CRAIG HARMON,

Grievant,

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

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Craig Harmon, employed by the Jackson County Board of Education (JCBE or Respondent), as a teacher and varsity basketball coach, was notified by letter dated April 29, 1994, that Superintendent Carroll L. Starts would recommend to JCBE that Grievant's name be placed on the Transfer and Subsequent Assignment List. The purpose of this recommendation was to change his assignment from Teacher, Ripley Middle School, and Varsity Basketball Coach, Ripley High School (RHS), to Teacher, Ripley Middle School, effective the 1994-95 school term. An informal conference was conducted at Grievant's request, by RHS Principal Jack D. Wiseman on May 19, 1994. A response to the informal meeting was dated and hand delivered to Grievant on June 1, 1994. A copy was also sent to Grievant by United States Mail.

A level one grievance was received by JCBE, via United States Mail, on June 17, 1994, and was subsequently denied on the basis of timeliness. Following an evidentiary hearing at level two, the grievance was denied as both untimely, and on the merits. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4, and appeal was made to level four on January 3, 1995. Evidentiary hearings were conducted on August 8, and 9, 1995, and the grievance was denied based upon the conclusion that the level one grievance had not been timely filed. The level four decision was reversed by the Kanawha County Circuit Court, and the matter remanded to theEducation and State Employees Grievance Board for further proceedings on the issue of timeliness, by Order entered June 16, 1997. A hearing was conducted on October 7, 1997, and the grievance became mature for decision with the submission of proposed findings of fact and conclusions of law on or before March 2, 1998. (See footnote 1)

Grievant complains that his transfer was improper because: 1) his immediate supervisor, Mr. Wiseman did not review the observation and evaluation instruments to be used with Grievant prior to

the basketball season; 2) Grievant was not given adequate opportunity to have meaningful input into his improvement plan; 3) Grievant's improvement plan was too short in duration to give him a fair opportunity to improve; 4) Grievant's evaluation was not open and honest; and, 5) Grievant was denied due process when he was not given a meaningful opportunity to be heard by JCBE prior to his transfer.

JCBE argues that Grievant failed to prove a violation of county policy when the principal neglected to review the observation and evaluation instruments with him prior to the basketball season, and that the evaluations were open and honest. Although the improvement period was shorter than those implemented for teaching positions, JCBE asserts that Grievant was given a meaningful opportunity to improve, given the nature of his duties and the deficiencies in his performance. JCBE also argues that Grievant was scheduled a hearing prior to consideration of the recommendation that he be transferred, and waived his right when he did not appear due to the unavailability of his counsel. JCBE suggests that alternative representation could have been obtained, and notes thatrescheduling was not a viable option in light of the statutory deadlines for such personnel matters. JCBE continues to assert that the grievance was not timely filed.

Timeliness

The burden of proving that a grievance was not filed within the timelines set forth in W. Va. Code §18-29-4 is upon the party asserting the grievance was not timely filed, and must be established by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ. Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). JCBE asserts that Grievant had actual receipt of the response from the informal conference when it was hand delivered to him on June 1, 1994, and the level one grievance was not received until June 17, 1994, eleven working days later.

Grievant argues that after he was unable to file the level one grievance by telefax on June 16, 1994, the document was placed in the United States Mail that same date, therefore, he complied with the filing requirements, substantially, if not actually. Respondent argues that the mailbox rule was adopted after the events in this grievance. It also argues that the rule has only been applied to level four filings, and questions the legality of applying the rule to the lower levels of the grievance procedure.

W. Va. Code §18-29-4(a)(3) states “[w]ithin ten days of receipt of the response from the

immediate supervisor following the informal conference, a written grievance may be filed with said supervisor by the grievant or the designated representative on a form furnished by the employer or agent." W. Va. Code §§18-29-1, et seq., does not define "receipt", or "filing". While some administrative procedures specifically state that "filing" shall mean that the agency is in possession of the document, the grievance proceduredoes not include such a provision. This absence would allow the application of a mailbox rule or substantial compliance. Applicability of the mailbox rule at the lower levels was addressed in Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997), in which an intervention at level two was found timely filed when promptly placed in the United States Mail.

Even if it is determined that the filing was not in actual compliance with the statutory provisions, a finding of substantial compliance is possible. Respondent was unable to produce the envelope in which the document was received; however, Grievant's assertion that he placed the grievance in the mail on June 16, 1994, is substantiated by the fact that it was received on June 17, 1994. While the grievance was not in Respondent's possession on June 16, 1994, numerous decisions by the West Virginia Supreme Court of Appeals establish that the procedural requirements of the grievance statute are not to be strictly applied, when such is not necessary to protect the rights of the parties. "In the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with filing provisions contained in W. Va. Code §§ 18A-2-8 and 18-29-1, et seq., is entitled to the requested hearing." Fayette County Bd. of Educ. v. Lilly, 184 W. Va. 688, 403 S.E.2d 431 (1991); Duruttya v. Bd. of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989). In consideration of the foregoing, the grievance is ruled timely filed.

Transfer

Grievant is employed by JCBE as a teacher assigned to Ripley Middle School. Grievant was additionally employed as the head varsity basketball coach for Ripley High School beginning with the 1989-90 school year. By its terms, the extracurricular contract was for a period of one year and expired at the end of the season. Grievant wassubsequently issued contracts for the 1990-91, 1991-92, and 1992-93 school years. At the end of the 1992-93 season Grievant received an unsatisfactory evaluation, and Mr. Wiseman recommended that his employment as coach not be renewed. Superintendent Staats advised Mr. Wiseman that Grievant could not be transferred without having received proper due process, and Grievant was re-employed as a coach for the 1993-94 school year.

Practices for the 1993-94 season began on November 15, 1993. Mr. Wiseman first observed Grievant at a game on December 17, 1993. The second observation was conducted by Mr. Wiseman on February 1, 1994. Subsequent observations were conducted on February 2 and February 4, 1994. Mr. Wiseman did not discuss these observations with Grievant, but produced an evaluation on February 7, 1994. The evaluation reports used by JCBE for extracurricular assignments rates the employees in ten categories:

1. Recognizes relationship of activity to the total school program.
2 Performs assigned directorship within the guidelines provided.
3. Plans and organizes.
4. Shows good leadership ability.
5. Demonstrates a knowledge of the activity.
6. Exhibits skills in the techniques of instruction.
7. Makes effective judgements and decisions.
8. Maintains good rapport with staff.
9. Maintains good public relations.
10. Shows productivity in the activity.

The employee is rated in each of these categories as “Highly effective” (3 points), “Effective” (2 points), “Needs Improvement” (1 point), or “Unsatisfactory” (0 points). Grievant was rated as “Effective” in four categories, and “Needs Improvement” in sixcategories, for a total number of points which placed him in the “Does Not Meet Standards” level of overall performance.

Additionally, Mr. Wiseman included the following narrative:

As exhibited on observations of 12-17-93, 2-1-94, 2-2- 94, and 2-4-94, Mr. Harmon does not exhibit productive technique in instruction and coaching ability in practice sessions which leads to non-productive game situations. During the game situations, Coach Harmon has been unable to make necessary adjustments which would create a positive turn-around in the game situation. Coach Harmon's communication skills with his players are ineffective in both practice and game situations.

This evaluation does not meet standards, therefore, Mr. Harmon is being placed on an Improvement Plan.

An Improvement Plan, developed by Mr. Wiseman, and dated February 8, 1994, was modified after meeting with Grievant and his representative to provide in pertinent part:

EVALUATOR'S STATEMENT OF DEFICIENCY:

1. Practice activities do not relate to game setting.
2. Coaching adjustments during the game are not dictated by game circumstances.
3. Communications to players are not clear during practice or game.

PLAN OF ASSISTANCE OF ACHIEVING IMPROVEMENT:

A. Specific actions to be taken by employee:

1. Organize practices to include activity, length of activity, purpose, demonstration, and practice of activity.
2. Make game adjustments based on game circumstances to cover all aspects of the game.
3. Communications should be clear and concise. (Players should be able to understand what it is that the coach wants them to do as observed by the principal with written examples.)

B. SOURCES OF ASSISTANCE:

Principal Game films

Improvement team

C. TIMELINE:

February 10 through end of season.

MONITORING SYSTEM:

Periodic observations of practice and game by principal with a conference following at a time set by the principal. Final evaluation to be held at end of season.

After some negotiations over who would be appointed to the Improvement Team, a meeting was held with the members on February 15, 1994, to determine their role in this situation. Thereafter, Mr. Wiseman conducted observations of games and/or practices on February 17, 18,19, 21(practice), 21(game),24, 25, 28, and March 1 and 7, 1994.

Grievant's final evaluation, dated March 16, 1994, again indicated that he did not meet standards,

rating him “Effective” in only three categories, and “Needs Improvement” in seven areas. Mr. Wiseman's comments were as follows:

Mr. Harmon's evaluation of 3-12-93 did not meet standards. His evaluation of 2-7-94 did not meet standards. Suggestions for improvement were given to Mr. Harmon during the course of the 1992-93 basketball season, and during the 1993-94 basketball season. Those suggestions were not implemented, therefore, Mr. Harmon was placed on a formal written improvement plan on 2-10-94. There were no improvements reflected through the end of the basketball season. In view of Mr. Harmon's unsatisfactory evaluation of 3-12-93, and the unsatisfactory evaluation received on 2-7-94, and his failure to meet the formal improvement plan, I can not in good conscience recommend that Mr. Harmon return as the head varsity boy's basketball coach at Ripley High School for the 1994-95 school year.

This evidence indicates that Respondent has met the evaluative requirements and provided procedural due process prior to transferring an employee from a coachingposition, consistent with the holdings of Hosaflook v. Nestor, 176 W. Va. 648, 346 S.E.2d 798 (1986), and Smith v. The Bd. of Educ. of the County of Logan, 176 W. Va. 65, 341 SE.2d 685 (1985). However, Grievant asserts that Respondent did not in fact provide him adequate evaluative due process because: 1) Mr. Wiseman failed to discuss the observations with Grievant promptly; 2) the Improvement Team was not properly utilized or trained, and 3) the improvement period was so short that it did not provide Grievant a fair opportunity to improve.

The evidence of record supports each of Grievant's claims. By his own testimony, Mr. Wiseman admits that he did not meet with Grievant following the observations, but only after he completed an evaluation. JCBE Policy GBI/GCI provides that “[t]he supervisor will hold a conference promptly following each observation with a written report given to the employee either before or after the conference.” Mr. Wiseman violated that policy when he failed to confer with Grievant after each observation.

Testimony from the members of the Improvement Team indicates that even after their meeting of February 15, 1994, they were unsure of what was expected of them. While they observed Grievant at practice or games, there is no evidence that they provided him with any specific suggestions or other assistance. Further, Mr. Wiseman indicated that he did not consider any input from the Improvement Team in making his decision to recommend that Grievant not be re-employed as coach. In this case,

the appointment of a team appears to be only a formality completed by Mr. Wiseman, but the members were not utilized to provide assistance either to the employer or the employee.

The parties disagree as to the length of the Improvement Period. The Plan indicates that it began on February 10, 1994. Grievant argues that it did not begin until themeeting with the Improvement Team on February 15, 1994. Both parties agree that the plan ended with the last game of the season on March 1, 1994. Whether the period lasted fifteen or twenty days is irrelevant, because neither was adequate. The West Virginia Supreme Court of Appeals addressed this issue in Wren v. McDowell County Bd. of Educ., 174 W. Va. 484, 327 S.E.2d 464 (1985), determining that a one-month period of time was inadequate for a teacher to show improvement. Respondent makes a valid argument that coaches are employed for a limited period of time during the year, i.e., the season, and that a different time period may be appropriate for those positions. However, it has been held that an entire season is a sufficient period of time for a head coach to show improvement. Hartlieb v. Ohio County Bd. of Educ., Docket No. 93-35-300 (Feb. 24, 1994); Banfi v. Lincoln County Bd. of Educ., Docket No. 93-22-125 (Feb. 28, 1994). The testimony of numerous individuals establishes that the weather was problematic in January and February 1994, causing schools to be closed approximately eleven days. Two of those days, February 10 and 11 fell within the Improvement Period. Grievant testified that he did not conduct practices on days schools were closed because of weather. Mr. Wiseman stated that Grievant could have held practices on those days; however, it seems reasonable that if school is not in session, the athletic programs should also be canceled. Of course, this was the case for games scheduled earlier in the season. Because of numerous cancellations, games were made up in late February, resulting in multiple games being played during the week. These circumstances affected both practice and game schedules and were not conducive to the successful completion of an Improvement Plan.

Because Mr. Wiseman did not determine Grievant's performance to be satisfactoryfor the 1992-93 school year, it raises the question of why he delayed observing, evaluating, and developing an Improvement Plan for Grievant. His explanation that he waited to see if Grievant would show any improvement in the 1993-94 school year is not unreasonable; however, he clearly waited too long and did not provide Grievant an adequate opportunity to improve. (See footnote 2)

In addition to the foregoing narration it is appropriate to make the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant is employed by JCBE as a teacher at Ripley Middle School. He has also held the extracurricular position of varsity basketball coach at Ripley High School since 1989.

2. At the conclusion of the 1992-93 season Principal Jack Wiseman rated Grievant's performance as unsatisfactory.

3. Following observations on December 17, 1993, February 1, 2, and 4, 1994, Mr. Wiseman rated Grievant as “Does Not Meets Standards”, and produced an Improvement Plan to correct his deficiencies.

4. Following a meeting with Grievant and his representative, the Improvement Plan was modified to include an Improvement Team.

5. The effective date of the Improvement Plan was February 10, 1994, although the Improvement Team did not meet until February 15, 1994. The team made no substantive contribution to either Grievant or Mr. Wiseman throughout the duration of thePlan.

6. The Improvement Plan expired with the final game of the season on March 1, 1994.

7. Grievant's final evaluation, dated March 16, 1994, rated him as not meeting standards.

8. Principal Wiseman recommended that Grievant be transferred from the position of head varsity basketball coach at Ripley High School for the 1994-95 school year.

9. At Grievant's request, a hearing was scheduled on April 27, 1994, prior to JCBE's consideration of the recommendation. Neither Grievant nor his counsel attended the meeting which could not be rescheduled within the statutory time frames governing personnel actions.

10. An informal conference was conducted on May 19, 1994.

11. Grievant was provided a written response to the informal conference by hand delivery on June 1, 1994. A copy of the response was also provided to Grievant and his counsel by U.S. Mail.

12. Grievant placed a level one grievance in the mail on June 16, 1994. The document was received by JCBE on June 17, 1994.

Conclusions of Law

1. The burden of proving that a grievance was not filed within the timelines set forth in W. Va. Code §18-29-4 is upon the party asserting the grievance was not timely filed, and must be established by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ. Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood CountyBd. of Educ., Docket No. 95-54-041

(May 18, 1995).

2. W. Va. Code §18-29-4(a)(3) provides "[w]ithin ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor by the grievant or the designated representative on a form furnished by the employer or agent."

3. By placing a level one grievance form in the United States Mail on June 16, 1994, Grievant substantially, if not actually, complied with the statutory timelines which require filing at level one within ten working days of receipt of the response to the informal conference.

4. "In the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with filing provisions contained in W. Va. Code §§ 18A-2-8 and 18- 29-1, et seq.,is entitled to the requested hearing." Fayette County Bd. of Educ. v. Lilly, 184 W. Va. 688, 403 S.E.2d 431 (1991); Duruttya v. Bd. of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989).

5. Grievant has proven by a preponderance of the evidence that Principal Wiseman acted in violation of JCBE Policy GBI/GCI when he failed to hold a conference following any observation conducted during the 1993-94 basketball season.

6. Grievant has proven by a preponderance of the evidence that the improvement period was of such short duration and under unusual circumstances created by the weather, that it did not provide him a fair opportunity to improve.

7. An Administrative Law Judge of the West Virginia Education and State Employees Grievance Board is without authority under W. Va. Code §18-29-8 to award attorney fees at level four. See Snodgrass v. Kanawha County Bd. of Educ., Docket No.97-20-007 (June 30, 1997); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to reinstate Grievant as the varsity basketball coach at Ripley High School, with backpay and benefits. Grievant's remaining requests for relief are **DENIED**.

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.

Date: June 30, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Joseph P. Albright, Jr., Esq.; JCBE was represented by Howard E. Seufer, Jr., Esq.

Footnote: 2

Based upon this conclusion, it is unnecessary to address the remaining issues raised by Grievant.