INDIA RUSH,

Grievant,

v. **Docket No. 02-20-362**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

India Rush ("Grievant") initiated this proceeding on August 12, 2002. The grievance was denied by Grievant's immediate supervisor on August 19, 2002. A level two hearing was held on September 25, 2002, and October 15, 2002. The grievance was denied at that level on October 30, 2002. Level three proceedings were waived, and Grievant appealed to level four on November 4, 2002. Rather than submit a grievance statement at level four, Grievant, through her counsel, submitted an extensive brief entitled "Closing Statement of Grievant, India D. Rush," arguing she should not have been fired from her position as cheer coach at George Washington High School. She requests reinstatement to the position with back pay and damages. The parties subsequently agreed to submit this grievance for a decision based upon the record developed below, supplemented by fact/law proposals submitted by January 31, 2003. (See footnote 1) Grievant was represented at levels two and four by counsel, Sharon F. Iskra, and Respondent was represented by counsel, James W. Withrow.

The following findings of fact are made based upon a preponderance of theevidence of record.

Findings of Fact

1. Grievant has been employed by the Kanawha County Board of Education ("KCBOE") since 1997 as a special education aide and autism mentor.

2. During the 2000-2001 school year, Grievant was assigned to John Adams Junior High School ("JA"). She also held an extracurricular contract as cheerleading coach at JA, only for the

2000-2001 school year.

3. While working as the cheerleading coach at JA, Grievant received a satisfactory performance evaluation for her coaching, although the principal noted there were “parent communication problems.”

4. Grievant was assigned as an aide and autism mentor at South Charleston Middle School for the 2001-2002 school year. She had no extracurricular duties that school year.

5. During the summer of 2002, KCBOE advertised a vacancy for the extracurricular position of cheerleading coach at George Washington High School (“GW”). Grievant was the only applicant for the position.

6. GW's principal and the superintendent both recommended to the Board that Grievant be hired as GW's cheerleading coach. Prior to the Board's vote on her hiring, Grievant was advised that she would be recommended, and she scheduled cheerleading tryouts to begin during the week of August 6, 2002.

7. Grievant's name was placed on the agenda for the Board's meeting on August 5, 2002, pursuant to the superintendent's recommendation that she be hired as GW's cheerleading coach. 8. At the August 5, 2002, Board meeting, some parents voiced concerns regarding the treatment of their daughters by Grievant as cheerleading coach at JA. One parent who made statements regarding Grievant's alleged mistreatment of the children was Board member Becky Jordan.

9. Grievant attended the August 5 meeting and spoke on her own behalf.

10. Because of the complaints of parents and Board member Jordan, KCBOE voted not to hire Grievant for the GW position, and it was reposted.

11. Grievant continues to be employed by KCBOE as an itinerant autism mentor, and she is currently assigned to Stonewall Jackson Middle School.

Discussion

In a non-disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Although Grievant contends that a disciplinary termination occurred in this case, the evidence simply does not support such a finding. Grievant was never hired for the GW position, so she could not have been terminated. No discipline occurred, so Grievant bears the burden of proof.

Grievant has made no arguments regarding her non-selection, but has framed all her arguments within the context of termination, alleging she was denied the procedural due process to which she was entitled, along with improprieties in the Board's method of “terminating” her coaching position. As discussed above, the evidence in this case is irrefutable--Grievant was simply not hired as cheerleading coach at GW. While it isunfortunate that Grievant was led to believe that her selection for the position was a “done deal,” so to speak, it has been held by this Grievance Board that, without Board approval, any representations made by principals or other school personnel that an applicant has been selected for a particular position would be ultra vires and not binding upon the Board. Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-09 (March 24, 1998); See Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998).

Accordingly, Grievant has the burden of proving that the Board's decision not to hire her was improper, and she has clearly chosen not to make any arguments in that regard. The selection of service personnel for extracurricular positions is governed by the provisions of W. Va. Code § 18A-4-8b, but Grievant has provided no evidence regarding how the Board's decision violated the provisions of that statute. Rather, she has focused upon what she believes to be procedural irregularities with which her alleged “termination” was handled by the Board at the August 5 meeting. W. Va. Code § 18A-4-16 is quite clear in stating that extracurricular contracts are entered into by mutual agreement of the employee and the superintendent, subject to Board approval. That approval did not occur in this case. Because Grievant has argued that she was improperly terminated, and no termination occurred, she has failed to meet her burden of proof.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Prior to formal Board approval, any representations made by principals or other school personnel that an applicant has been selected for a particular position would be ultra vires and not binding upon the Board. Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-09 (March 24, 1998); See Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998).

3. Grievant was not hired as cheerleading coach at George Washington High School, so it would not be possible for her to be terminated from that position. Since no termination occurred, so Grievant has failed to meet her burden of proof.

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.

Date: February 28, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In order to expedite the decision in this case, the grievance was reassigned to the undersigned administrative law judge on February 5, 2003.