Grievant made to his female players in 1991 while under a plan of improvement were offensive. Simply because OCBE did not learn of those comments until after a "satisfactory" evaluation was rendered does not negate the fact that they were made. Moreover, Grievant failed to exercise due care for his players when he left the motel and forget to direct another coach to remain. (See footnote 6)

Finally, OCBE was not bound to place Grievant on another improvement plan after it discovered that he made inappropriatecomments in 1991 during coaching-related activities and failed to provide for an approved chaperone during the 1992 tournaments. The plan from the prior season clearly required that Grievant continue to meet standards which he utterly failed to do while on the plan and during the following season at the tournaments. See Allen v. Monroe County Bd. of Educ., Docket No. 90-31-021 (July 11, 1990). (See footnote 7)

In short, as OCBE correctly argues, while Code §18A-4-16 suggests that a board of education may unilaterally choose not to renew an extracurricular contract just the same as the holder of an extracurricular contract may unilaterally elect not to agree to continue the contract, what is required of the employer when it desires not to renew such a contract is that it afford a meaningful improvement period and adhere to lawful due process requirements of timely notice and action. (See footnote 8) OCBE has afforded Grievant these protections; it has also justified its actions.

The foregoing discussion is supplemented by the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was placed on a Plan of Assistance for the 1991-92 school term relative to his Head Girls Basketball Coach duties, in part, because of his failure to "use appropriate behavior with the athletes under his charge." Grievant did not protest this action.

2. On June 8, 1992, at the expiration of the coaching season and plan, a coaching evaluation stated that Grievant "worked diligently to improve his identified deficiencies cited in the Plan of Assistance. In essence, a directive was given that Grievant "continue to improve upon the identified

concerns."

3. During the 1992-93 school year, school officials were informed by some parents that Grievant made inappropriate comments containing sexual innuendo to members of the team on at least two separate occasions during the prior season. Information was also received that during the current playing season, Grievant had left his varsity team members at a motel with a parent in charge instead of a fellow coach or an approved, designated chaperone while he attended the early morning playoff game of the junior varsity team.

4. When confronted about these matters, Grievant attempted to rationalize his behavior and promised not to repeat the infractions in the future.

5. The overall rating on Grievant's January 1993 Head Coach evaluation stated that Grievant "Does Not Meet Standards." Grievant did not then protest or raise a claim that he had been denied the opportunity to submit a self evaluation.

6. By letter dated March 12, 1993, Superintendent Lawrence Jones notified Grievant that, based upon Grievant's coachingevaluation, he would not recommend the renewal of his extracurricular contract for Head Girls Basketball Coach. Grievant was advised that a hearing would be scheduled for March 31, if he wished to be heard by OCBE's members prior to final action.

7. Another letter, dated March 18, 1993, cited the reasons for the nonrenewal of the contract; basically, it charged that Grievant failed to comply with coaching regulations and standards which required exemplary personal behavior of the coach and due care while managing and supervising the team.

8. At Grievant's request and the parties' mutual agreement, OCBE conducted a formal hearing on the matter on May 24, 1993. At that time, OCBE heard testimony from WPHS's assistant principal regarding Grievant's questionable comments during the prior season and behavior at the motel while attending the tournaments during the current season. Grievant denied that his comments were sexually motivated, admitted that he used poor judgement and essentially requested an opportunity to improve.

9. Thereafter, OCBE declined to renew Grievant's extracurricular contract for Head Girls Basketball Coach for the 1993-94 term.

10. Following his receipt of a notice dated May 27, 1993 from Superintendent Jones that his contract would not be renewed, Grievant filed the within action.

Conclusions of Law

1. The assignment of teachers and service personnel to extracurricular assignments shall be made by mutual agreement ofthe employee and the superintendent, or designated representative, subject to board approval. Code §18A-4-16.

2. "Procedural requirements mandated under W.Va. Code §18A-2-7 and W.Va. Code §18A-2-8, apply to all school personnel positions; therefore, school board actions relating to contracts entered into pursuant to W.Va. Code §18A-4-16, are not exempt from such procedural requirements. Smith v. Board of Educ. of County of Logan, 341 S.E.2d 685 (W.Va. 1985)." Banfi v. Lincoln County Bd. of Educ., Docket No. 92-22-120 (June 30, 1992).

3. Inasmuch as OCBE afforded Grievant an improvement period, timely notice and an opportunity for hearing prior to a final nonrenewal action, it substantially complied with lawful processes and procedural requirements required of it.

4. Overall, Grievant's coaching performance was shown to be unsatisfactory because he failed to meet standards and directives, not only during a prior season while under an improvement plan, but also during the following season while yet under the plan's guidance that he continue to meet standards.

5. Grievant was afforded all the protective processes due him, and he failed to prove he was entitled, under Code §§ 18A-2-8 and 18A-4-16, to reinstatement to his coaching position as a matter of law.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio County and such appeal must be filed within thirty (30) 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. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

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Administrative Law Judge

Date: February 24, 1994

Footnote: 1The lower-level record consists of the transcript and exhibits of a May 24, 1993 nonrenewal hearing before OCBE's members, a transcript of the brief July 20, 1993 level two hearing and the July 26, 1993 level two decision. At level two, the parties merely submitted the May transcript into evidence so that OCBE could produce a formal level two decision. By agreement of the parties, a level four hearing was conducted September 30, 1993, to augment the record compiled at the May nonrenewal hearing. Fact/law proposals were tendered by mid-November 1993.

Footnote: 2Under Code §18A-2-2, when a board of education seeks to terminate a teacher's contract for the following school year, prior to final action by April 1 of the then current year, it must notify the employee in writing, stating cause or reasons, and provide the employee with an opportunity to be heard. For any actionpertaining to employees who have been targeted for transfer or other personnel actions under Code §18A-2-7, the procedure is basically similar, but notices must be furnished by the first Monday in April and final actions completed by the first Monday in May of the then current year. Compliance with timelines was not an issue in this case.

Footnote: 3W.Va. Code §18A-2-8 provides, in pertinent part:
Notwithstanding any other provision of law, a board may suspend or dismiss any person in its employment at any time for: immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation[.]

Footnote: 4Nothing in the record indicates Grievant sought or was denied an opportunity to submit a self-evaluation. Seemingly, the burden is upon him to complete this task.

Footnote: 5Grievant conceded that he was due some punishment although he sought a lesser punishment than the termination of his coaching position.

Footnote: 6This is especially true in light of the fact that the bus in which the players traveled during the tournament had been broken into during a stop at a restaurant prior to the stop for the night at the motel. Uniforms and other items had

been stolen.

Footnote: 7A custodian was dismissed in Allen. On the issue of whether the custodian had been entitled to an improvement plan prior to dismissal, the dismissal was upheld, in part, because the employee had been given an earlier plan several years before and ample warning and time to correct misbehavior since then.

Footnote: 8The execution of extracurricular assignment contracts is governed by W.Va. Code §18A-4-16 which states that,

[t]he assignment of teachers and service personnel to extracurricular assignments shall be made by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval.