NO._____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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

v.

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 08-AA-132
Honorable Paul Zakaib, Jr., Judge

PETITION FOR APPEAL

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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KIND OF PROCEEDING AND NATURE OR RULING BELOW

This is an appeal from a final order of the Circuit Court of Kanawha County, entered on August 27, 2010, by the Honorable Paul Zakaib, Jr., Circuit Judge. The Circuit Court affirmed the decision of the West Virginia Public Employees Grievance Board dated September 30, 2008, which denied the grievance filed by the Petitioners. Petitioners contend that the decision of the Grievance Board was contrary to law and inconsistent with at least four decisions of this Court, and that the decision of the Administrative Law Judge was clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

The Petitioners contend that the decision of the Grievance Board is contrary to West Virginia Code §18A-2-7 and §18A-4-16, and is inconsistent with the holdings of this Court in *Smith v. Board of Education*, 176 W.Va. 65, 341 S.E.2d 685 (1985), *Lavender v. McDowell County Board of Education*, 174 W.Va. 513, 327 S.E.2d 691 (1984), *Linger v. Board of Education*, 152 W.Va. 379, 163 S.E.2d 790 (1968), and *Morgan v. Pizzino,* 163 W.Va. 454, 256 S.E.2d 592 (1979). For the reasons set forth below, the final order of the Circuit Court and the decision of the Grievance Board should be reversed.

STATEMENT OF FACTS

The Petitioners are professional employees of the Barbour County Board of Education, who were assigned to various extracurricular coaching positions at Barbour County schools for the 2007-2008 school year pursuant to agreements between the employees and the board of education. In addition to the coaching contracts, Petitioner Tammy Martin was designated as Athletic Director at Philip Barbour High School, as well as serving as head girls basketball coach at that school. She was

paid a supplement of $2500 as basketball coach and $8500 for her duties as athletic director. The other appellants were paid various supplements for other coaching assignments. Those contracts were renewed annually, in accordance with West Virginia Code §18A-4-16.

During the 2007-2008 school year, Superintendent DeEdra Lundeen decided to completely overhaul the existing salaries for all coaching and similar positions. She surveyed pay scales in other counties, and created a schedule of coaching positions and pay supplements for all such positions in the county entitled "Barbour County Schools Coaching Supplement Calculation Matrix." R. 50.[1] The schedule increased some salaries, decreased others, eliminated some positions and created new positions in some sports.

On January 9, 2008, Superintendent Lundeen distributed to the members of the Barbour County Board of Education an agenda for the board meeting scheduled for January 14, 2008. Included as item 26 was a recommendation that the board "approve changes to the schedule of supplemental pay for coaches effective July 1, 2008." Copies of the proposed schedule were attached to the notice. (Notice of Board Meeting, January 9, 2008, R. 53-54).

On January 14, 2008, the board met and considered a number of matters recommended by the superintendent, including item 26, the recommendation that the board approve changes to the schedule of supplemental payments for coaches. The minutes reflect that items 1 through 16 of the agenda were approved. The board then adjourned into executive session to discuss and consider personnel and legal matters at 7:17 p.m. Those matters included the proposed schedule for coaching

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[1]The record provided by the Grievance Board to counsel was in the form of 58 unpaginated double pages. For the convenience of the Circuit Court a paginated copy was submitted by Petitioner's counsel to provide access to specific citations to the record ("R. __").

pay. At 9:17 p.m., the board returned to open session, and a motion to approve agenda items 17 through 30, including item 26, was approved by a 5-0 vote. (Board minutes, page 313, R. 56-58)[2].

At no time prior to the approval of the superintendent's changes did the superintendent discuss those changes with the affected employees, either individually or as a group. At no time was their input solicited by the superintendent or the board. Although some of the employees were present at the board meeting, only brief remarks objecting to the process by their representative, Mary Snelson, and by Tammy Martin, one of the grievants, were permitted. The affected employees were excluded from the executive session.

In addition to the unilateral changes in compensation for coaches, the proposed schedule approved by the board of education contemplated that the position of athletic director would be reassigned to an associate principal and the supplemental pay for that position was reduced from $8500 to $2000. On March 3, 2008, notice of the "proposed" termination of her contract as athletic director was sent to Ms. Martin. On March 4, 2008, Autumn Queen signed a contract to be assigned as associate principal at Philip Barbour High School, incorporating the duties of athletic director previously performed by Ms. Martin. R. 15. The contract was signed by Ms. Queen two weeks before the hearing by the board on Ms. Martin's termination.

The Petitioners filed a grievance on February 7, 2008, objecting that their right to due process was denied by the unilateral changes to their coaching contracts without either negotiations with the affected coaches regarding the changes or going through the transfer process required by West Virginia Code § 18A-4-16 and § 18A-2-7, prior to any decision by the board.

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[2]Pages 311-313 of the Board minutes were missing from the record transmitted by the Board, and counsel provided those pages to the Circuit Court as well. They are clearly part of the record, as discussed below.

A hearing on the grievance at Level 1 was held on February 26, 2008. The Petitioners offered limited testimony, since the issues were primarily legal issues. The Petitioners also voiced concerns at the hearing regarding their objections to certain factors used by the Superintendent in determining pay levels. They pointed out fairness issues regarding some of those factors, including basing pay levels on the number of participating students, participation in state tournaments, and potential liability.

The grievance was denied at level 1. The parties subsequently agreed to waive a level 2 hearing and submitted the grievance to level 3 on the record developed at the level 1 hearing.

The Administrative Law Judge denied the grievance, on the ground that the action of the board did not amount to prejudgment of any subsequent hearing that might be requested by the grievants. *Martin v. Barbour County Board of Education*, Docket No. 2008-1178-CONS (September 30, 2008). That decision was contrary to established law, and any factual findings relied upon by the Administrative Law Judge were clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

The Petitioners appealed that ruling that ruling to the Circuit Court of Kanawha County. The Circuit Court did not address the arguments raised by the Petitioners, but summarily affirmed the Grievance Board decision in a three-page order. The Petitioners now appeal to this Court, and request that the Court reverse the decisions of the Circuit Court and the Grievance Board, for the reasons set forth below.

ARGUMENT

A. The Petitioners Were Entitled to Notice and a Meaningful Hearing Before the Board of Education Prior to the Modification of the Terms and Conditions of Their Coaching Assignments.

This Court has consistently held that school personnel laws and regulations must be strictly construed in favor of the employee. *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979) Syl. pt. 1; *Hedrick v. Board of Education*, 175 W.Va. 148, 332 S.E.2d 109 (1985). Those laws were clearly violated by the procedures employed in this case.

West Virginia Code §18A-2-7 authorizes the superintendent to assign and transfer school personnel, with the approval of the Board of education. However, it further provides that

> . . . an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown.

In *Smith v. Board of Education*, 176 W.Va. 65, 341 S.E.2d 685 (1985), the Court held that school personnel who are in coaching and other extracurricular positions are protected by those provisions. The plaintiff in that case, Lacy Smith, was the head football coach at Logan High School, and was dismissed by the board of education without going through the transfer process mandated by §18A-2-7. The Court held that coaching positions were subject to the same procedural requirements as transfers of any other school personnel.

In addition to finding that the plain language of the statute made no distinction between coaching positions and any other positions, the Court also relied upon interpretations of the State Superintendent of Schools, who had interpreted the statutes to require that the nonrenewal of a coaching position must be considered a transfer subject to the procedural protections of §18A-2-7, and further determined that a failure to follow these procedures "will result in automatic reassignment to the same position for the following year under the same terms and conditions of the current contract." *Smith,* 176 W.Va. 65, 70, *Hosaflook v. Nestor*, 176 W.Va. 648, 346 S.E.2d 798 (1986). Because the board of education failed to follow the procedural requirements of the statute, the Court held that Smith must be reinstated to his position.

In addition, the statutory provision regarding contracts for extracurricular assignments is applicable to the circumstances involved in this grievance. West Virginia Code §18A-4-16, provides:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article.
>
> (2) The employee and the superintendent, or a designated representative, subject to board approval, shall mutually agree upon the maximum number of hours of extracurricular assignment in each school year for each extracurricular assignment.
>
> (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.

> (4) An employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board.

The statute provides that such assignments "shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval," and that the terms of the agreement "shall be in writing and signed by both parties." The intent of the Legislature was obviously to provide that such assignments be negotiated and agreed to between the employee and the board or the superintendent. This language contemplates a meeting of the minds and an agreement. It does not contemplate a "take it or leave it" unilateral ultimatum.

The statute also provides that the employee's primary teaching contract could not be conditioned upon acceptance of extracurricular assignments, and that the procedural rights of employees regarding extracurricular assignments are also protected. This Court in *Smith* held that:

> Nothing in the "separate contract" statute operates to deprive teacher-coaches of their procedural employment rights. The statute's intended purpose was to grant them *additional* protection by mandating that school boards could not assign teachers to coaching duties without their express consent, and more importantly, could not condition their teaching employment upon acceptance or continuation of coaching duties.

Smith, 176 W.Va. at 69, 341 S.E.2d at 688.

Although coaching contracts are renewed annually, modifications to the existing contracts are subject to the rights of the affected employees pursuant to W. Va. Code §§ 18A-2-7 and 18A-4-16. If the superintendent wished to change the terms of those contracts for the following school year by implementing a new schedule for coaching positions and compensation for those positions, she had two alternatives to achieve that result. First, §18A-4-16 contemplates that the superintendent (or other board representative) negotiate with the affected employees regarding the terms and

conditions of contracts for coaching assignments. The statute specifically states that the extracurricular assignments "shall be made only by mutual agreement of the employee and the superintendent" and the employee and the superintendent "shall mutually agree on the upon the maximum hours" of the assignment, and "the terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties. W.Va. Code § 18A-4-16. Superintendent Lundeen should have met with the affected employees, either singly or as a group, and attempted to reach agreement regarding the changes that she was proposing. That process would have included input from the affected employees, who certainly had experience with the responsibilities associated with the various sports and other extra curricular activities. They may have been able to contribute useful knowledge and meritorious suggestions regarding the criteria employed by the superintendent in creating her schedule of positions and salaries.[3]

In the event that an agreement could not be reached satisfactory to the affected employees and the superintendent, then § 18A-2-7 requires the superintendent to go through the transfer process, notifying the affected employees prior to the first Monday in April that she intended to change the terms of their contracts for the following year, and affording the employees an opportunity to request a statement of the reasons and to have a hearing before the board of education prior to the first Monday in May regarding such changes. Moreover, the fair hearing they were entitled to by the board of education was a hearing on the merits of the issue that matters, not one where the decision has already effectively been made. *Lavender v. McDowell County Board of Education*, 174 W.Va. 513, 327 S.E.2d 691 (1985).

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[3]Such a discussion would have been especially valuable since Superintendent Lundeen had only been on the job for 14 months, according to her testimony at the February 26 grievance hearing.

In this case, the superintendent did neither. There was no effort to negotiate or even discuss her proposal with the affected employees. She created the schedule of positions and salaries on her own, with no input from the employees. She then placed her proposal for a revised schedule of coaching positions and pay on the agenda for the board of education's meeting of January 14, 2008, on a few days notice. At the board meeting, any substantive discussion of the proposal was done in executive session, with the affected employees excluded from the room. The board then returned returned to the open session and adopted the proposal, apparently on a single vote approving 14 agenda items which were discussed in executive session.

The Superintendent indisputably took her proposal directly to the board. She testified at the level 1 hearing that as follows:

> G. Bailey — Uh, did you make a recommendation to the board, uh uh, for the, uh approval of this frame work for compensating extracurricular coaches?
>
> D. Lundeen — I did. I asked, uh, I, I provided this to them, uh, I always provide information to the, the Wednesday night they get it Thursday to that they can preview it. I got not one phone call, um, with regard to the matrix, or etc. *And I asked them to look at the proposed coaching supplements and more importantly how the supplements are drawn up. I explained to them that, um, we would be looking at this annually. And that we would be looking at it based on the numbers, so, for example, uh, the information from this year would drive next year's supplement.*
>
> R. 46.

It is clear from the superintendent's own testimony that she had no intention of discussing with the affected employees her plan to completely revise the positions and salaries for coaches and similar personnel. Her action in taking her proposal to the board and successfully obtaining its adoption by the board prior to any sort of notification to the affected employees also demonstrates

that she had no interest in providing the affected employees with any sort of meaningful hearing pursuant to § 18A-2-7. She testified as follows at the grievance hearing:

> G. Bailey: I guess complaints that we've heard is that you did not seek input in terms of establishing salary or compensation formula that you testified about, did you seek input from any of the individual grievants regarding their salaries?
>
> D. Lundeen: I did not.
>
> G. Bailey: And, could you explain the rationale for that?
>
> D. Lundeen: It is, my, my practice to not seek input from individuals with regard to salaries for several reasons. First of all, it could be claimed that because that I spoke to individuals that I was biased or had favoritism, there's usually a general concern when I, when I start to do something like that, so although I seek input for a lot of reasons and this has already been explained. I don't seek input for salary. Another reason as well, if I were to seek input for salary the person that I'm talking to is biased towards himself with regard to his own . . . his or her own circumstances so even if I sought input, I'm not going to get the information that is going to be helpful and helping me makes decisions and finally, it would be inappropriate for a superintendent to put myself in a position to be influenced by what an individual or a group may think about their proposed salaries.
>
> Transcript at 19-20.

The superintendent acknowledged that she was not interested in any discussion of her proposed changes with the affected employees. She simply assumed that the affected employees would just behave like children and whine about their salaries, and she did not wish to be bothered with talking to them. That position does not comply with the statutory mandate to negotiate such agreements, nor with the due process requirements of the transfer process. The superintendent deliberately avoided their input, by first bypassing any negotiations and then by securing adoption of her proposal from the board, creating a *fait accompli*.[4]

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[4]The dictionary definition of the phrase precisely describes this situation: "An accomplished fact; an action which is completed before those affected by it are in a position to query or reverse it."

In fact, the employees had legitimate concerns regarding the fairness of some of the criteria used by the superintendent, as Ms. Martin testified at the grievance hearing, including basing pay without considering differences between sports regarding participation in state tournaments, potential personal liability based on the nature of the sport, and other issues. The intentional refusal to hear their input is inconsistent with the statutory provisions.

This Court's decisions in *Morgan v. Pizzino,* 163 W.Va. 454, 256 S.E.2d 592 (1979), *Lavender v. Board of Education*, *supra*, and *Smith v. Board of Education*, *supra*, are directly on point. In *Morgan*, the Court noted that the actual decision had been made well before the hearing, with letters sent to the employees stating "the Superintendent recommended you for transfer and subsequent reassignment. By a vote of 3 to 0 the Board approved the Superintendent's recommendation." The Court held that

> Code, 18A-2-7 requires that an employee be notified and given a hearing before a decision about their placement on a transfer and reassignment list is made. But the final Board decision was made on March 12, 1979 as evidenced by the March 26th letter and the minutes of the March 12th meeting.
>
> The Board's subsequent notice and hearing did not cure their early approval which did not comply with Code, 18A-2-7. The purpose of Code, 18A-2-7 notice and hearing is to give employees an opportunity to present their position to the Board before their names are listed. If a decision has already been made, and the employees have been prejudged the process is meaningless.
>
> *Morgan v. Pizzino*, 163 W.Va. at 458, 256 S.E.2d at 594-595.

The superintendent in *Lavender* also took the proposed transfer to the board of education before affording the employee notice of his proposed action and providing him with an opportunity to have a hearing before the board. Although the board's action was characterized as tentative, the Court found that the statute was violated:

> It appears from the statute that the legislature intended for the county board of education to conduct a detached and independent hearing on the reasons for a proposed transfer. *We also believe that due process requires that such a hearing be conducted only after due notice to the employee and in such a manner as to guarantee that the employee has an opportunity to present his position to the board.*
>
> In the case presently before us, the Superintendent of Schools in McDowell County failed to follow the procedure outlined in W.Va. Code, 18A-2-7. He took his case to the Board of Education on March 11, 1983, before notifying the appellant of the contemplated transfer and before affording the appellant his right to demand a hearing on the proposed transfer.
>
> The tentative approval process followed by the Superintendent not only failed to comply with the requirements of W.Va. Code, 18A-2-7, but it invited prejudgment of the appellant's case before the appellant was entitled to present his side of the case, a point which we condemned in *Morgan*. The statute requires that a superintendent not submit an employee's name for proposed transfer or other action to the board of education, *or discuss such actions with the board*, until after the superintendent has notified the employee directly and has afforded him an opportunity to request a hearing before the board. Such a procedure is consistent with the concept that the board is to make a detached and independent evaluation of the employee's case.
>
> Because the appellant was not notified and given the rights outlined in W.Va.Code, 18A-2-7, before his proposed transfer was taken before the McDowell County Board of Education, we conclude that the Circuit Court of McDowell County erred in refusing to grant the appellant the writ which he sought.
>
> *Lavender*, 174 W.Va. at 516-517, 327 S.E.2d at 694.

In *Smith v. Board of Education*, the board, on its own, removed the head football coach, without any action by the superintendent, and no hearing was offered, before or after the board's action. The Court followed *Morgan* and *Lavender*, holding that subsequent notice and hearing would not cure a premature decision.

The Court reached the same conclusion in 1968 in *Linger v. Board of Education*, 152 W.Va. 379, 163 S.E.2d 790 (1968). In that case, the superintendent submitted a list which would transfer two principals to different schools, and a motion was made and passed "to employ, transfer or

assign" the two as principals to other schools and letters were sent stating that they "had been employed and placed as principal" at the new schools. The Court held that the statute was violated:

> It was mandatory upon the superintendent of schools to furnish in writing to the board at that meeting or some meeting prior to 'the first Monday in May' a list of those teachers to be 'considered for transfer and subsequent assignment for the next ensuing school year;'. From the facts hereinabove stated, taken from the stipulation, it will be noted that that procedure was not followed as to these petitioners. *Whatever recommendation was made to the board at the March 19 meeting, what the board did was 'to employ, transfer, or assign' the petitioners and each was then informed that the board had 'employed' each of them as principal of a different school.* The first notice these petitioners had of a change in their places of employment was in language of the past tense. *They were informed that they had been 'transferred' or 'employed' or 'placed'-not that they would prospectively be 'considered' for such.*
>
> *It is the opinion of this Court that such action is clearly contrary to the plain provisions of the section*

152 W.Va. at 383-384, 163 S.E.2d at 792-793. (Emphasis added).

The decisions in *Morgan*, *Lavender*, *Linger*, and *Smith* make it clear that in a transfer situation, whether it involves a transfer to a different location, a different coaching position, reassignment of a position to another employee, or a change in the terms and conditions of an assignment, the statute is violated if the board of education approves the transfer or change before the notice of the proposed transfer is given and the employee is provided a hearing before the board. A hearing after the decision does not cure the problem. "If a decision has already been made, and the employees have been prejudged the process is meaningless." *Morgan*, 163 W.Va. at 458, *Lavender*, 174 W.Va. at 516, *Smith*, 176 W.Va. at 71.

Indeed, the Court in *Lavender* held that even if the decision is characterized as "tentatively approved" by the board, it would be a violation of the procedural protections of §18A-2-7:

> It appears from the statute that the legislature intended for the county board of education to conduct a detached and independent hearing on the reasons for a

> proposed transfer. *We also believe that due process requires that such a hearing be conducted only after due notice to the employee and in such a manner as to guarantee that the employee has an opportunity to present his position to the board.* As we stated in Morgan v. Pizzino, 163 W.Va. at 458, 256 S.E.2d at 595,"[i]f a decision has already been made, and the employees have been prejudged the process is meaningless."
>
> *Lavender*, 174 W.Va. at 516, 327 S.E.2d at 694.

The Court also criticized the fact that the board apparently heard an ex parte exposition of the superintendent's reasons for requesting a transfer:

> The fact that the McDowell County Board of Education on March 11, 1983, tentatively approved the appellant's transfer suggests that the Board on that date heard an *ex parte* exposition of the Superintendent's reasons for requesting a transfer.
>
> *Lavender*, 174 W.Va. at 517, 327 S.E.2d at 694, n.6

The Grievance Board has generally followed *Lavender* and the other cases. In *Crouse v. Morgan County Board of Education*, Docket No. 89-32-468 (March 29, 1990), the Administrative Law Judge found that the superintendent presented a list of transfers to the board, which the board approved, prior to giving notice to the affected employees and granted the grievance. See, also, *Dotson v. Berkley Board of Education*, Docket No. 90-02-404 (March 26, 1991).

In this case, Superintendent Lundeen took her proposed revised salary schedule to the board without any notice to the affected employees or any opportunity for a hearing. She made an *ex parte* presentation of her reasons for the proposal to the board, in executive session with the employees excluded, and the board approved the proposal as demonstrated by the board's minutes. This was clearly a final decision, not even a "tentative approval" as in *Lavender*, and clearly violated the procedural requirements of § 18A-2-7. Moreover, by the superintendent's own testimony, this

procedure was intentional, premeditated, and deliberately designed to shut the affected employees out of the process until the decision was made by the board.

The same is true of the termination of grievant Tammy Martin's assignment as athletic director at Philip Barbour High School. The superintendent went to the board of education and obtained approval of the reorganization of coaching positions and salaries, including assigning to the athletic directors functions to an associate principal. The recipient of the position, Ms. Queen, signed a contract for the position on March 4, 2008, the day after the notice was mailed to Ms. Martin (March 3) and two weeks before Ms. Martin was offered a hearing before the board.[5] The letters to Ms. Martin notifying her of the proposed transfer and reassignment emphasizes the finality of the board's action, specifically stating that "the reason for the transfer is that your extra-curricular position(s) will be modified to follow the board approved coaches supplement."

In light of the precedents of this Court and the particular circumstances of this situation, the finding of the Administrative Law Judge that there was no prejudgment in this case is indefensible. The decision of the Administrative Law Judge was clearly contrary to this Court' rulings discussed above. If those decisions mean anything, they mean that the mere assertion that the board might change its mind if employees are given hearings after the fact is not sufficient to cure the violation.

The employees were entitled to a fair opportunity to object to a proposed action before the decision was made, and to make that objection before an impartial board of education which has not already decided the matter at issue or discussed it *ex parte* with the superintendent. The chance that the board of education would unravel the superintendent's new schedule after it had already been

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[5]Copies of the letters were submitted to the Circuit Court with a request that they be included in the record, since they relate to the same incident, but had not yet been written at the time of the level 1 hearing.

implemented was exactly nil. Prejudgment is based upon objective facts, not the assertion that the board has a hypothetical open mind on an issue which the board has already decided. If all that is required to meet the procedural requirements is an assertion that the board could be fair at a subsequent hearing, notwithstanding its prior approval of the action, then the statutory requirements are meaningless. No grievant can ever prove or disprove the state of mind of a board member. The standard established by this Court is an objective one. The matter has been prejudged whenever the board has approved, even tentatively, the action in question, or whenever the superintendent has *ex parte* discussed the issue with the board, prior to providing the hearing required by § 18A-2-7. That is what happened here.

The Grievance Board decisions cited by the Administrative Law Judge in support of her ruling are clearly distinguishable. The grievance decision in *Teter & Hoover v. Pendleton County Board of Education*, Docket Nos. 95-36-178/179 (September 4, 1996) was based upon the specific facts of that case, which involved the elimination of certain supplemental pay in the context of a $250,000 deficit. There was a dispute over whether or the board had approved salary reductions at an earlier date, and the ALJ simply determined that it was not proven that they had done so, and therefore that prejudgment of the issue was not proven. That is clearly not the case here. The board minutes unambiguously state that the proposal was approved.

Stephens & Raines v. Wayne County Board of Education, Docket No. 99-50-103 (May 28, 1999) is cited for the proposition 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. The terms of a contract for coaching or other extracurricular positions, including the salary for the position, are clearly subject to the procedural requirements of the statute if they are to be changed for the following year.

The *Stephens* decision involved a bus driver where the mutually agreed contract contained a specific trigger which granted the board the right to terminate the contract *during its term* if the particular need for the assignment no longer existed or if funding was no longer available. Such conditions, if they are part of the contract, are valid. No such provisions are involved in the situation in this case.

The Respondent's argument that the Petitioners suffered no harm by the change is simply not the case. Certainly Ms. Martin was adversely affected, and the coaching schedules were changed by the plan recommended by the superintendent and approved by the Board on January 14. The Appellants were not simply arguing about the changes in the pay scale, but had concerns about the fairness of the system devised by the superintendent for determining the pay scale, including coach to student ratios, differences between sports, potential liability as a criterion, and other factors included in the plan. (R. 42). The procedure followed by the Superintendent and the Board, approving the new plan prior to the process required by § 18A-2-7, deprived the Appellants of the opportunity to address those concerns to a board of education which had not already made the decision. A change in the terms and conditions of a coaching contract which is not agreed to by the affected teacher triggers the due process obligations of §18A-2-7.

The Respondent has not argued that the board did not approve the compensation plan on January 14, nor that the board's decision did not predate by weeks the notice and opportunity for a hearing. Rather, the Respondent argued that the board's action did not "prejudge" the matter, and that notice and hearing *after* the fact was sufficient to meet the requirements of § 18A-2-7, apparently on the basis that there was a chance that the board might change its mind.

The Respondent has defined the issue as whether the board's action prejudged the issue. The problem with that argument is that this Court has previously held that the procedure of § 18A-2-7 contemplates a hearing before the board before the decision is made by the board, and has ruled that notice and an opportunity for a hearing after the decision has already been made does not meet the requirements of the statute:

> The Board's subsequent notice and hearing did not cure their early approval which did not comply with Code, 18A-2-7. The purpose of Code, 18A-2-7 notice and hearing is to give employees an opportunity to present their position to the Board before their names are listed. If a decision has already been made, and the employees have been prejudged the process is meaningless.

Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979), *Lavender v. McDowell County Board of Education*, 174 W.Va. 513, 327 S.E.2d 691 (1985), and *Smith v. Board of Education*, 176 W.Va. 65, 69, 341 S.E.2d 685, 688 (1985).

Regardless of the merits of the superintendent's proposal, the failure to comply with West Virginia Code § 18A-2-7 deprived the Appellants of the opportunity to have a hearing before the board prior to the Board's approval of the changes. The fact that they have a choice under §18A-4-16 to "take it or leave it" after the changes have been approved by the board does not cure the violation of § 18A-2-7. They had a right to be heard before the changes were approved and they were intentionally deprived of that right by the procedure followed in this case.

B. The Evidence Objected to by the Respondents Was Properly Part of the Record.

The Respondents' counsel moved to strike certain matters and arguments in the brief of the Petitioners before the Circuit Court as outside the scope of the record. Petitioners filed a reply brief

responding to that motion. The Circuit Court ordered stricken all matters in the Appellant's brief which were not supported by the administrative record, without specifying what those matters were, and further stated that those matters, whatever they were, were not considered in the Circuit Court's decision.

The Petitioners contend that the facts upon which the Petitioners rely are clearly not only supported by the record but, as to the principal arguments, were essentially undisputed.

Much of the Respondent's argument below dealt with the circumstances of Tammy Martin's removal as athletic director as part of the superintendent's revision of coaching positions and salaries.

The Grievants' representative, Mary Snelson, submitted two additional documents at level 4 of the grievance procedure along with the Grievants' proposed findings. The first was a document titled "Extra Curricular Duty Assignment" signed by Ms. Martin and the President and Secretary of the Board of Education, indicating that Ms. Martin was, for the 2007-2008 school year assigned as head girls basketball coach at Philip Barbour High School at a salary of $2500, and also assigned as Athletic Director at Philip Barbour High School at a salary of $8500.

The second document is a contract for extracurricular signed by Autumn Queen, indicating that she was being placed in the position of "Full time Associate Principal including Athletic Director Duties at Philip Barbour High School" dated March 4, 2008 and apparently approved by the Board March 31, 2008. R.50. Although the Respondent's counsel argued that the Queen contract was irrelevant, there was no objection or motion to strike either document from the record. They are a part of the record argued by Appellant's representative, considered by the Administrative Law Judge, prepared by the Grievance Board and forwarded to the Court. (R. 15).

Ms. Snelson's proposed findings also clearly pointed out the significance of those documents. They indicate that Ms. Queen signed a contract in which she assumed Ms. Martin's duties as athletic director on March 4, fifteen days before the transfer hearing Ms. Martin received (March 19).

In addition, Ms. Snelson pointed out that the Board of Education in its meeting of January 14, 2008, in which it approved the superintendent's salary schedule for coaching positions, approved the reduction in the salary of the Athletic Director at Philip Barbour High School from $8,500 to $2,000, more than two months before she was afforded a hearing on those actions. (Board Minutes, January 14, 2008, p. 311).[6] (Grievants' Proposed Findings, R. 13, ¶¶ 8-10). The reduction in the salary of athletic director, the removal of Ms. Martin from that post, and the reassignment of her duties to Ms. Queen were part and parcel of the Superintendent's reorganization of coaching salaries and positions, and were clearly actions which required a transfer notice and hearing pursuant to West Virginia Code § 18A-2-7. The issues were raised before the Grievance Board and were properly part of the grievance. Indeed, Ms. Martin was the lead Grievant.

Ms. Martin's compensation as Athletic Director was stated in the documents submitted by Ms. Snelson at Level IV. The Minutes of the Board Meeting of January 14, 2008, also demonstrate

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[6]The record prepared by the Grievance Board included two documents submitted by the Respondent at the Level I hearing: R-1, which is the Agenda (dated January 9, 2008) for the Board of Education's meeting for January 14, 2008 (R. 53), and R-2, which is the official Board minutes of the January 14 meeting. (R. 56). The record transmitted to counsel by the Board includes only pages 308-310 of the minute book, with the missing pages apparently going through the scanner behind other pages. The full document contained pages 308-314, plus an attachment. It is clear from the testimony at the hearing that the full document was submitted, since both the witnesses and counsel testified or referred to the missing pages. See, for example, testimony of Superintendent Lundeen (R. 46) where she is shown and is reading the Board minutes, referring to the vote of the Board on her proposal, which appears at page 313 of the minutes. A copy of the complete Board minutes document was provided to the Circuit Court.

that the Board approved the Superintendent's reduction in the salary of the athletic director position from $8500 to $2000. (Board minutes, p. 311, 313).

The written Level One Grievance clearly states the nature of the grievance and the relief requested. The grievance was filed on February 7, 2008, after the Board of Education had approved the Superintendent's proposal to modify coaching salaries. The Grievance states:

> 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.
>
> The relief we are seeking is to be afforded proper due process as required by W.Va. Code, before our contracts are changed. (Emphasis added).
>
> R. 27.

This is a quite adequate complaint that their rights under West Virginia Code §18A-2-7 had been violated. The remedy for a violation of that statute has been clearly stated by this Court – the failure to follow the procedures of the statute "will result in automatic assignment to the same position under the same terms and conditions of the current contract." *Smith v. Logan County Board of Education*, 176 W.Va. 65, 70, 341 S.E.2d 685 (1985).

Superintendent Lundeen testified at some extent on the factors she was using in revising the salary schedule for coaching positions. That schedule included various factors such as student participation, state tournament participation, potential liability, all of which may be subject to change, with assistant coaches paid certain percentages of the pay of head coaches. Ms. Lundeen testified that there were inconsistencies in coaching salaries and that the purpose of her changes was to create a formula to make salaries more consistent. She also testified the Administrative Law Judge made a finding that the Superintendent's proposed revisions of coaching salaries reflected an

overall increase of $15,000 in coaches compensation. The Board of Education's minutes for the January 14, 2008 meeting state that the motion on the table was to "approve changes to the schedule of supplemental pay for coaches effective July 1, 2008." Since there was an additional $15,000 allocated and the purpose was to make salaries more consistent, it is a reasonable inference that some salaries were increased (perhaps most) and some were decreased.[7] The salary of the Athletic Director at Philip Barbour was clearly reduced from $8500 to $2000, as reflected in the Board minutes (p. 311).

The factual asserts in the brief to the Circuit Court and this Petition for Appeal are clearly supported by the record, and the Respondent's motion to strike should have been denied.

CONCLUSION

For the reasons discussed above, the decision of the Administrative Law Judge, affirmed by the Circuit Court, was plainly contrary to the decisions of this Court in *Morgan*, *Lavender*, *Linger*, and *Smith*. The facts are essentially undisputed. The Board approved the proposal weeks before a hearing was afforded to the affected employees. The issue was clearly prejudged, and the granting of a hearing after the fact does not cure the violation.

The decision of the Circuit Court, affirming the decision of Grievance Board should be reversed, and the grievance should be upheld. The board should be required to reimburse all grievants whose salaries were reduced for the 2008-2009 school year, and Ms. Martin should be reinstated to her position as athletic director with reimbursement of her lost salary.

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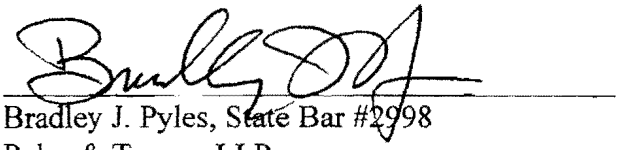
[7]Superintendent Lundeen testified at the Level I hearing that "Yes, I'm actually trying to give everybody a raise . . . *for the most part*." (Emphasis added).

TAMMY MARTIN, et al.
Petitioners



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EXHIBITS

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