THOMAS HOFFMAN,

Grievant,

v. **DOCKET NO. 05-29-104**

MINGO COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Thomas Hoffman filed this grievance against his employer, Respondent Mingo County Board of Education, on February 1, 2005, stating, “I was selected as principal of Williamson Middle School but was told I had to resign from a coaching position and to pull my applications to other coaching positions in order to have the job.” His stated relief sought is “WMS principal job and to keep coaching positions.”

The grievance was denied at levels one and two, and Grievant elected to bypass level three. A level four hearing was held in the Grievance Board's Charleston office on May 6, 2005. Grievant represented himself, and Respondent was represented by counsel, Howard Seufer, Esq. The matter became mature for decision on June 3, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

As a preliminary matter, Respondent asserts that this grievance was untimely filed, a claim denied by Mr. Hoffman. Mr. Hoffman's points of contention are that Respondent'spolicy prohibiting Principals from serving as Coaches is in contravention of W. Va. Code § 18A-2-9, and is discriminatory, since Assistant Principals may be coaches.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Mr. Hoffman is an Assistant Principal at Burch Elementary School.
2. In December 2004, Respondent posted a position opening for Principal of Williamson Middle

School (WMS).

3. Mr. Hoffman applied for and was selected to fill the WMS position.

4. At the time of his application, Mr. Hoffman was also the Assistant Girls' Basketball Coach at Matewan High School.

5. Upon being advised that he was selected to fill the WMS position, Mr. Hoffman was also informed that Respondent's Policy No. 814.01 required him to give up his coaching position. This he did, but the next day, January 5, 2005, Mr. Hoffman rescinded his coaching resignation and withdrew his application for the WMS position.

6. On January 6, 2005, Mr. Hoffman was off work on leave in order to accompany his spouse to the hospital for surgery.

7. January 17, 2005, was a school holiday, and school was closed on January 21 and 24 due to the weather.

8. This grievance was initiated on February 1, 2005, when Mr. Hoffman mailed it to Assistant Superintendent Randy Keathley.

9. Respondent's Policy 814.01(6) states, “Principals must not be employed as coaches.” 10. The current Policy provision is a change from prior policy, which prohibited both Principals and Assistant Principals from serving as coaches. The policy was amended in 2002 to address a shortage of candidates for coaching positions.

11. No other Principals are permitted to have coaching positions.

12. Unlike Assistant Principals, Principals are responsible for the overall supervision and management of the school's activities and facilities, and are required to attend all after-hours athletic events at their schools, and to be available for evening activities such as PTO, parent-teacher conferences, practices, civic events, and are always on-call for school emergencies.

Discussion

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. (See footnote 1) The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the most recent occurrence of a continuing practice. (See footnote 2) The time period for filing a grievance ordinarily begins to run

when the employee is unequivocally notified of the decision being challenged. (See footnote 3)

In this case, Grievant was unequivocally notified that he must give up his coaching position in order to accept the WMS Principal position, on January 4, 2005. Fifteen daysfrom that date, given the one holiday and two snow days, was Monday, January 31, 2005. Grievant also claims January 6, 2005, as an extra day because he was at the hospital with his wife, which day falls within the reasons for permissibly extending the time limits contained in W. Va. Code § 18-29-3(a), which incorporates the reasons for personal leave stated in W. Va. Code § 18A-4-10. Grievant also claims the time should begin to run the day he changed his mind about accepting the position and withdrew his application, but that was not a grievable event; that was his decision, not the decision of the employer upon which he bases his grievance. The grievance was mailed by Grievant on Tuesday, February 1, 2005, the sixteenth day. Accordingly, this grievance was filed untimely.

Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. (See footnote 4) Grievant argues that he attempted to initiate this grievance much earlier, on January 12 and again on January 31, by meeting with his Principal, but she had no authority to resolve the complaint and did not know where or how he should file his grievance. West Virginia Code section 18-29-4(a) has this to say about timely initiating a grievance:

> (1).Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
>
> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.
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> (2).The immediate supervisor shall respond to the grievance within ten days of the conference.
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> (3).Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the

office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

At the time these issues arose, Grievant was an Assistant Principal, so his Principal would have been his immediate supervisor. Grievant's testimony that, within the fifteen- day period for initiating his grievance, he broached the subject with her informally, but received an uninformed response was not controverted. Even higher up the management chain, there seems to be some confusion over the proper procedure, as Assistant Superintendent Keathley, to whom Grievant mailed his grievance, scheduled an informal conference then informed Grievant he could file a level one grievance thereafter. However, when Grievant apparently did so, a level two hearing was scheduled, without a level one decision being issued.

What should have happened was, Grievant's immediate supervisor, his Principal, should have met with Grievant to discuss the issue. Since it could not be resolved by her, she should have informed him he could file, within ten days, a level one written grievance *with her,* on which she would then issue a decision. From there, Mr. Hoffman would have five days to file a level two appeal, presumably with Mr. Keathley or the Superintendent.

In any event, Mr. Hoffman raised the matter with his immediate supervisor well within the time frames, and attempted to get his grievance filed in the proper place. But for his supervisor's mistake in not knowing what to do with the matter, the grievance process would have been started on time. A party simply cannot acquiesce to, or be thesource of, an error during proceedings before a tribunal, and then complain of that error at a later date. (See footnote 5) "Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences." (See footnote 6)

Further, "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" (See footnote 7) In the absence of bad faith, substantial compliance is deemed acceptable. (See footnote 8) Grievant's one-day delay in timely filing his grievance is therefore excused by his good-faith attempt to file within the time limits, and by Respondent's mistake in processing the grievance when Grievant properly raised the issue informally with his immediate supervisor.

Based on the merits of Mr. Hoffman's claim, however, this grievance must be denied. Respondent has a properly-enacted policy that it is bound to follow. "County boards of education are bound by

procedures they properly establish to conduct their affairs." (See footnote 9) Mr. Hoffman cites *Holmes v. The Board of Education of Berkeley County, infra,* *(See footnote 10)* as support for his position that Respondent's policy prohibiting Principals from also being Coaches is improper. The pertinent holding in that case, syllabus point two, states, “W. Va. Code § 18A-2-9 (1990) does not prohibit a Principal assigned to a school with a netenrollment equal to or greater than one hundred seventy students from simultaneously holding a coaching position.” However, that case was answering a different question: whether Principals were prohibited by law from being coaches, not whether a school board could impose that restriction by policy. That same case answers the second question in the affirmative: “For this reason, we believe these types of decisions must be made by each county on a case-by-case basis.” (See footnote 11) In this case, Respondent has decided for its own reasons that they may not.

Grievant also argues that the policy is discriminatory, since Assistant Principals, such as himself, are permitted to serve as coaches. Mr. Hoffman in this argument improperly equates Principals and Assistant Principals. “W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'” *(See footnote 12)* “[T]he policy underlying uniformity and discrimination claims under the education statutes is to prevent discrimination against similarly situated education employees regardless of the basis for discrimination. The crux of such claims is that the complainant was treated differently than similarly situated employees[.]” (See footnote 13) In order to establish a claim of discrimination, an employee must establish by a preponderance of the evidence

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee. (See footnote 14)

Here, Respondent has shown that it different treatment of Principals and Assistant Principals is a function of their differing job responsibilities. Principals and Assistant Principals have differing levels of responsibilities after school closes for the day, and Principals have more duties that require

additional work. Principals are required to attend all after-hours athletic events at their schools, and to be available for evening activities such as PTO, parent-teacher conferences, practices, and are always on-call for school emergencies. A Principal who is a coach at a different school than where he serves as head administrator would not be so available, and even if he were coaching at his own school, the responsibilities of each job would likely interfere with the effective execution of both jobs. While an Assistant Principal is also a highly responsible administrative position, the job responsibilities assigned to those positions are not equivalent to a Principal's responsibilities.

Mr. Hoffman has not met his burden of proving that Principals are similarly situated to Assistant Principals, or that the differences in treatment between those positions is not related to their actual job duties. For these reasons, Mr. Hoffman has not met his burden of proving Respondent's policy is discriminatory or otherwise improper, and its application to him cannot be proscribed.

The following conclusions of law support this discussion:

Conclusions of Law

1. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

2. The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. Va. Code § 18-29-4a. *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Seifert*, *supra*. *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

3. A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Rhodes v. Randolph County Bd. of Educ.*, Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-326D (Oct. 14, 1999). *See, e.g., State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996). "Having induced an error, a party in a normal case may not at a later stage of the

trial use the error to set aside its immediate and adverse consequences." *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993). 4. "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). In the absence of bad faith, substantial compliance is deemed acceptable. *Duruttya, supra*; *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999). *See also Deel v. Bureau of Employment Prog.*, Docket No. 00-BEP-256D (Nov. 17, 2000). *Toothman v. Marion County Bd. of Educ.*, Docket No. 05-24-036D (Apr. 15, 2005).

5. Should the employer demonstrate a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991)

6. Grievant's untimely filing of this grievance is excused by his substantial compliance with the required filing procedure and by Respondent's mistake in processing the grievance when the issue was first timely raised.

7. “W. Va. Code § 18A-2-9 (1990) does not prohibit a Principal assigned to a school with a net enrollment equal to or greater than one hundred seventy students from simultaneously holding a coaching position.” However, “these types of decisions must bemade by each county on a case-by-case basis.” *Holmes v. The Bd. of Educ. of Berkeley County, 206 W. Va. 534,539; 526 S.E.2d 310,315 (1999)*.

8. “W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'” *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

9. In order to establish a claim of discrimination, an employee must establish by a preponderance of the evidence

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

10. Respondent did not discriminate against Grievant because the difference in treatment of Principals and Assistant Principals is legitimately based on their actual job responsibilities, and because the positions are not similarly-situated.

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 Mingo 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 tosuch 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.

June 14, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998); Lynch v. W. Va. Div. of Highways, Docket No. 97-DOH-060 (July 16, 1997).

Footnote: 2

W. Va. Code § 18-29-4a. Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002).

Footnote: 3

Seifert, supra.

Footnote: 4

Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997).

Footnote: 5

Rhodes v.Randolph County Bd. of Educ., Docket No. 00-42-133D (2001).

Footnote: 6

Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993).

Footnote: 7

Toothman v. Marion County Bd. of Educ., Docket No. 05-24-036D (2005).

Footnote: 8

Id.

Footnote: 9

Syl. Pt. 2, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

Footnote: 10

An appeal of the Kanawha County Circuit Court's reversal of the level four decision in Holmes v. Berkeley County Bd. of Educ., Docket No. 96-02-070 (1998).

Footnote: 11

Holmes v. The Bd. of Educ. of Berkeley County, 206 W. Va. 534, 539; 526 S.E.2d 310,315 (1999).

Footnote: 12

Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (2001).

Footnote: 13

The Bd. of Educ. of the County of Tyler v. White, __ W. Va. __, 605 S.E.2d 814 (2004).

Footnote: 14

See White, supra; Frymier v. Glenville State College, Docket No. 03-HE-217R (2004).