DANNY PERKINS,

Grievant,

v. DOCKET NO. 97-29-470

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and,

CARL SPARKS,

Intervenor.

DECISION

This grievance was filed by Grievant Danny Perkins against Respondent Mingo County Board of Education ("MBOE"), alleging violations of W. Va. Code §§ 18A-2-8, 18A-4-16, and 18A- 4-7a, when MBOE posted the position of head boys' baseball coach at Matewan High School for the 1997-98 school year, without giving him notice that he would be removed from that position. (See footnote 1) As relief he sought instatement into the position, back pay, and any lost benefits. (See footnote 2) The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings.

Findings of Fact

1. Grievant is employed by MBOE as a teacher.

2. Danny "Yogi" Kinder resigned as head boys' baseball coach at Matewan High School effective March 10, 1997. He told Assistant Superintendent John Fullen some time prior to this that he was going to resign. Grievant was also aware of Mr. Kinder's intention to resign.

3. Grievant had assisted Mr. Kinder for two years as a volunteer assistant boys' baseball coach.

4. Baseball practice started around March 23, 1997, and the first game was April 1, 1997.

5. Grievant applied for Mr. Kinder's coaching position, with the understanding that the position was a volunteer position; however, in his application he stated he would accept the assignment only if he were paid for his coaching duties.

6. The head boys' baseball coach position at Matewan High School was not posted during the Spring of 1997.

7. Grievant served as head boys' baseball coach at Matewan High School during the Spring of 1997. 8. Grievant signed an extra-curricular contract sometime between May 27 and June 3, 1997, to be paid $2,500.00 as the head boys' baseball coach at Matewan High School. The contract was also signed by Everett Conn, Jr., Superintendent. The contract was not approved by MBOE, and it is not dated. It does not indicate a particular term, and Grievant was not told the position was for one season only, and it would be posted the following year.

9. Grievant was not notified that he would not be employed as the head boys' baseball coach at Matewan High School during the 1997-98 school year, or that the assignment would be posted.

10. The head boys' baseball coach assignment at Matewan High School which Grievant had filled during the Spring of 1997, was posted July 15, 1997, as a paid assignment. Grievant and Intervenor applied, and Intervenor was selected.

Discussion

Grievant bears the burden of proving the allegations of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. Id. Respondent argued the position had not been posted, and therefore Grievant acquired no right to remain in the position, while Grievant contended the position had been posted.

"[C]ounty 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); . . .." Toney v.

Lincoln County Bd. of Educ., Docket No. 97-22-020 (July 7, 1997). However, when an employee is placed in a position without proper posting, he is not legally in the position, acquires no right to remain in the position, and is not entitled to the statutory notice that his contract will be terminated. (See footnote 3) See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991) ("employees do not acquire a property interest requiring due process protection by virtue of an illegal action." Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994)); Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-272 (Aug. 25, 1997); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994).

W. Va. Code § 18A-4-16 provides, in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval.
>
> . . .
>
> (5) The board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b, article four of this chapter . . ..

W. Va. Code § 18A-4-8b provides, among other things, for the posting of all service personnel vacancies. The statute is silent on how extracurricular professional positions are to be filled. However, extracurricular professional assignments have been found by this Grievance Board to besubject to the posting requirements of W. Va. Code § 18A-4-7a. (See footnote 4) Jarrell v. Raleigh County Bd. of Educ., Docket No. 90-45-155 (Aug. 22, 1990); Friend v. Nicholas County Bd. of Educ., Docket No. 34-87-286-4 (Jan. 19, 1988). See also Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995).

The first issue then, is a factual question of whether the position was posted. As the foregoing findings of fact state, the undersigned finds from the following evidence that it was more likely than not that the position was not posted.

Grievant's evidence that the position had been posted consisted of his testimony that he had seen the position posted as a volunteer position in late February or early March 1997. He stated he submitted an application for the position, but he had stated in his application he would not accept the

position unless he was paid. He also presented evidence that then Superintendent Conn had stated to a newspaper reporter that the position had been posted. No posting was produced.

Former Superintendent Conn testified he also had thought the position had been posted, and admitted the newspaper account in late March 1997, referred to by Grievant, probably accurately quoted him as stating the position had been posted. He noted that Mr. Fullen is responsible for posting positions. He stated he had gone through MBOE's records, and discussed the matter with Mr. Fullen in preparation for the hearing, and he discovered the position had not been posted in the Spring of 1997. Mr. Conn stated the position would not have been posted until Mr. Kinder's resignation was received. Once the resignation was received, the position could have been postedimmediately for five working days, and he would have been able to make his recommendation on the applicants to the members of the board of education on April 3, 1997, at the earliest. He stated he and Mr. Fullen had discussed that the baseball season would already be underway by the time the position was filled, and that because Grievant was already working with Mr. Kinder, and it was a volunteer position, it would be better to leave him in the coaching position for the rest of the year, to best serve the needs of the students. Later, Mr. Fullen told him Grievant wanted to be paid. Another volunteer coach had already threatened to quit in mid-season if he was not paid, which Mr. Conn agreed to do, so he decided Grievant should also be paid.

Mr. Kinder testified that he may have informed Mr. Fullen as early as mid-February of his intent to resign, and of Grievant's interest in the position, and Mr. Fullen told him that Grievant should go ahead and apply. In mid-February 1997, MBOE posted three other coaching positions as volunteer positions, a head boys' baseball coach at Tug Valley High School, and an assistant football coach and a girl's softball coach at Matewan High School.

Mr. Conn's recitation of what transpired is more likely than not what happened. None of the parties produced a posting for this position, even though MBOE numbers its postings, and records of the postings are maintained by MBOE. It is likely Grievant was aware of Mr. Kinder's impending resignation when the other volunteer positions were posted in mid-February, and applied because Mr. Fullen told Mr. Kinder Grievant should go ahead and apply. Grievant thought he saw the position posted because of the similarity of the mid-February postings to this position, and because of the newspaper account of former Superintendent Conn's remarks. Because the coaching assignment was never posted in the Spring of 1997, Grievant was not legally serving in the position as a paid

employee, and acquired no right to notice that he would not remain in the position. (See footnote 5)

Intervenor also pointed out Grievant's contract was not valid, as it had never been approved by MBOE. Grievant signed a contract at the end of the school year to be paid for the coaching duties, as did former Superintendent Conn. No evidence was presented that MBOE approved the contract as is required by W. Va. Code § 18A-4-16. Former Superintendent Conn did not recall MBOE ever approving the contract.

The statutory notice provisions have not been extended to protect an employee whose contract was not properly approved by the board of education, as is clearly required by Code § 18A- 4-16. See Boyd v. Mercer County Bd. of Educ., Docket No. 90-27-390 (Sept. 30, 1991); Londeree v. Fayette County Bd. of Educ., Docket No. 90-10-497 (May 31, 1991). Superintendent Conn never recommended Grievant to MBOE for the position, as he was required to do, and he had no authority to enter into a contract to employ Grievant without MBOE's approval.

> The Superintendent's act of entering into a written agreement with [an employee] . . . without Board approval, constitutes an ultra vires act, which the Board is not bound to follow. A contract of employment between a county board of education and a[n] . . . employee, whether regular full-time or extracurricular, can be made only with the board's approval. See W. Va. Code §§ 18A-2-5 and 18A-4-16. A superintendent's recommendation or approval, in and of itself, will not suffice. See W. Va. Code § 18-4-10(2). . . ..
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> Ultra vires promises are nonbinding when made by public officials, their predecessors, or subordinates functioning in their governmental capacity, and such ultra vires representations do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985); see also Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994). Thus, ultra vires acts are not enforceable, and the written agreement between Grievant [and] the Superintendent . . . is not enforceable.

Cook v. Mason County Bd. of Education, Docket No. 96-26-105 (Aug. 19, 1996).

Grievant applied for the assignment knowing that MBOE did not intend to pay the person who accepted the assignment. The fact that MBOE never approved his contract should not have come as a complete surprise. MBOE was not obligated to give Grievant notice of the termination of his contract, as otherwise required by W. Va. Code § 18A-2-8, as he was never legally in the position, and he did not have a valid contract.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. All vacant extracurricular service personnel and professional assignments must be posted. W. Va. Code §§ 18A-4-7a and 18A-4-16. Jarrell v. Raleigh County Bd. of Educ., Docket No. 90-45-155 (Aug. 22, 1990); Friend v. Nicholas County Bd. of Educ., Docket No. 34-87-286-4 (Jan. 19, 1988). See also Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995).

3. Extracurricular coaching assignments "shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval." W. Va. Code § 18A-4-16.

4. A superintendent's act of entering into a written agreement with an employee without approval by the board of education, constitutes an ultra vires act, and the board of education is not bound by such a contract. Ultra vires representations do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991), citing Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985); Cook v. Mason County Bd. of Education, Docket No. 96-26-105 (Aug. 19, 1996). See also, Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

5. As Grievant was placed in the coaching position without the position having been properly posted, and his contract was not approved by the board of education, he acquired no right to remain in the position, and the Mingo County Board of Education was not required to give him notice of termination. W. Va. Code § 18A-4-16; See Parker, supra; Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-272 (Aug. 25, 1997); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Boyd v. Mercer County Bd. of Educ., Docket No. 90-27-390 (Sept. 30, 1991); Londeree v. Fayette County Bd. of Educ., Docket No. 90-10-497 (May 31, 1991).

Accordingly, this grievance is **DENIED**.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: July 21, 1998

Footnote: 1

Grievant raised for the first time in his post-hearing written argument, the claim that he had been discriminated against. This argument will not be addressed, as it was not properly raised by Grievant in a manner which would have placed Respondent on notice that this was one of Grievant's claims, so that it could properly respond. Rush v. Bd. of Directors/Fairmont State College, Docket No. 97-BOD-369 (Apr. 3, 1998); Montgomery v. Greenbrier County Bd. of Educ., Docket No. 97- 13-427 (Mar. 18, 1998); Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996).

Footnote: 2

This grievance was filed on or about September 18, 1997. Grievant's supervisor responded on September 22, 1997, that she was without authority to respond to the grievance, and Grievant proceeded to Level II. A Level II hearing was held on October 2, 1997, and the grievance wasdenied at Level II on October 20, 1997. Grievant waived Level III, appealing to Level IV on October 23, 1997. A Level IV hearing was held before the undersigned Administrative Law Judge on February 26, 1998. Grievant was represented by Sidney Fragale and Steve Angel of the West Virginia Federation of Teachers, Respondent was represented by W. C. Totten, and Intervenor was represented by Michael Sparks, Esquire. This grievance became mature for decision on May 1, 1998, upon receipt of the last of the parties' written arguments.

Footnote: 3

In fact, Grievant did not even have a contract for the position until after the statutory time period for notifying employees that their contracts were being terminated.

Footnote: 4

The selection criteria of this same Code Section, however, have been found to not apply to coaching positions. Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993) ("the provisions of Code § 18A-4-7a pertain to the employment of professional personnel to regular positions in the school system, not extracurricular assignments.")

Footnote: 5

Even had the position been posted, Grievant does not dispute that it was to be a volunteer position, and he did not agree to accept the position as a volunteer. See Childers v. Harrison County Bd. of Educ., Docket No. 97-17-175 (Apr. 3, 1998), for a discussion of the effect of a conditional application, restating the proposition that when an employee places

conditions on his application for a posted position, it renders him ineligible for the position, "and not a proper `applicant,'" and as such the employee has no standing to challenge the selection of another employee for the position.