THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

SHERLENE HIROSKEY,

Grievant,

v. **Docket No. 06-50-060**

WAYNE COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Sherlene Hiroskey, is a retired teacher employed as a substitute in Wayne County. She filed a grievance on June 14, 2005, alleging, "Violation of W. Va. Code §§ 18A-4-7a and 18A-4-16 with regard to the posted position for assistant coach girls softball at Spring Valley High School. Ms. Hiroskey was the most qualified applicant for the posted position." For relief she seeks to be granted the position and any compensation due. Grievant waived Level I. The grievance was denied at Level II, and Grievant bypassed Level III. A Level IV hearing was held at the Grievance Board's Charleston office on May 1, 2006. This case became mature on June 1, 2006, upon the parties' submission of proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant argues she never resigned her position as head coach of the Spring Valley High School girls' softball team when she retired. Yet, she was replaced by her assistant coach. She also asserts she should have been hired as the assistant coach for both the 2005 and the 2006 season.

Respondent asserts Grievant's claims for the position as head coach and assistantcoach for the 2005 season are time barred. Based on a preponderance of the evidence, I find the following material

facts have been proven:

Findings of Fact

1. Grievant was under contract as a teacher with Wayne County for 34 years. In June, 2004, she retired from the Wayne County School system. Since retirement, she has been employed by Respondent as a substitute teacher.

2. Grievant is a certified professional teacher.

3. At the time Grievant retired, she was head coach of the girls' softball team at Spring Valley High School. She did not resigned her position as head coach.

4. The head coaching position was posted for the 2005 season. Stacey Hedrick-Mabry was awarded the position of head coach. Ms. Mabry had been the assistant coach prior to Grievant's retirement.

5. Grievant applied for the head coach position, but did not grieve her non- selection.

6. The position for assistant coach for the 2005 season was posted. Grievant applied for this position, but was not selected. Steve Hall was chosen to fill that position.

7. Mr. Hall resigned during the softball season. The position was not posted again.

8. Jim Hensley (See footnote 1) was appointed assistant coach for the remainder of the 2005 softball season by the Superintendent.

9. Mr. Hensley is employed by the Wayne County Schools as a BuildingConstruction Technology teacher at Spring Valley High School. He has a first class/full- time permit for Career Technical Education with a 7028 "General Building Construction" endorsement.

10. The assistant coach position was posted on May 5, 2005, for the 2006 girls' softball season.

11. Both Grievant and Mr. Hensley applied for that position. (See footnote 2)

12. On June 7, 2005, Respondent hired Mr. Hensley. Grievant filed her grievance on her non-selection of that position on June 14, 2005.

Discussion

This grievance does not challenge a disciplinary action, so 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 Res., 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.*

While the grievance form only grieves non-selection of the assistant coach for 2006, during testimony provided at Levels II and IV, it appeared Grievant was grieving non- selection of head coach and assistant coach for the 2005 season.

I. 2005 Head and Assistant Coach Positions

Grievant retired in June of 2003, and contends she never resigned her coachingposition. After retirement, Grievant continued to be employed by the county as a substitute teacher. The head coach position was posted during the 2004-2005 school year for the 2005 softball season. Grievant applied, but Ms. Hedrick-Mabry was awarded the position. Grievant did not file a grievance concerning her non-selection for the position, but did address this issue in testimony during her current grievance. Respondent asserts this issue is time-barred.

Grievant also claims she should have been awarded the assistant coach position in 2005, and now appears to request back pay for both the 2005 and 2006 season. Once again, Respondent asserts timeliness as a defense.

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* §18-29-4(a)(1). *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). 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).

Clearly, Grievant's claims that she should be awarded the 2005 head coaching and assistant coaching positions are barred by time. Grievant should have filed within the statutorily prescribed time frame. Because she did not, these claims are denied.

II. 2006 Assistant Coach Position

Grievant applied once again for the position of assistant coach for the 2006 softballseason. However, the position was awarded to Mr. Hensley, who is not a certified professional teacher. The key issue to address is if Mr. Hensley should have received the position instead of Grievant who is a

certified professional educator with coaching experience. *W. Va. Code* §18A-3-2a discussed the authority of a state superintendent to issue various certificates. This *Code* Section discusses professional teaching certificates and the requirements for receiving them. Other certificates and permits are covered at *W. Va. Code* § 18A-3-2a(4), which states:

> Other certificates and permits may be issued, subject to the approval of the state board, to persons who do not qualify for the professional or paraprofessional certificate. Such certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation, unless the state board declares certain of these certificates to be the equivalent of the professional certificate.
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> Within the category of other certificates and permits, the state superintendent may issue certificates for persons to serve in the public schools as athletic coaches or other extracurricular activities coaches whose duties may include the supervision of students, subject to the following limitations:
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> (A) Such person shall be employed under a contract with the county board of education which specifies the duties to be performed, which specifies a rate of pay equivalent to the rate of pay for professional educators in the district who accept similar duties as extra duty assignments and which provides for liability insurance associated with the activity: Provided, That such persons shall not be considered employees of the board for salary and benefit purposes other than as specified in the contract;
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> (B) a currently employed **certified professional educator** has not applied for the position; and
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> C) such person completes an orientation program designed and approved in accordance with state board rules which shall be adopted no later than the first day of January, one thousand nine hundred ninety-one.

(All emphasis added).

As clearly stated by this *Code* Section, an individual employed on a teaching permit cannot be considered for a coaching position if a "certified professional educator has applied for the position." *Arrington v. Jackson County Bd. of Educ.*, Docket No. 04-18-365 (April 29, 2005).

Because Grievant is a certified professional educator who is employed by Respondent as a

substitute teacher, and Mr. Hensley is not a certified professional educator, Respondent erred in not selecting her for the position.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so 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 Res.*, 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. Pursuant to *W. Va. Code* § 18A-3-2a(4) the West Virginia State Department of Education may issue teaching permits to those individual who meet the requirement. These "certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation. . . ."

3. An employee possessing a teaching permit cannot receive a coaching position over "a currently employed certified professional educator" who has applied for theposition. *W. Va. Code* § 18A-3-2a.

4. Grievant has met her burden of proof in this matter and shown by a preponderance of the evidence Respondent violated *W. Va. Code* § 18A-3-2a with respect to the 2006 girls' softball season.

Accordingly, this grievance is hereby **GRANTED**, in part. Respondent is directed to place Grievant in the position of assistant coach of the Spring Valley High girls' softball team. Grievant is also entitled to back pay for the 2006 season, along with any interest due. All other portions of this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County. Any such appeal must be filed within thirty 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: July 17, 2006

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1 *Mr. Hensley is Grievant's nephew.*

Footnote: 2 *No evidence was presented to indicate anyone other than Grievant and Mr. Hensley applied for the position.*