LEO G. LAKE,

Grievant,

v. **DOCKET NO. 02-06-370**

CABELL COUNTY BOARD OF EDUCATION,

Respondents.

DECISION

In a grievance filed at Level I on or about September 3, 2002, Leo G. (Jerry) Lake stated: "6-9A-3 On July 16, 2002 [Cabell County Board of Education (CCBOE)] violated Open Meeting Laws by appointing a task force to investigate Huntington High School. This item was not on agenda or declared an emergency as provided by law. 6-6-1 CCBOE neglected duty by the willful waste of public funds[.]" His relief sought was stated as follows: "(1) Invalidate the action of July 16, 2002 to establish the task force. (2) Resind [sic] said action as illegal and unnecessary."

On September 11, 2002, his grievance was denied at Level I, and a Level II grievance hearing was held on October 8, 2002, before Erwin Conrad, Esq., Grievance Evaluator. Mr. Conrad denied the grievance on November 6, 2002. Grievant represented himself, and Respondent was represented by Howard E. Seufer, Jr. Esq. of Bowles Rice McDavid Graff & Love, PLLC. The parties agreed to submit the matter at Level IV for decision based on the foregoing record, and agreed to file their proposed findings of fact and conclusions of law by December 27, 2002, on which date the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Since July 2, 2002, Grievant has been employed by Respondent as Principal of Barboursville Middle School. He had previously worked as Principal at Huntington High School (HHS) for three and a half years.

2. On July 16, 2002, Cabell County Superintendent David Roach presented his recommendation for a replacement principal at HHS to the CCBOE at a regular board meeting. The transfer of Gregory T. Webb from Principal at Enslow Middle School to Principal of HHS was on the agenda.

3. In executive session, the Board decided not to accept the recommendation, but instead agreed to appoint a task force to investigate perceived problems at HHS that had prompted another candidate for the position to decline it.

4. The task force, composed of one Board member, an Assistant Superintendent and three administrative employees, made the required investigation and reported back to the Board within one week. The task force spent three working days on the investigation and report.

DISCUSSION

In this non-disciplinary grievance, Grievant bears the burden of proof. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. However, the facts are largely immaterial to the outcome of this grievance. Grievant has failed to raise a grievable issue, and has asked for relief that would be impossible to grant. Further, he has no standing to file a grievance over these issues, as he has no personal stake in the outcome.

Grievant's first contention is that Respondent's action in appointing a task force to investigate problems at HHS was not on the meeting agenda, in violation of W. Va. Code § 6-9A-3, part of the Open Governmental Proceedings Act, the so-called “Sunshine Law.” More important to the issue at hand is not whether the Board violated the Sunshine Law, but whether the Grievance Procedure may be used to enforce this specific alleged violation of the Sunshine Law by granting relief provided for in the Act itself. West Virginia Code § 6-9A- 6 provides for specific remedies in cases of violations of the Sunshine Law by giving jurisdiction to enforce the article to the circuit court of the county in which the meeting is held, and in doing so, but does not provide for any administrative remedies.

Further, such a violation is not a grievable event as contemplated by W. Va. Code § 18-29-2(a), which defines “grievance” as:

> [A]ny claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a

> misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

In enacting this definition of "grievance," the legislature provided clear guidance as to the purpose of the grievance procedure in W. Va. Code § 18-29-1, which states in part, "The purpose of this article is to provide a procedure for employees of . . . county boards of education . . . and their employer or agents of the employer to reach solutions to problems which arise between them *within the scope of their respective employment relationships* . . ." (Emphasis added.) The facts giving rise to this grievance, whether related to the Board's alleged Sunshine Law violation or to its alleged misuse of public funds, have nothing to do with the employment relationship between Grievant and Respondent.

Further, W. Va. Code § 6-9A-6 provides in part,

> The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made. . . . The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article.

The next section, W. Va. Code § 6-9A-7 provides for criminal penalties that the Grievance Board unquestionably has no jurisdiction to impose. While the Sunshine Law may be construed as a statute under which Grievant works, the same law provides specific remedies for violations. "[A] statute may deal with a number of subjects, treating them all in general terms by making a provision common to all. If, in such case, a new statute selects one of the several subjects, and makes a complete special provision as to it, the intention to substitute that provision for the general law to that extent is equally as obvious and apparent." UMWA v. Kingdon 174 W. Va. 330; 325 S.E.2d 120 (1984), citing Hawkins v. Bare, 63 W. Va. 431; 60 S.E. 391 (1908). The Grievance Procedure covers a wide range of possible topics that may affect an employee, while the Sunshine Law is more specific. "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." UMWA, *supra*. Thus

the specific civil and criminal provisions of W. Va. Code §§ 6-9A-6 and 7 override the general administrative provisions of W. Va. Code § 18- 29-1 *et seq.* as a means of relief for violations of that statute.

Also, while it does provide for civil and criminal actions, the Sunshine Law does not discuss administrative remedies. Another rule of statutory construction, *inclusio unius est exclusio alterius*, (See footnote 1) provides a foundation for the inference that the legislature, by failing toprovide administrative remedies for violations of the law, intended those remedies to be unavailable. Granted, the maxim is not an infallible guide to intent. “Importantly, *expressio unius* is not a rule of law, but merely an aid to construing an otherwise ambiguous statute. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:23, at 315 (6th ed. 2000). And even in this limited capacity courts have frequently admonished that 'the maxim is to be applied with great caution and is recognized as unreliable.' Director, Office of Workers' Compensation Programs v. Bethlehem Mines Corp., 669 F.2d 187, 197 (4th Cir. 1982).” State of W. Va. v. Euman, 210 W. Va. 519; 550 S.E.2d 319 (2001). However, when coupled with the additional inference that may be drawn from the specificity of the Sunshine Law compared to the generality of the Grievance Procedure, the legislative intent is fairly clear. Grievant is requesting that the Grievance Board annul the action of the Board, but the Sunshine Law expressly gives that power to the Circuit Court. The undersigned declines to usurp at the administrative level the power granted to the judicial level.

Grievant also lacks standing because the Board's actions had nothing to do with him personally. The Board ordered an investigation of a school at which Grievant did not work in order to competently make a hiring decision for Grievant's replacement. None of the matters delegated to the Task Force for investigation concerned Grievant or even mentioned him. The Task Force's report did not involve Grievant. Resolving the grievance by granting the relief requested by Grievant would not affect his employment status at all. “A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. [Citations omitted].” Wiley v. Raleigh County Bd. of Educ., Docket No. 01-41-531 (Apr. 3, 2002); Bailey v. Raleigh County Bd. of Educ., Docket No. 02-41-042 (Sep. 16, 2002). Even if Grievant had standing and his grievance were cognizable under the grievance procedure, it could not be granted because the relief he seeks is speculative. It would be the classic case of shutting the barn door after the horse has escaped. The Task force completed its

investigation in three days and presented its final report within a week. Stating that such actions were improper now, six months later, would be merely advisory. "[T]his Grievance Board does not issue advisory opinions." Prickett v. Monongalia County Bd. of Educ., Docket No. 00-30-280 (Nov. 16, 2000).

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 party bearing the burden has not met its burden. Id.

2. A grievance is:

> [A]ny claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

W. Va. Code § 18-29-2(a).

3. The purpose of the grievance process is “to provide a procedure for employees of . . . county boards of education . . . and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employment relationships . . .” W. Va. Code § 18-29-1.

4. “[A] statute may deal with a number of subjects, treating them all in general terms by making a provision common to all. If, in such case, a new statute selects one of the several subjects, and makes a complete special provision as to it, the intention to substitute that provision for the general law to that extent is equally as obvious and apparent.” UMWA v. Kingdon 174 W. Va. 330; 325 S.E.2d 120 (1984), citing Hawkins v. Bare, 63 W. Va. 431; 60 S.E. 391 (1908).

5. “The general rule of statutory construction requires that a specific statute be given

precedence over a general statute relating to the same subject matter where the two cannot be reconciled." UMWA, *supra*.

6. The specific civil and criminal provisions of W. Va. Code §§ 6-9A-6 and 7 override the general administrative provisions of W. Va. Code § 18-29-1 *et seq.* as a means of relief for violations of the Sunshine Law, W. Va. Code § 6-9A-1 *et seq.* West Virginia Code § 6-9A-6 does not empower the Grievance Board to void an action of a Board of Education undertaken in violation of the Sunshine Law.

7. "A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29,1994)." Wiley v. Raleigh County Bd. of Educ., Docket No. 01-41-531 (Apr. 3, 2002); Bailey v. Raleigh County Bd. of Educ., Docket No. 02-41-042(Sep. 16, 2002).

8. Grievant has no standing to pursue this grievance because he has no personal stake in the outcome.

9. "[T]his Grievance Board does not issue advisory opinions." Prickett v. Monongalia County Bd. of Educ., Docket No. 00-30-280 (Nov. 16, 2000). *See* Anderson v. Raleigh County Bd. of Educ., Docket No. 01-41-070 (Sep. 25, 2001); Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: January 21, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The inclusion of one is the exclusion of another.