MICHAEL REED,

Grievant,

v. **Docket No. 99-20-111**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

In accordance with W. Va. Code §§ 18-29-1, et seq., Michael Reed (Grievant) filed this grievance against Respondent Kanawha County Board of Education (KCBE) on January 12, 1999. Grievant alleges KCBE failed to pay him his full salary as Head 9th Grade Football Coach at Nitro High School. Grievant's immediate supervisor was without authority to grant the grievance at Level I, and Grievant proceeded to Level II where an evidentiary hearing was conducted on February 8, 1999. Thereafter, the grievance was denied by the Superintendent's designee, Lisa West, on February 22, 1999. Grievant appealed to Level III where, on March 4, 1999, KCBE waived participation in accordance with W. Va. Code § 18-29-4(c). Grievant appealed to Level IV on March 9, 1999, and an evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on April 20, 1999. Grievant made an oral closing argument, and the parties wereafforded an opportunity to submit post-hearing briefs. This matter became mature for decision on May 4, 1999, the deadline for post-hearing submissions. (See footnote 1)

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at both levels.

FINDINGS OF FACT

1. Grievant is employed by the Kanawha County Board of Education (KCBE) as a teacher at South Charleston High School.

2. Paul McClanahan is employed by KCBE as Principal of Nitro High School (NHS). NHS includes grades 9 through 12.

3. Robert Burdette is employed by KCBE as Head Football Coach at NHS under an extracurricular contract.

4. In the summer of 1998, NHS had a vacancy for a Head 9th Grade Football Coach for the 1998 season. Football practice was scheduled to commence on August 3, 1998.

5. Sometime before August 3, 1998, Grievant approached Coach Burdette and indicated an interest in the 9th grade coaching position. Coach Burdette recommended Grievant's hiring to Principal McClanahan, and Grievant began performing coaching duties on August 3, 1998. 6. The position was subsequently posted. It is not clear if there were any other applicants, but Grievant was informed through Coach Burdette that Principal McClanahan had selected him to fill the position. This selection was never approved by KCBE.

7. Within a week after practice began, it was apparent to Grievant and Coach Burdette that NHS had insufficient 9th grade participants to field a separate football team. The 9th grade athletes were included in the NHS junior varsity team, and Grievant was assigned by Coach Burdette, with Principal McClanahan's concurrence, to coach the junior varsity as an Assistant Football Coach.

8. In prior years, when NHS was unable to field a separate 9th grade team for a full season, the 9th Grade Head Football Coach had been similarly moved to the varsity as an Assistant Football Coach. (See footnote 2)

9. Melanie Vickers is employed by KCBE as Director of Human Resources.

10. In early September, Ms. Vickers received one or more unwritten complaints through the American Federation of Teachers and an unidentified person who said he was a “coach,” that NHS and other four-year high schools in Kanawha County were improperly paying an “extra” coach with county funds.

11. On or about September 29 or 30, 1998, Grievant spoke with Ms. Vickers by telephone, and she advised him that he would not be paid for coaching as NHS did not have a 9th grade football team. L II HT at 27. 12. Grievant worked as an Assistant Coach for all NHS varsity and junior varsity games through the state championship game on December 5, 1998. (See footnote 3)

13. On October 8, 1998, KCBE Deputy Superintendent Joseph T. Godish sent a memorandum to all KCBE Secondary Principals, including Principal McClanahan, stating the following:

> It has been brought to my attention that there are questions regarding ninth grade coaches. I would like to make it clear that any school receiving funds for a ninth grade coach must have a team and a full schedule. This decision was made prior to the opening of our middle schools six years ago.
>
> If at any point there is an insufficient number of students participating, the coach must notify you so that my office can review the situation. If you have any questions, please contact me.

G Ex B at L IV.

14. Prior to receiving Deputy Superintendent Godish's letter, Principal McClanahan had discussed Grievant's employment and compensation with Ms. Vickers and Deputy Superintendent Godish. Principal McClanahan interpreted Deputy Superintendent Godish's correspondence as a definitive response indicating that Grievant could not continue to receive compensation for coaching.

15. Following a conversation between Coach Burdette and Principal McClana han, on October 8, 1998, Coach Burdette informed Grievant that he would probably not be paid for coaching during the remainder of the season. L II HT at 22.

16. KCBE's salary schedule for extracurricular assignments provides that a Senior High 9th Grade Head Football Coach or a Junior High Head Football Coach will bepaid $2,740.80 per season, while a Senior High Assistant Football Coach will be paid $3,661.20 per season.

17. Principal McClanahan did not forward a requisition for employment of Grievant as NHS 9th Grade Head Football Coach until October 16, 1998. G Ex A at L IV.

18. This requisition was not received in KCBE's Personnel Office until November 12, 1998.

19. Sometime after October 16, 1998, KCBE's Personnel Office sent a standard form extracurricular contract to Grievant at South Charleston High School which purports to employ him as an Assistant Football Coach for the 1998-1999 school year at a rate of $3,661.20 for the season. G Ex 2 at L II. Grievant signed and returned the contract on October 28, 1998.

20. The agreement described in Finding of Fact Number 19, above, states on its face that it is “subject to approval by the Board of Education of the County of Kanawha.” G Ex 2 at L II. KCBE's

Superintendent never forwarded Grievant's extracurricular contract to KCBE for action.

21. Despite Grievant's prior conversations with Coach Burdette, Principal McClanahan and Ms. Vickers, Grievant did not inquire as to his status after receiving the extracurricular contract form, and continued working as a football coach at NHS.

22. Beyond the salary schedule covering extracurricular coaching assignments, KCBE has never adopted an official county policy governing payment to a coach at a four- year high school when a season is curtailed due to insufficient player participation. 23. KCBE ultimately paid Grievant $1,761.94, which represents a pro-rated share of $2,740.80, intended to cover Grievant's coaching services from August 3 through October 8, 1998.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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.

W. Va. Code § 18A-4-16 specifies that coaching is among those duties considered to be an extracurricular assignment of educational personnel and as such “shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval,” and shall be contracted separately from the employee's contract of employment. Catron v. Mingo County Bd. of Educ., Docket No. 95- 29-060 (July 11, 1995). See Anderson v. Gilmer County Bd. of Educ., Docket No. 95-11- 197 (Aug. 1, 1995); Miller v. Mason County Bd. of Educ., Docket No. 94-26-1106 (May 15, 1995); Soohy v. Wetzel County Bd. of Educ., Docket No. 32-86-138-2 (Sept. 4, 1986). According to a preponderance of the credible evidence of record, Grievant and KCBE never completed all steps necessary to establish a genuine “mutual” agreement for an extracurricular coaching assignment for the 1998 football season at NHS.

Nonetheless, based upon past practice, Grievant had a reasonable expectation of receiving compensation for performing coaching duties at NHS until late September whenhe spoke with Ms. Vickers and was informed that he was not eligible for compensation because NHS had not fielded a 9th grade team. This determination was reiterated in Deputy Superintendent Godish's memo on October 8, 1998, and conveyed to Grievant by Coach Burdette. KCBE apparently concluded that

equity warranted partially compensating Grievant for his services on a quantum meruit (See footnote 4) basis, and gave him the benefit of the doubt by paying him through October 8, when Grievant should have recognized that he did not have a binding extracurricular contract.

It is understandable that Grievant, being aware of prior 9th grade coaches at NHS being shifted to varsity duties when a separate team was not viable, expected to receive the same benefit. However, Ms. Vickers informed Grievant in late September that he could not be paid to coach if there was no 9th grade team. Moreover, once Grievant was informed by Principal McClanahan through Coach Burdette that Deputy Superintendent Godish was going to enforce KCBE's unofficial policy against paying 9th grade coaches who did not field a 9th grade team, thereby affirming Ms. Vicker's position, Grievant became a volunteer with no reasonable expectation of receiving compensation for his extracurricular work. See Anderson, supra; Vencill v. Kanawha County Bd. of Educ., Docket No. 93-20-196 (May 26, 1994). Because of these prior conversations with Ms. Vickers and Coach Burdette, Grievant was not justified in assuming that the form contract he received from KCBE's Personnel Department represented a reversal of KCBE'sposition. As a minimum, Grievant should have made some effort to verify that the contract would be approved by KCBE.

Grievant also complains that KCBE's decision not to employ him as an additional coach at NHS was inconsistent with past practice, and not supported by a written policy officially adopted by KCBE. In dealing with this issue, it is important to note that county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Further, county boards of education are expected to abide by the policies and regulations they promulgate, even if those rules bestow rights upon employees which are not provided by statute. Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996). See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993).

Nevertheless, in the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994). See e.g., Taylor v. Monongalia County Bd. of Educ., Docket No. 92-30-314 (Nov. 30, 1992); Biller v. Upshur County Bd. of Educ., Docket No. 90-49-533

(Sept. 27, 1991); Napier v. Lincoln County Bd. of Educ., Docket No. 89-23-635 (May 25, 1990); Isaacs v. Lincoln County Bd. of Educ., Docket No. 89-22-555 (Jan. 12, 1990); Terek v. Ohio County Bd. of Educ., Docket No. 35- 87-294-3 (July 20, 1988). A deviation from past practice simply represents one of anumber of factors to be considered when determining if a discretionary decision by the county board or a school administrator is arbitrary and capricious. See Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995).

In determining whether a discretionary decision was "arbitrary and capricious" a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Mar. 22, 1995). In reviewing a county board's exercise of discretion in a personnel decision, the inquiry into the process by which the decision was made must be thorough and searching, but considerable deference must be afforded those conducting it. See Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996). Moreover, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Although reasonable people may differ on whether a 9th grade coach whose team is unable to play a full schedule should be paid for the remainder of the season, or how many assistantcoaches are appropriate for football programs in either three or four-year high schools, the decision to limit NHS to three paid Assistant Football Coaches, and not to compensate Grievant once it was established that there was no separate 9th grade football program at NHS, was not shown to be clearly wrong, or arbitrary and capricious.

Consistent with the foregoing discussion, the following conclusions of law are made 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. Extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval, and shall be contracted separately from the employee's contract of employment. W. Va. Code § 18A-4-16. See Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995); Vencill v. Kanawha County Bd. of Educ., Docket No. 93-20-196 (May 26, 1994).

3. Absent a legal requirement to do so, a board of education is not required to adhere to the same informal personnel practices year after year. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994).

4. Under the facts and circumstances presented by this grievance, after October 8, 1998, Grievant became a volunteer Assistant Football Coach at Nitro High School, withno reasonable expectation that he would be paid for the duties he performed from that point in time through the end of the football season. See Vencill, supra.

5. Although Respondent Kanawha County Board of Education has never formally adopted a policy specifying the circumstances under which an employee should or should not be compensated as an extracurricular coach when the season is curtailed due to insufficient participation or other reasons beyond the control of the employee, it was not clearly wrong or arbitrary and capricious to inform Grievant that he would not be compensated for coaching football as a 9th Grade Head Football Coach, once it was clear that a separate 9th grade team could not be fielded.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 27, 1999

Footnote: 1

Grievant appeared pro se in this matter. KCBE was represented by its General Counsel, James W. Withrow. Neither party filed a post-hearing argument.

Footnote: 2

This practice appears to date back to 1992, when NHS became a 4-year high school.

Footnote: 3

NHS was the West Virginia AAA football champion in 1998.

Footnote: 4

Quantum meruit, literally "as much as he deserved," refers to a class of obligations imposed by law, without regard to intention or formal agreement of the parties, for reasons dictated by reason and justice. See Black's Law Dictionary 1408 (4th Ed. 1968). See also Hussell v. Mason County Bd. of Educ., Docket No. 96-26-073 (July 24, 1996).