REX TONEY,

Grievant,

v. **Docket No. 97-22-020**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Rex Toney (Grievant), a school service employee of Respondent Lincoln County Board of Education (LCBE), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on October 30, 1996, alleging that LCBE violated W. Va. Code §§ 18A-2-8 and 18A-4-16 by improperly terminating his extracurricular coaching contract at Harts High School. Grievant initially filed this grievance directly at Level IV. However, as this grievance does not involve a disciplinary termination, the matter was remanded to Level I on November 20, 1996. Thereafter, Grievant pursued this matter through the lower levels of the grievance procedure without obtaining relief. He appealed to Level IV on January 14, 1997, and a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on February 6, 1997. This matter became mature for decision on February 24, 1997, following receipt of written post-hearing arguments from the parties. The pertinent facts in this matter are not in dispute. Accordingly, the following Findings of Fact have been developed from the record created at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by the Lincoln County Board of Education (LCBE) as a regular Bus Operator, a school service personnel position. L II HT at 3-4.

2. On August 20, 1996, LCBE posted an extracurricular assignment for a junior high boys basketball coach at Harts Junior/Senior High School (HHS). G Ex C at L IV.

3. The assignment at issue had been posted on two prior occasions without being filled. See G Ex B at L IV; G Ex 2 at L II.

4. Grievant timely applied for the assignment. As Grievant was the only applicant, on August 27, 1996, LCBE awarded the assignment to Grievant, thereafter issuing Grievant a "supplemental contract of employment" for the 1996-97 school term. G Ex 1 at L II.

5. As Grievant is not a professional employee, he applied for a temporary license to coach in accordance with W. Va. Code § 18A-3-2a(4). On October 4, 1996, the West Virginia Department of Education issued Grievant a temporary coaching authorization, effective August 28, 1996. G Ex 4 at L II.

6. LCBE School Superintendent Dallas Kelley received one or more telephone calls, followed by a letter from the Principal and Assistant Principal at HHS, dated October 18, 1996, expressing concern that the coaching assignment at issue had been filled without input from the school's new Principal. It was also noted that the posting for the assignment was "not common knowledge among staff members" at HHS, apparently because it took place during the summer. R Ex 1 at L II. 7. On October 21, 1996, LCBE voted to rescind its action hiring Grievant as the junior high boys basketball coach at HHS. Grievant was given no advance notice that LCBE was contemplating such action. After the board meeting, on October 22, 1996, Superintendent Kelley wrote to Grievant advising him that his extracurricular coaching contract had been rescinded. G Ex 5 at L II.

8. At the time LCBE acted to revoke its decision granting Grievant an extracurricular coaching contract, no employee had filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., contesting Grievant's selection for the assignment.

9. On October 22, 1996, LCBE reposted the coaching position at issue. G Ex 3 at L II. Grievant and a professional employee employed as a classroom teacher at HHS applied for the position, and it was awarded to the professional employee.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

This grievance involves an extracurricular assignment subject to W. Va. Code § 18A-4-16 which provides:

> (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 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.

It is well established that county boards of education must utilize the notice and hearing procedures of W. Va. Code §§ 18A-2-8 or 18A-2-7 to terminate an extracurricular or supplemental assignment under W. Va. Code § 18A-4-16, unless the assignment expires under its own terms. Hosaflook v. Nestor, 176 W. Va. 648, 346 S.E.2d 798 (1986); Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996); Ramey v.

Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994). See Garvin v. Webster County Bd. of Educ., Docket No. 92-51- 407 (Jan. 7, 1993); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June24, 1991). Grievant established that he was issued an extracurricular contract for the 1996-97 school year, and LCBE terminated the contract without following the required procedures. Thus, the burden of persuasion shifts to LCBE to establish some exception to the notice and hearing procedures required under W. Va. Code §§ 18A-2-8 or 18A-2-7 by Smith and Hosaflook.

The record indicates that LCBE became aware that the Principal at HHS wanted the position reposted after an extracurricular contract was issued to Grievant. There was no evidence that Grievant engaged in any improper action or misrepresentation to obtain the assignment. LCBE routinely posts position vacancies during the summer, and filled other vacancies from the same posting without any indication that the posting did not comply with W. Va. Code §§ 18A-4-16 or 18A-4-7a.

In rescinding Grievant's contract, LCBE was not acting in a quasi-judicial capacity as a grievance evaluator because there was no employee grievance under W. Va. Code §§ 18-29-1, et seq., pending at the time. See Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990), aff'd No. 90-AA-67 (Kanawha County Cir. Ct. Apr. 3, 1992). Accord, Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995); Adams v. Cabell County Bd. of Educ., Docket No. 94-06-520 (May 15, 1995); Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991). See also Webster v. Wayne County Bd. of Educ., Docket No. 96-50-119 (Nov. 27, 1996). Further, LCBE's contention that only professional employees can be employed as coaches is rejected as being inconsistent with W. Va. Code § 18A-3-2a(4). See Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994). Accordingly, where Grievant was issued an extracurricular contract for a coaching assignment for the 1996-97 school year, LCBE was obligated to comply with the procedures in W. Va. Code §§ 18A-2-7 or 18A-2-8 to terminate that contract. Smith, supra; Hosaflook, supra; Payne, supra; Doss, supra. Given LCBE's unilateral rescission of Grievant's contract, Grievant is entitled to backpay, with interest, in the amount of "five days salary supplement at established daily rate" in accordance with the terms of Grievant's original contract. See Sanders v. Putnam County Bd. of Educ., Docket No. 96- 40-382 (May 28, 1997).

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. County boards of education must utilize the notice and hearing procedures of W. Va. Code §§ 18A-2-8 or 18A-2-7 to terminate an extracurricular or supplemental assignment under W. Va. Code § 18A-4-16, unless the assignment expires under its own terms. Hosaflook v. Nestor, 176 W. Va. 648, 346 S.E.2d 798 (1986); Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Payne v. Mason County Bd. of Educ.,Docket No. 96-26-047 (Nov. 27, 1996); Doss v. Mason County Bd. of Educ., Docket No. 96-26-108 (Sept. 30, 1996); Ramey v. Lincoln County Bd. of Educ., Docket No 94-02-002 (June 3, 1994); Lambert v. Logan County Bd. of Educ., Docket No. 91-23-199 (June 24, 1991). See Bowman v. Marion County Bd. of Educ., Docket No. 96-24-261 (Apr. 29, 1997).

4. A school service employee may be employed to fill an extracurricular athletic coaching assignment when no currently employed certified professional educator applies for the position. W. Va. Code § 18A-3-2a(4). See Kinser v. Mingo County Bd. of Educ., Docket No. 96-29-075 (July 30, 1996); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994).

5. Once LCBE voted to approve Grievant's selection for an extracurricular coaching assignment, and he was issued an extracurricular contract of employment in substantial compliance with W. Va. Code § 18A-4-16, LCBE could not thereafter terminate Grievant's assignment without complying with the procedures contained in W. Va. Code §§ 18A-2-8 or 18A-2-7. See Hosaflook, supra; Smith, supra; Payne, supra; Doss, supra. See also Sanders v. Putnam County Bd. of Educ., Docket No. 96-40-382 (May 28, 1997). See generally Morgan, supra.

Accordingly, this Grievance is **GRANTED**. Respondent Lincoln County Board of Education is hereby **ORDERED** to award Grievant back pay with interest, in accordance with the terms of his extracurricular coaching assignment for the 1996-97 school year. Any party may appeal this

decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: July 7, 1997