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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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,

Appellants,

v. No. 101632

BARBOUR COUNTY BOARD OF EDUCATION,

Appellee.

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

REPLY BRIEF OF APPELLANTS

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The Appellants ("Teachers") submit this Reply to the Response of the Barbour County Board of Education ("Board").

The Board in its Response contends that certain documents should not be in the record. In particular, the Board objects to the two documents submitted to the Grievance Board with the proposed findings, and argues that there is insufficient evidence in the record support the Teachers' complaint. These arguments were addressed in the Petition for Appeal, at 18-22. However, it should be pointed out that the issue involved here is almost entirely legal.

The Superintendent took her proposal to change coaching salaries to the Board of Education on January 14, 2008, and the Board approved the proposal. She did without neither seeking an agreement with the affected employees, nor invoking the transfer statute, West Virginia Code § 18A-2-7, which would have allowed the affected employees object and present their views *before the decision was made by the Board.*

The Appellants' grievance was clearly a procedural one. The original grievance stated:

> We are members of the coaching staff at various Barbour County schools. We were denied our due process when our coaching 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.

A level 1 hearing on the grievance was held on February 26, 2008, testimony was taken to develop the basic facts, and the grievance was denied by the Superintendent's designee on March 21, 2008. The parties agreed to submit the record of the level one hearing and briefs. The Teachers' representative, Mary Snellson, also submitted two documents, Ms. Martin's existing extracurricular contract and Autumn Queen's agreement to be reassigned to the athletic director position, with a note

that the reassignment had been approved by the Board on March 31, 2008.

The latter document did not exist at the time of the level 1 hearing on February 26, 2008, but it was certainly relevant to the issue as to whether the matter of the coaching salary schedule prejudged. It was submitted to the Grievance Board, and was not objected to by the Appellee.

I.

The Facts the Teachers Relied Upon In Support of Their Claim Were Essentially Undisputed.

The Board argues that the Circuit's Court decision should be affirmed because the Teachers failed to offer any evidence to support their claims, and therefore the Administrative Law Judge is entitled to deference as findings of fact upon conflicting evidence. The problem with that argument is that there is virtually no dispute about the facts, and the Teachers agree with almost all of the 10 findings of fact. The ALJ acknowledged that the Grievants were coaches, subject to West Virginia Code § 18A-4-16. She found that the Superintendent devised a new salary schedule and went to the Board of Education, which approved it. These are the salient facts. The ALJ also found that "Superintendent Lundeed *intended* to afford the Grievants notice and a hearing" (sometime after the Board's action). However, where the decision is already made, notice and a hearing after the fact is insufficient to remedy the failure.

Neither do the Teachers quarrel with most of the ALJ's conclusions of law. She acknowledges that county boards are required to observe the procedural requirements of West Virginia Code § 18A-2-7, that the termination of a coaching contract is regarded as transfer, and that the terms and conditions of the positions are subject to § 18A-4-16, requiring that they be "mutually agreed upon." However, the ALJ's Conclusions 6 and 7 are clearly erroneous as a matter of law.

As to Conclusion 6, the Grievance Board cases cited in support are clearly distinguishable, and under the circumstances of this case, inconsistent with this Court's precedents 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). See, Petitioner for Appeal at 16-17.

The ALJ's conclusion that a board of education can change the compensation schedule for extracurricular activities for numerous teachers and "such a course of action does not amount to prejudgment" is also erroneous. If the Superintendent goes to the Board, as she did in this case, and the Board approves the changes without the consent of the affected employees, or the due process required by West Virginia Code § 18A-2-7, then it has been prejudged. That is certainly what happened in this case.

II

The Appellees Were Entitled to Due Process Regarding The Terms and Conditions of Their Employment

The Board's argument that the procedural right to a hearing does not apply to the terms of the employment overlooks that fact that although coaches and other extracurricular positions may sign a one year contract each year, their positions are not re-bid each year. Once a teacher is awarded a position, he or she remains in that position until he or she leaves it by resignation, transfer, discharge, or move to another position. They have a continuing interest in that position which is protected by statute. This Court held in *Smith v. Board of Education, supra*, that the enactment of West Virginia Code § 18A-4-16, requiring that extracurricular assignments "shall be made only by

mutual agreement" was not intended to abrogate the procedural rights of West Virginia Code § 18A-2-7. 176 W.Va. 68-69, 341 S.E.2d 88-90.

Morever, Policy 5300 of the West Virginia Board of Education provides that:

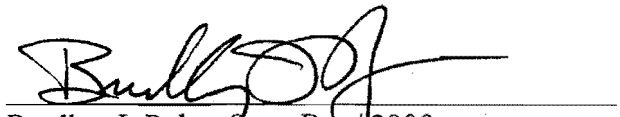
> 2.2. Employees of boards of education share the responsibility for putting into effect the policies and practices approved by boards of education and such employees have certain rights and responsibilities as provided in statute, in contract or in accepted practices.
>
> 2.7. Every employee is entitled to "due process" *in matters affecting his/her employment, transfer, demotion or promotion.*

The Board's argument is that the procedural rights do not apply to the terms and conditions, and therefore since the Board could theoretically make a "take it or leave" ultimatum regarding the terms and conditions of their coaching assignments each year, and thus no harm was done by action of the Superintendent in this case. That proposition is not consistent with the statutory provisions, particularly § 18A-4-16, which certainly contemplates a mutual agreement, and § 18A-2-7, which provides a procedural right to be heard where there is a transfer or other change in job assignments.

Providing due process when there is a significant change the terms and conditions of their employment is not a significant burden in the circumstances of this case. The Superintendent was proposing a substantial change in the method of compensating coaches. There should have been an effort to reach a mutual agreement regarding the proposed compensation plan, and barring that the Teachers should have been afforded the protections of § 18A-2-7, and should have been granted an opportunity to present their concerns to the Board of Education *before* the decision was made. They were intentionally shut out of the process when the Superintendent went to the Board and obtained approval of the plan, before any due process was provided by the Superintendent and the Board. This Court has held that once that occurred, offering a hearing after the fact is not sufficient.

For the reasons set forth in the Petition For Appeal and this Reply, Appellents requests to the Court to reverse the decision of the Circuit Court.

TAMMY MARTIN, et al.
Petitioners



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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 June 15, 2011.

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