

**CRAIG HARMON, .**

**Grievant, .**

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**v. . Docket No. 95-18-001**

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**JACKSON COUNTY BOARD OF EDUCATION, .**

**Employer. .**

## **DECISION**

Craig Harmon, Grievant, filed a written grievance against his employer, the Jackson County Board of Education (hereinafter Board), at level one, on June 17, 1994, pursuant to the provisions of West Virginia Code §§18-29-1, et seq. He contends that he should not have been removed from the position of boys' head basketball coach at Ripley High School at or near the end of the 1993-1994 school year. Grievant and Jack Wiseman, Principal at Ripley High School, engaged in an informal conference concerning this matter on May 19, 1994. Thereafter, the instant complaint was filed at level one of the grievance procedure. Grievant was informed that his grievance was denied on June 2, 1994, and he submitted a written grievance form to Mr. Wiseman on June 17, 1994. The grievance was denied at level one as untimely and appeal was made to level two on June 23, 1994. A hearing was conducted by the Board on August 25, 1994, followed by a level two decision denying the claim both as untimely and on the merits, on December 22, 1994. Appeal was made to level four on January 3, 1995. Evidentiary hearings were held on August 8 and 9, 1995, at this Grievance Board's Charleston, West Virginia office. The case became mature for decision on November 14, 1995, upon receipt of the Board's written, post-hearing brief. [\(See footnote 1\)](#)

Grievant is employed by the Board as a teacher at Ripley Middle School. He was hired for the 1993-1994 school year, pursuant to a written, extracurricular contract, to be the boys' head basketball coach at Ripley High School. He has coached basketball for the Board, in some capacity, since the 1987-1988 school year. In the Spring of 1994, and after the end of the 1993-1994 basketball season, Grievant was informed that the Board had voted not to renew his extracurricular contract to coach for the 1994-1995 school year. He challenges the Board's decision to remove him from this coaching position.

The Board contends that this grievance was untimely filed and a finding on this issue must be made before a discussion of the merits. The Board contends that the level one grievance form was submitted to Mr. Wiseman on June 17, 1994, eleven days after Grievant's receipt of Mr. Wiseman's decision following the informal conference. It argues that pursuant to W. Va. Code §18-29-4(3), Grievant had only ten days to file his written grievance at level one; therefore, his claim was untimely filed. [\(See footnote 2\)](#) Grievant contends that his attorney attempted to send a copy of the written grievance form to Mr. Wiseman's office, via a facsimile machine, on June 16, 1994, ten days from the date he received the first response; however, the facsimile copy could not be transmitted for whatever reason.

W. Va. Code §18-29-4(a) requires that an informal conference on all grievances be conducted and that a written response must be issued by the employee's supervisor within ten days of the conference. Then, pursuant to Code §18-29-4(a)(3), the grievant must file a written grievance with said supervisor within ten days of receipt of the initial response. Here, the written grievance form was neither filed with Mr. Wiseman nor his office within the statutorily mandated time. Therefore, the grievance was untimely filed at level one.

The Undersigned is aware of our Supreme Court of Appeals' ruling in Duruttia v. Board of Education of County of Mingo, 382 S.E.2d 40 (W. Va. 1989), wherein it was held that a grievant may substantially comply with the filing provisions of Code §18-29-1, et seq., and be entitled to a hearing and a decision on the merits, though the grievance was not filed with the appropriate entity under the grievance procedure in a timely fashion. However, here, not only did Grievant fail to substantially comply with the filing requirements, he failed to comply at all. By unsuccessfully attempting to send his appeal form to Mr. Wiseman's office by a "fax" machine, Grievant never relinquished control of the document. In essence, he did not file his

**grievance with anyone or anywhere on the last day for which he could legally initiate a formal grievance at level one.**

**In Duruttya, the grievant was dismissed from his employment with the Mingo County Board of Education. His termination letter informed him that he had the right to file a grievance at level four of the grievance procedure. However, the letter did not inform the grievant how to file a grievance or where to submit the grievance. Mr. Duruttya proceeded, within ten days of receipt of the termination letter, to submit a written grievance with his employer and not this Grievance Board. The employer did nothing with the grievance and grievant's attorney filed a request for a Writ of Mandamus with the Circuit Court of Mingo County to compel the board of education to process his request. At this stage, the board of education contended that the grievance was not timely filed because it had been filed with it instead of with the Grievance Board.**

**In holding as the Court did, it concluded that the level four hearing request procedures contained within Code §18-29-4 are unclear in that they do not specify where a request to level four is to be filed. The Court recognized that Mr. Duruttya did submit the appropriate grievance form to an entity, within the statutory time; however, he submitted it to the wrong entity. It concluded that by doing so, he substantially complied with the procedural requirements of Code §18-29-4.**

**Here, Grievant did not substantially comply with the clear procedural requirements of Section 4(a) that state a written grievance form is to be filed with the employee's supervisor. In fact, he did not comply at all. One's unsuccessful attempt to file a grievance using a "fax" machine cannot be viewed as substantial compliance, any more than one's unsuccessful attempt to make one's supervisor aware by telephone that he is going to file a grievance can be considered sufficient. The evidence clearly indicates that no document was actually sent via "fax" because the line was busy on the receiving end; therefore, Grievant's appeal was not received until the next day. Grievant did not take sufficient, affirmative steps within the required ten-day period to assure that his grievance was filed. [\(See footnote 3\)](#) Therefore, the claim is determined to be untimely. The merits of the case shall not be addressed as this Grievance Board's jurisdiction cannot be properly evoked. The following findings of fact are properly deduced from the evidentiary record in the case:**

### **Findings of Fact**

1. Grievant was notified on April 29, 1994, that his contract to coach boys' basketball at Ripley High School was not going to be renewed for the 1994-1995 school year.

2. On May 12, 1994, Grievant requested an informal conference with his supervisor, Principal Jack Wiseman. The conference was held on May 19, 1994, and Grievant was notified by letter dated June 1, 1994, on June 2, 1994, that his complaint had been denied.

3. Grievant filed a written grievance form with Principal Wiseman's office on June 17, 1994. On June 16, his attorney had attempted but failed to file the same grievance with Principal Wiseman by using a facsimile machine.

4. Grievant's level one, written grievance was filed with his supervisor eleven days from his receipt of the initial response.

The foregoing conclusions are law are appropriate in this case:

### **Conclusions of Law**

1. Pursuant to W. Va. Code §18-29-4(a), a written grievance must be filed with one's supervisor within ten days of the employee's receipt of the initial decision on the claim arising from the required informal conference.

2. Grievant's filing of a written grievance with his supervisor on June 17, 1994, was untimely. 3. Grievant's actions herein cannot be classified as substantial compliance with the clear and unambiguous procedural requirements of W. Va. Code §18-29-4(a).

Therefore, this grievance is hereby DENIED and DISMISSED as untimely. The Grievance Board does not properly have jurisdiction to decide the merits of the case.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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 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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**ALBERT C. DUNN, JR.**  
**Administrative Law Judge**

**March 18, 1996**

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**Footnote: 1**     *Grievant did not elect to submit a post-hearing brief. The record has been supplemented by an affidavit and the deposition of Larry Edwards, Director of Girls' Athletics at Parkersburg South High School.*

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**Footnote: 2**     *The Board has made this argument throughout the processing of the claim.*

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**Footnote: 3**     *This Grievance Board has applied a "mailbox rule" in cases where a grievant has mailed his written appeal to level four on the last day of the ten-day period, and thereby determined that the grievance was timely filed. See, McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). Again, the facts in this case represent a significant departure from those cases where the "mailbox rule" is to be applied. Grievant's attorney did not send a copy of his written grievance by facsimile to Mr. Wiseman's office, he merely attempted to do so. At that time, he had no reason to believe that the document would be received by the method used.*