JOHN PORTERFIELD,

Grievant,

v. **Docket No. 96-21-270**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent,

and

RICHARD HISERMAN,

Intervenor.

D E C I S I O N

John Porterfield (Grievant), an employee of the Lewis County Board of Education (LCBE), alleges a violation of W. Va. Code § 18A-4-7a in regard to elimination of his extracurricular contract as County Athletic Coordinator. Following denial of his grievance at Level I, Grievant appealed to Level II where an evidentiary hearing was held on May 28, 1996. The grievance was denied by the Superintendent's designee, Paul Derico, on June 21, 1996. Grievant waived Level III and submitted this matter to Level IV on June 28, 1996, requesting a decision on the record developed below. By Order dated July 26, 1996, the undersigned administrative law judge granted Intervenor status to Richard Hiserman (Intervenor) in accordance with W. Va. Code § 18-29-3(u). This matter becamemature for decision on August 29, 1996, upon receipt of timely written arguments from all parties.

None of the facts pertinent to resolution of this grievance are in controversy. Accordingly, the following Findings of Fact are appropriately made from the record developed through Level II.

FINDINGS OF FACT

1. Grievant is currently employed by the Lewis County Board of Education (LCBE) as an Assistant Principal at Lewis County High School (LCHS). In addition, he holds an extracurricular contract as Head Football Coach at LCHS. HT at 7. (See footnote 1)

2. Grievant was awarded a separate extracurricular contract to serve as County Athletic Coordinator for LCBE, beginning on July 1, 1991. See G Ex 1.

3. Initially, the County Athletic Coordinator was employed to "supervise and advise all county-wide coaches and/or athletic personnel." G Ex 1.

4. These duties were subsequently clarified or expanded to include "schedule athletic events for schools not having an Athletic Director available." See G Ex 3.

5. On June 16, 1995, LCBE posted a vacancy for the extracurricular assignment of Athletic Scheduling Coordinator. G Ex 4. Richard Hiserman (Intervenor) was selected for this assignment. 6. Some of the duties of Intervenor's assignment, including "work with the coaches and administration in scheduling of all athletic events at Lewis County," overlapped with Grievant's duties. See G Ex 4.

7. Grievant has greater seniority in his extracurricular assignment than Intervenor has in his extracurricular assignment.

8. Sometime prior to March 19, 1996, LCBE Superintendent Joseph L. Mace recommended that LCBE eliminate the County Athletic Coordinator assignment held by Grievant for the 1996-97 school year. HT at 73-74.

9. On March 19, 1996, LCBE voted to accept Superintendent Mace's recommen dation to eliminate the extracurricular assignment held by Grievant. HT at 74.

10. Grievant attended the LCBE meeting of March 19, 1996, and became aware of the Board's decision to eliminate his extracurricular assignment. HT at 30. On March 26, 1996, Grievant received a letter from Superintendent Mace, dated March 25, 1996, and sent by certified mail, advising that LCBE had accepted the recommendation to terminate Grievant's contract as County Athletic Coordinator at the end of the 1995-96 school year. See R Ex 1.

11. On April 18, 1996, Grievant spoke to Superintendent Mace, requesting a conference to discuss the instant grievance. See R Ex 7.

12. An informal conference was scheduled and held on April 24, 1996. See R Ex 8. Superintendent Mace denied the grievance in a letter dated April 24, 1996, noting that the grievance might not be timely. R Ex 5.

13. Grievant filed a written grievance on May 1, 1996. 14. Lewis County Schools were not in session from April 1 to 5, 1996. HT at 69.

DISCUSSION

Initially, Respondent contends that the instant grievance was not timely filed. W. Va. Code § 18-29-4(a)(1) states:

> **Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.**

A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

W. Va. Code § 18-29-2(b) provides that, for purposes of the Education Employees Grievance Procedure, "'[d]ays' means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with section two [§ 18A-5-2], article five, chapter eighteen-A of this code." Thus, the "school holiday" which covers April 1 through 5, as well as March 30, April 6 and April 13 (Saturdays), and March 31, April 7, and April 14 (Sundays), are excluded from calculating the 15 days in which Grievant was required to initiate this grievance. Further, W. Va. Code § 2-2-3, provides that "[t]he time or period prescribed or allowed within which an act is to be done shall be computed by excluding the first day and including the last."

Consequently, if only the days Grievant worked are counted, as required by § 18- 29-2(b), Grievant initiated this grievance 17 days after attending the LCBE board meeting, but only 12 days after receiving written notice of the Board's decision. Therefore, it is necessary to determine which of the foregoing "events" activated running of the time limit for filing this

grievance.

The Supreme Court of Appeals of West Virginia has determined that the procedural protection provided by W. Va. Code § 18A-2-7 are applicable to extracurricu lar contracts governed by W. Va. Code § 18A-4-16. Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986); Smith v. Bd. of Educ., 341 S.E.2d 685 (W. Va. 1985). That statute specifically requires that affected employees be notified in writing of the county board of education's decision, following a hearing on a superintendent's recommendation, and such notices are to be delivered by certified mail, return receipt requested, to the employees' last known address within ten days following the board meeting. W. Va. Code § 18A-2-7. Therefore, the statute requires service of proper written notice as the final step in the process through which school boards effect changes in an employee's employment status. Accordingly, for purposes of applying the time limits in W. Va. Code § 18-29-4(a)(1), the "event" upon which the grievance was based, in the context of the instant grievance, was Grievant's receipt of this statutorily-mandated notice on March 26, 1996. See Eastham v. Cabell County Bd. of Educ., Docket Nos. 95-06-317/318 (Apr. 9, 1996).

Starting from March 27, 1996, as required by W. Va. Code § 2-2-3, only 12 "days" elapsed until April 18, 1996. Thus, by calling Superintendent Mace to request aninformal conference on April 18, 1996, Grievant initiated this grievance within the 15-day time limit specified by W. Va. Code § 18-29-4(a)(1). See Damron v. Mingo County Bd. of Educ., Docket No. 95-29-517 (Apr. 30, 1996).

Turning to the merits of this grievance, Grievant contends that LCBE should have permitted him to displace Intervenor as the Athletic Scheduling Coordinator for Lewis County Schools in accordance with the reduction-in-force (RIF) provisions in W. Va. Code § 18A-4-7a. That statute provides, in pertinent part:

> **Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employ ment pursuant to the provisions of section two [§ 18A-2-2], article two of this chapter[.]**

Grievant cites the decision of the Supreme Court of Appeals of West Virginia in State ex rel. Board of Education v. Casey, 349 S.E.2d 436 (W. Va. 1986), to support his position. In Casey,

the Court applied W. Va. Code § 18A-4-8b, the statute which W. Va. Code § 18A-4-7a superseded in 1990, and determined that reductions in force of professional educational personnel are to be conducted on the basis of seniority. Casey, supra, at 440. The Court further concluded that the petitioner, a secondary school principal whose school was being closed, and who was not the least senior principal in the county, was entitled to displace the secondary school principal in the county with the least seniority, who, in turn, was to be released from employment under the RIF procedures in effect at that time. Id. If the RIF provisions in W. Va. Code § 18A-4-7a apply to extracurricular positions held by professional personnel in accordance with W. Va. Code § 18A-4-16, Grievant's position may have merit. W. Va. Code § 18A-4-16 provides as follows:

> **(1) The assignment of teachers and service personnel to extracur ricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.**
>
> **(2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.**
>
> **(3) The terms and conditions of the agreement between the employee and the board of education shall be in writing and signed by both parties.**
>
> **(4) An employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board.**
>
> **(5) The board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b], article four of this chapter: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel assignments within a particular classification category of**

employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment.

This Grievance Board recently applied § 18A-4-16 in the course of addressing a closely-related issue regarding elimination of certain bus operators' extracurricular assignments. In Smith v. Wood County Board of Education, Docket No. 96-54-271 (Oct.31, 1996), this Grievance Board holds that eliminating the extracurricular assignments of certain school service personnel does not result in a reduction in the number of service personnel. Thus, the RIF provisions in W. Va. Code § 18A-4-8b should not have been applied to "bump" the grievants in Smith from their extracurricular assignments. Smith explicitly overrules a prior decision of this Grievance Board, Garvin v. Webster County Board of Education, Docket No. 51-86-060 (Aug. 21, 1986), concluding that Garvin was clearly in error, to the extent that it found that termination of extracurricular contracts results in a RIF, thereby triggering the right of a senior employee to displace another employee with less seniority.

This Grievance Board attempts to follow the well-recognized legal doctrine of stare decisis. (See footnote 2) Wargo v. W. Va. Dept. of Health & Human Resources, Docket Nos. 92-HHR- 441/445/446 (Mar. 23, 1994). The undersigned administrative law judge is persuaded that the same rule of law should apply, whether an extracurricular assignment is held by school service personnel or professional employees. However, this is not the only factor which merits application of this Grievance Board's recent Smith precedent to the instant matter. It is apparent that LCBE did not "reduce the number of professional personnel in its employment" within the meaning of W. Va. Code § 18A-4-7a. LCBE simply took certain extra duties away from Grievant, simultaneously withdrawing the additionalcompensation that went with those duties. Under these circumstances, the RIF provisions in W. Va. Code § 18A-4-7a are not applicable. See Smith, supra.

Moreover, even if Grievant was entitled to protection under the RIF procedures of W. Va. Code § 18A-4-7a, the undersigned administrative law judge is not persuaded that Grievant should "bump" Intervenor on the basis of his greater seniority. As discussed in Smith, supra, the logic of Grievant's position on extracurricular assignments, extended hypothetically, could result in a football coach, whose assignment was eliminated through consolidation,

being allowed to "bump" a less senior basketball or baseball coach. There was some evidence that the duties assigned to each of these employees, as County Athletic Coordinator and County Athletic Scheduler, were developed to accommodate the circumstances and abilities of each of the incumbents. Assignments such as these are filled under W. Va. Code § 18A-4-16 on a more subjective basis than school service personnel assignments or regular teaching positions. See e.g., Spillers v. Brooke County Bd. of Educ., Docket No. 95-05-329 (Sept. 18, 1995); Ramey v. Mingo County Bd. of Educ., Docket No. 93-29-470 (May 12, 1994). Thus, neither Grievant nor Intervenor were selected for their respective assignments on the basis of seniority, and seniority should not control who holds the remaining assignment, after LCBE eliminated Grievant's assignment for legitimate reasons. Grievant also contends that LCBE should have eliminated Intervenor's extracurricular assignment as Athletic Scheduling Coordinator and reassigned certain duties to Grievant instead of eliminating Grievant's extracurricular assignment as County Athletic Coordinator. The evidence presented falls well short of meeting Grievant's burden of proof to demonstrate thatLCBE abused its broad discretion in making this determination, or that the decision was otherwise arbitrary and capricious. See Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995). See generally Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974). Moreover, there was no credible evidence that, at the time LCBE created the Athletic Scheduling Coordinator assignment, there was any intention to eliminate Grievant's position as County Athletic Coordinator.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter:

CONCLUSIONS OF LAW

1. A grievant is required to prove the allegations of his or her complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96-29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. "Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor todiscuss the nature of the grievance and the action, redress or other remedy sought." W. Va. Code § 18-29-4(a)(1).

4. For purposes of W. Va. Code §§ 18-29-1, et seq., "days" means "days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings . . . ." W. Va. Code § 18-29-2(b).

5. "The time or period prescribed or allowed within which an act is to be done shall be computed by excluding the first day and including the last." W. Va. Code § 2-2- 3.

6. Terminations of extracurricular contracts entered into pursuant to W. Va. Code § 18A-4-16 are subject to the procedural requirements mandated under W. Va. Code §§ 18A-2-7 and 18A-2-8. Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986); Smith v. Bd. of Educ., 341 S.E.2d 685 (W. Va. 1985).

7. The "event" which gave rise to this grievance, and began the running of the time limits for filing a grievance within the meaning of W. Va. Code § 18-29-4(a)(1), was Grievant's receipt of LCBE's certified letter advising that his extracurricular assignment was being terminated at the end of the 1995-96 school year. See Eastham v. Cabell County Bd. of Educ., Docket Nos. 95-06-317/318 (Apr. 9, 1996). Accordingly, this grievance was timely initiated. See Ooten, supra; Eastham, supra.

8. "Termination of extracurricular contracts does not result in a reduction-in-force. The employee with the terminated contract simply loses his or her job and has no rightto displace a less senior employee from his or her extracurricular contract." Smith v. Wood County Bd. of Educ., Docket No. 96-54-271 (Oct. 31, 1996).

9. Grievant failed to demonstrate that LCBE abused its discretion in deciding to eliminate Grievant's extracurricular assignment as County Athletic Coordinator rather than Intervenor's extracurricular assignment as Athletic Scheduling Coordinator, or that the decision was otherwise arbitrary and capricious. See Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995). See generally Bowman

Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974).

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: October 31, 1996

Footnote: 1

All references to the Level II hearing transcript will be cited as "HT at " with the appropriate page number filled in the blank. Exhibits submitted at Level II by Grievant will be cited as "G Ex " and exhibits submitted at Level II by LCBE will be cited as "R Ex ."

Footnote: 2

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968).