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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON-CLERK
KANAWHA COUNTY CIRCUIT COURT

TAMMY MARTIN, DOUG ROW, MARCUS JOHNSON, JOSEPH FERGUSON, NEIL BAKER, STAN FITZWATER, CURTIS BODKINS, JENNIFER SWIFT, CATHERINE WOLFE, CRYSTAL GRAY, JAMIE WRIGHT GREEN, JOSH KITTLE, TINA SHRIVER, DANNY WAGNER, and JOEY KAISER,

Petitioners/Appellants,

v.

CIVIL ACTION NO. 08-AA-132
Judge Paul Zakaib, Jr.

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent/Appellee.

FINAL ORDER AFFIRMING DECISION OF PUBLIC EMPLOYEES GRIEVANCE BOARD

This matter is before the Court for consideration and judicial review pursuant to *W.Va. Code* § 6C-2-5. The Appellants appeal from a final decision of the West Virginia Public Employees Grievance Board ("Grievance Board") dated September 30, 2008, which denied their grievance regarding changes made to their coaching contracts for the 2008-2009 school year.

This Court established a briefing schedule by letter dated December 4, 2008, and the case was submitted to the Court for decision on the written briefs of counsel.

Brief History

The Appellants were all employed as coaches during the 2007-2008 school year with the Barbour County Board of Education ("Appellee"). The Grievance Board decision appealed from held the Appellants failed to establish any basis for the relief sought in their grievance. More

specifically, the decision found the Appellants failed to offer any evidence that the Appellee intended to take action which would predetermine the outcome of any hearing that could be requested by the Appellants regarding the coaching compensation schedule adopted by the Appellee for the 2008-2009 school year.

The Appellants' contracts are issued and signed on an annual basis and are issued in accordance with *W.Va. Code* § 18A-4-16. The Superintendent, in reviewing the 2007-2008 coaching contracts, decided to analyze coaches' pay from seven different counties in the region in an effort to propose a more equitable salary schedule for all coaches. The issue was placed on the Appellee - Board of Education's January 9, 2008, agenda. At the January 9, 2008, meeting, the Appellee voted to approve the compensation plan for coaches proposed by the Superintendent.

Although not required, the Superintendent intended to afford notice of the new compensation plan and the opportunity to request a hearing regarding the same to each employee affected by the change. The Appellants argue that because the Appellee had already voted to adopt the coaching compensation schedule proposed by the Superintendent for the 2008-2009 school year, the outcome of any hearing requested by the Appellants was predetermined by Appellee.

Appellee's Motion to Strike

The Appellee filed a Motion to Strike along with its brief in response to the petition for appeal filed in this case. The Appellee's motion states that the Appellants included many matters in their brief which were not contained within the administrative record. The Appellee requests that the Appellants' brief in support of the petition for appeal be stricken, or in the alternative, that the matters and arguments identified by the Appellee as not part of the administrative record be stricken.

After reviewing the Appellee's motion and the Appellants' response to the same, this Court finds all matters identified in the Appellants' brief which are not supported by the administrative record are **ORDERED** stricken, and the same were not considered by the Court in formulating this opinion and final order.

Court's Conclusions and Orders

After a careful independent review of the record and all assignments of error set forth in the petition for appeal, this Court concludes the Grievance Board's final decision in this case is neither clearly wrong based upon the substantial, reliable and probative evidence of record, nor contrary to applicable law. Additionally, the decision is not arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

Code § 6C-2-5; *Randolph County Bd. Of Educ. v. Scalia,* 182 W.Va. 289, 387 S.E.2d 524 (1989); *Martin v. Randolph County Bd. Of Educ.,* 195 W.Va. 297, 465 S.E.2d 399 (1996).

Therefore, the Court hereby **ORDERS** the final decision of the Grievance Board is affirmed in its entirety and incorporated by reference herein, and this case is **DISMISSED AND STRICKEN** from the docket of the Court. The Court **FURTHER ORDERS** that a certified copy of this Final Order be sent to all parties or counsel of record and to the Grievance Board.

The Court notes the objections and exceptions of all parties aggrieved by the Final Order

Enter this 26th day of August, 2010.

PAUL ZAKAIB, JR., CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 7 DAY OF September 2010
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Attachment 2

DECISION OF THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DATED SEPTEMBER 30, 2008

Tammy Martin, Doug Row, Marcus Johnson, Joseph Ferguson, Neil Baker, Stan Fitzwater, Curtis Bodkins, Jennifer Swift, Catherine Wolfe, Crystal Gray, Jamie Wright Green, Josh Kittle, Tina Shriver, Danny Wagner, and Joey Kaiser,

Grievants

v. Docket No. 2008-1178-CONS

Barbour County Board of Education,

Respondent.

THE PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY MARTIN, et al.
Grievants,

v. Docket No. 2008-1178-CONS

BARBOUR COUNTY
BOARD OF EDUCATION,
Respondent.

DECISION

Grievants[1] were employed as coaches for the 2007-2008 school year. Grievant Martin was also employed as Athletic Director for the school year. They filed this grievance on February 7, 2008, alleging:

> We are members of the coaching staff at various Barbour County Schools. We were denied our due process rights when our coaching contracts were changed by the Barbour County Board of Education.

For relief the Grievants seek "to be afforded proper due process, as required by WV Code, before our contracts are changed."

A Level 1 conference was held on February 26, 2008. Grievants were represented by Mary Snelson, West Virginia Education Association, and Respondent was represented by Gregory Bailey, Esq., Bowles Rice McDavid Graff & Love. The Superintendent's Designee denied the grievance on March 21, 2008, finding that the Respondent intended to notify the Grievants and afford them a hearing on the issue of the change in compensation and that the Grievants had prejudged the outcome of such hearing. The

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[1]Doug Row, Marcus Johnson, Joseph Fergus, Neil Baker, Stan Fitzwater, Curtis Bodkins, Jennifer Swift, Catherine Wolfe, Crystal Gray, Jamie Wright Green, Josh Kittle, Tina Shriver, Danny Wagner, and Joey Kaiser. Sarah Harris was a Grievant at Level 1. Upon her notification that she wished to withdraw her appeal to Level 3, she was dismissed as a party to this action on July 9, 2008.

parties agreed to waive Level 2 mediation, and submit this case to Level 3 on the record below. The case became mature for decision on July 7, 2008.

Synopsis

Grievants assert they are entitled to due process before they are deprived of property and liberty interests by reducing the salary supplement for some of the extracurricular coaching contracts. They assert that because the Respondent voted to accept the coaching compensation schedule proposed by Superintendent Lundeen for the 2008-2009 school year, Respondent has predetermined the outcome of any hearing that may be requested by Grievants on that issue. At the lower level, Grievants asserted this was purely a legal issue and elected to present very limited testimony from Grievant Martin who outlined several issues the Grievants had with the coach compensation schedule which was created and adopted by the Respondents.

Respondent argues that all coaching contracts are issued and signed on an annual basis. Because of this, the Respondent is free to offer contract terms on an annual basis as part of the process in an effort to obtain mutual agreement, and employees are free, on an annual basis, to agree to such terms or forgo performing the extracurricular assignment. No notice or hearing on the issue is required, yet Respondent was going to provide both notice and the opportunity to request a hearing on the issue for those who would be affected. Respondent also asserts that simply voting to accept the new compensation plan does not indicate it has predetermined the outcome of any such hearing on the issue. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact and denies Grievants' claim.

Findings of Fact

1. Grievants were employed by Respondents as coaches, except for Grievant Martin who served not only as coach but also as the Athletic Director, for the 2007-2008 school year.
2. Grievants' contracts were issued in accordance with W.VA. CODE §18A-4-16, which requires the terms of such contracts to be mutually agreed upon by the employee and the county board of education, thereby allowing county boards of education to offer contract terms on an annual basis while allowing employees to either agree to such terms or forgo performing the extracurricular assignment.
3. In reviewing the 2007-2008 coaching contracts, Superintendent Lundeen determined there appeared to be no rational basis for the salaries provided in the contracts.
4. Superintendent Lundeen reviewed and analyzed coaches' pay from seven different counties in the region.
5. Based on her analysis, Superintendent Lundeen derived a calculation matrix to attempt to make the coaches' salaries more equitable. Her proposed compensation schedule reflected an increase of approximately $15,000 in the total amount of compensation to be paid to coaches.
6. The issue of coaches' compensation was placed on the Barbour County Board of Education's January 9, 2008, agenda, which was posted.
7. At the Board meeting on that evening, the Board voted to approve the extracurricular coaching compensation plan established by Superintendent Lundeen.

8. Superintendent Lundeen intended to afford the Grievants notice and a hearing on the issue.

10. There was no testimony by Grievants concerning the effect the new compensation plan would have on their coaching salaries.

Discussion

In nondisciplinary cases, Grievants bear the burden of proof by a preponderance of the evidence. 156 CSR 1 §156-1-3. Grievants in this case presented very limited evidence at the lower level. While it is their burden, no testimony was solicited concerning what impact, if any, the new compensation schedule would have on their individual coaching compensation contracts. In addition, no evidence was presented to indicate Respondent had predetermined the outcome of any potential hearing on the matter.

Grievants assert they are entitled to due process before they are deprived of property and liberty interests, and due process requires a hearing before action is taken to alter or eliminate their jobs. They rely on *Lavendar v. McDowell County Board of Education*, 174 W.Va. 513, 327 S.E.2d 691 (1984), arguing that boards of education are to conduct a "detached and independent hearing on the reasons for a proposed transfer." They go on to assert that if the decision is already made, the employees have been prejudged and the hearing would be meaningless.

Grievants' coaching contracts are issued and executed on an annual basis. The Grievance Board has consistently held that the requirements of W.VA. CODE §18A-2-7 need not be observed in relation to contract terms that are subject to mutual agreement, including even terms that provide for termination without notice and hearing. *See Stephens v. Wayne County Board of Education*, Docket No. 99-50-103 (May 28, 1999).

While county boards of education are required to observe the procedural requirements of *W.Va. Code* §18A-2-7 under certain circumstances in relation to extracurricular contracts, this statute relates to procedures that must be observed in relation to the assignment, promotion, demotion or suspension of school personnel. The termination of a coaching contract, leaving intact the underlying teaching contract, is regarded as a transfer as a result of the alteration of the nature of an employee's responsibilities. *Smith v. Board of Educ.*, 176 W.Va. 65, 341 S.E.2d. 685 (1985).

The present case does involve a transfer, and since the coaching contracts are issued and signed on an annual basis, *W.Va. Code* §18A-4-16 requires that the terms of such contracts be mutually agreed upon by the employee and the county board of education. It follows that county boards of education are free to offer contract terms on an annual basis as part of the process to obtain mutual agreement. Employees are free, on an annual basis, to agree to such terms or forgo performing the extracurricular assignment.

The Grievance Board considered a similar issue in the case *Teter, et al. and Hoover, et al. v. Pendleton County Board of Educ.*, Docket No. 95-38-178/179 (September 4, 1996), affirmed by the Kanawha County Circuit Court, Civil Action No. 96-AA-143 (July 8, 1998). In *Teter*, the Pendleton County Board of Education, faced with financial constraints, voted on December 5, 1994, to approve a coaching compensation schedule that reflected a reduction in compensation for all coaches. The affected employees were notified of the new compensation schedule and afforded a right to a hearing before the Board. The Grievants in that case asserted that the December 5, 1994, vote by the Board to approve the compensation schedule served to prejudge the outcome of the hearing to which they believed they were entitled. The Grievance Board held that because there was

no evidence that the Board intended to determine the outcome of any hearing that may be requested, prejudgement did not occur.

In the present case, no evidence was presented that the Respondents intended to predetermine the outcome of any hearing that may be requested. Superintendent Lundeen testified she intended to notify the parties and allow them an opportunity to request a hearing. Absent any evidence to the contrary, it cannot be assumed the Respondent predetermined the issues. County boards of education have the authority to consider and approve a compensation schedule that will be offered for the performance of extracurricular coaching contracts during the next ensuing school year. Such a course of action does not amount to prejudgement. The Respondents are free to exercise discretion in making decisions upon any hearing requested, including a decision to modify the proposed compensation schedule.

Conclusions of Law

1. In nondisciplinary cases, Grievants bear the burden of proof by a preponderance of the evidence. 156 CSR 1 §156-1-3.
2. The Grievance Board has consistently held that the requirements of W.VA. CODE §18A-2-7 need not be observed in relation to contract terms that are subject to mutual agreement, including even terms that provide for termination without notice and hearing. *See Stephens v. Wayne County Board of Education*, Docket No. 99-50-103 (May 23, 1999).
3. While county boards of education are required to observe the procedural requirements of W.VA. CODE §18A-2-7 under certain circumstances in relation to extracurricular contracts, this statute relates to procedures that must be observed

in relation to the assignment, promotion, demotion or suspension of school personnel.

4. The termination of a coaching contract, leaving intact the underlying teaching contract, is regarded as a transfer as a result of the alteration of the nature of an employee's responsibilities. *Smith v. Board of Educ.*, 176 W.Va. 65, 341 S.E.2d. 685 (1985).

5. W.VA. CODE §18A-4-16 requires that the terms of extracurricular coaching contracts be mutually agreed upon by the employee and the county board of education.

6. Absent evidence that a board of education intended to predetermine the outcome of any hearing that may be requested, prejudgment has not occurred. *Teter, et al. and Hoover, et al. v. Pendleton County Board of Educ.*, Docket No. 95-36-178/179 (September 4, 1996), affirmed by the Kanawha County Circuit Court, Civil Action No. 96-AA-143 (July 8, 1998).

7. County boards of education have the authority to consider and approve a coach compensation schedule that will be offered for the performance of extracurricular coaching contracts during the next ensuing school year. Such course of action does not amount to prejudgment.

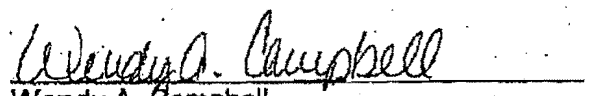
8. Grievants did not meet their burden.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

WHEREFORE, based upon the foregoing, the grievance is **DENIED**.

Date: September 30, 2008



Wendy A. Campbell
Administrative Law Judge

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMMY MARTIN, et al.
Grievants,

v. Docket No. 2008-1178-CONS

BARBOUR COUNTY BOARD OF EDUCATION,
Respondent.

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies the attached **DECISION** has been sent to the following persons and addresses by United States Certified Mail, postage prepaid:

Mary Snelson
WV Education Association
PO Box 1066
Jane Lew, WV 26378

Gregory W. Bailey, Esquire
Bowles, Rice, McDavid, Graff & Love
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Dr. DeEdra Lundeen, Superintendent
Barbour County Schools
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Philippi, WV 26416

By United States Mail, postage prepaid:

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Bellington, WV 26250

Certified sent this the 30th day of September, 2008.

Cricket Powell
Secretary

CERTIFICATE OF SERVICE

I, hereby certify that the foregoing Petition for Appeal of Tammy Martin et al. was served on all parties in this matter by mailing a true copy thereof to their counsel of record in this matter, on December 22, 2010, as follows:

Gregory W. Bailey, Esquire
Bowles, Rice, McDavid, Graff & Love
70000 Hampton Center, Suite K
Morgantown, WV 26505-1720

FILED
2010 DEC 22 AM 10: 53
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Counsel for Petitioners