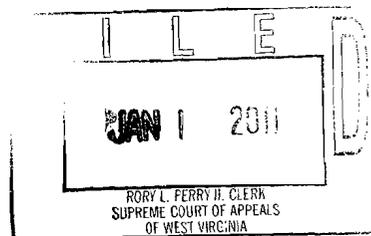


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. *101632*



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

v.

Circuit Court of Kanawha County
Civil Action No. 08-AA-132

BARBOUR COUNTY BOARD OF
EDUCATION,
Respondent.

RESPONSE TO PETITION FOR APPEAL

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Board of Education

STATEMENT OF FACTS

The Circuit Court granted Respondent's motion to strike those matters contained in the brief filed by the Petitioners that were not supported by the administrative record. Final Order, entered August 27, 2010. Petitioners persist in making reference to matters not supported in the administrative record. Among these: the record contains nothing regarding Petitioner Martin's assignment as an athletic director; Petitioner Martin's extracurricular assignment contract is not in the record; the written grievance contains no allegations concerning Petitioner Martin's assignment as an athletic director; the record contains nothing about Petitioner Martin's compensation as a basketball coach or as an athletic director; the record contains nothing to support the statement, "The schedule increased some salaries, decreased others, eliminated some positions and created new positions in some sports," except evidence that the estimated overall compensation to be paid to coaches would be increased by an excess of \$15,000 as a result of the proposed schedule; the March 3, 2008, notice of proposed termination of contract is not in the record; and, the record contains no evidence that the proposed coach compensation scheduled was discussed in executive session by the Barbour County Board of Education or that any of the Petitioners were "excluded" from an executive session.

Petitioners take the position because a document purporting to be Petitioner Martin's extracurricular contract was attached to proposed findings of fact and conclusions of law, submitted on behalf of the Petitioners at Level III of the grievance procedure, that this document amounted to evidence to be considered by the Grievance Board when rendering its decision. The Grievance Board's decision makes no findings relative to Petitioner Martin's Athletic Director extracurricular contract or the level of compensation associated with such contract. Petitioners accurately note that the Respondent offered that the documents attached to

Petitioners' proposed findings of fact and conclusions of law, including a document purporting to be Petitioner Martin's extracurricular contract, were irrelevant to the issues arising from the written statement of grievance. However, this observation is not tantamount to a concession that Petitioner Martin's extracurricular contract had been admitted as evidence. Respondent asserted in its motion to strike Petitioners' brief that the document was not properly within the administrative record. This document was not moved into evidence during any hearing and should not be considered part of the record as evidence. As noted in the Grievance Board's decision, the parties agreed that the Administrative Law Judge ("ALJ") consider the appeal of the Level I "on the record below." There was never an agreement to supplement the record below in the manner attempted by the Petitioners, except Respondent did agree that the document signifying Autumn Queen agreed to perform the duties of Athletic Director as Phillip Barbour High School could be submitted on behalf of the Petitioners, subject to objections as to relevancy.

The scope of the issues considered below are framed in the initial statement of grievance and statement of relief sought. The Statement of Grievance provides:

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 Request for Relief provides:

The relief we are seeking is to be afforded proper due process, as required by W. Va. Code before our contracts are changed.

The extracurricular contracts held by the Petitioners were one-year contracts that were entered on an annual basis. No action was taken to terminate the extracurricular coaching contracts of the Petitioners or to modify the terms of the extracurricular coaching contracts under which the Petitioners were performing at the time they initiated their grievance.

The Petitioners asserted that their grievance presented only legal issues and elected to offer no evidence at the Level I grievance hearing, with the exception of brief testimony from Petitioner Martin, who outlined several components of the coach compensation schedule with which the Petitioners had general disagreement. Specifically, Petitioner Martin testified concerning a meeting that was attended by coaches and Superintendent Lundeen. Petitioner Martin stated that a concern existed regarding the fairness of the coaching compensation schedule relative to the student/coach ratio. She felt that the schedule would improperly motivate coaches to keep players who would not help the team. Petitioner Martin expressed a concern that the coaches of sports that permitted individual student athletes to participate in state tournaments would receive greater opportunities than coaches of sports involving team participation to receive post-regular season compensation. Petitioner Martin did not consider the risk of liability as an appropriate factor in determining compensation. Finally, Petitioner Martin expressed her opinion that the number of games should not be considered in determining compensation in view of the fact that the WVSSAC prescribed the number of games for each sport. The disagreement of Petitioner Martin with certain elements of the coach compensation schedule provided an insufficient basis to warrant any relief through the grievance procedure. None of the testimony offered by Petitioner Martin was particularly relevant to the written statement of grievance. Except for the testimony offered by Petitioner Martin, described in the foregoing paragraphs, no other testimony was offered on behalf of the Petitioners. Neither

Petitioner Martin nor any of the other Petitioners offered any evidence upon how they were affected by the change in the salary schedule. The Administrative Law Judge made specific findings of fact noting that the Petitioners failed to offer any evidence in support of their written grievance.

The only evidence relating to the written grievance was presented without contradiction by the Respondent. Superintendent Lundeen further testified that in reviewing the 2007-2008 coaching contracts, it was determined no rational basis existed for the differences in compensation paid to various coaches. In addressing the lack of a sound salary schedule for coaches, Superintendent Lundeen reviewed and analyzed coaches' pay from seven different counties in the region. 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.

The issue of coaches' compensation was placed on the Barbour County Board of Education's January 9, 2008, agenda, which was posted. At the Board meeting on that evening, the Board voted to approve the coaching compensation plan established by the Superintendent. Superintendent Lundeen testified that she intended to afford the Petitioners notice and a hearing on the issue. The record contains no evidence of whether any of the Petitioners requested hearings or, if they did, the outcomes of any such hearings.

ARGUMENT

I.

THE FAILURE OF THE PETITIONERS TO OFFER ANY EVIDENCE IN SUPPORT OF THEIR CLAIMS WAS EMBRACED AS A FINDING OF FACT RENDERED BY THE ADMINISTRATIVE LAW JUDGE AND IS ENTITLED TO THE SAME DEFERENCE AS FINDINGS OF FACT BASED UPON CONFLICTING EVIDENCE

The present appeal turns upon the findings of fact rendered by the ALJ. The standard of review in such appeals is well settled. In syllabus point 1 of *Randolph County Board of Education v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989), the West Virginia Supreme Court held that: [a] final order of the hearing examiner for the West Virginia Educational Employees Grievance Board made pursuant to W. Va. Code, 18-29-1, *et seq.* (1985) [now Code 6C-2-1 *et seq.*], and based upon findings of fact should not be reversed unless clearly wrong.

Syllabus point 1 of the case *Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000), provides:

Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*. (Emphasis supplied).

Because the underlying grievance involved an alleged denial of due process, the burden of proof was upon the Petitioners to offer some evidence of a material deprivation of a property right before advancing to due process claims involving notice and hearing. Petitioners never reached this threshold of proof. No attempt was made to show any adverse consequences arising from revisions to the coach salary schedule. Petitioners failed to make a showing that the

findings of fact, rendered by the ALJ to the effect that Petitioners offered no evidence in support of their claims, were “clearly wrong in view of the reliable, probative and substantial evidence on the whole record.” W. Va. Code § 6C-2-5. Petitioners have given little attention to demonstrating that any of the findings of the fact rendered by the ALJ are clearly wrong.

II.

REGARDLESS OF THE EFFECT THAT THE CHANGE IN THE COACH SALARY SCHEDULE MAY HAVE HAD ON THE PETITIONERS, THEY WERE FREE TO ACCEPT OR REJECT THE PERFORMANCE OF THEIR EXTRACURRICULAR CONTRACTS

Superintendent Lundeen testified that coaching extracurricular contracts were issued and signed on an annual basis. The Petitioners were free to forgo the performance of such contracts in succeeding school years. West Virginia Code §18A-4-16 requires that extracurricular contracts be the product of mutual agreement. The statute provides in relevant part:

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.

The Petitioners all held one-year extracurricular coaching contracts. The terms of such contracts, including the level of compensation, were only in effect until the conclusion of the contract.

Under the provisions of West Virginia Code § 18A-4-16, the terms of such contracts must 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 in an effort to obtain mutual agreement. Employees are free, on an annual basis,

to agree to such terms or forgo performing the extracurricular assignment. The Petitioners offered no evidence concerning specific changes in extracurricular contract terms that resulted from the application of the coach compensation schedule (Level I, Joint Exhibit 1).

Although not specifically articulated in the Statement of Grievance, the Petitioners assert that the Respondent prejudged the outcome of hearings that may have been requested under the provisions of West Virginia Code 18A-2-7. The record contains no evidence as to whether hearings were subsequently requested by any of the Petitioners or, if requested, the outcome of such hearings.

While county boards of education are required to observe the procedural requirements of West Virginia Code § 18A-2-7 under certain circumstances in relation to extracurricular contracts, Code § 18A-2-7 relates to procedures that must be observed in relation to the assignment, transfer, 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. This notion of transfer was applied in the cases *Smith v. Board of Educ.*, 176 W. Va. 65, 341 S.E.2d 685 (1985), and *Hosaflook v. Nestor*, 176 W. Va. 648, 346 S.E.2d 798 (1986). Each of these cases involved the termination of coaching contracts, thus triggering the "transfer" procedural rules. Petitioners assert that these decisions provide authority for the proposition that the terms of a one-year extracurricular contract may not be modified in subsequent years, absent mutual agreement, without observing the transfer procedures set forth in West Virginia Code § 18A-2-7. Petitioners are wrong on this point. These decisions did not consider the issue of modifications of the terms of extracurricular contracts. West Virginia Code § 18A-4-16 does not create an entitlement to perpetual extracurricular contract terms. Nor does the statute create an entitlement

to notice and hearing upon extracurricular contract terms. The Legislature established that extracurricular contract terms only be subject to the requirement that the parties mutually agree.

The case cited by the Petitioners, *Lavender v. McDowell County Board of Education*, 174 W. Va. 513, 327 S.E.2d 691 (1984), as the basis for their claim of prejudgment involved the transfer of a professional employee from one school to another.

The present case does not involve the termination of coaching contracts. The Petitioners, as well as all other coaches holding extracurricular contracts within Barbour County, are entitled to continue their coaching assignments. Changes in proposed contract terms for contracts for the next ensuing school year do not fall within the scope of personnel actions identified within West Virginia Code § 18A-2-7, where, as in the present case, extracurricular contracts are issued and agreed to by the parties on an annual basis.

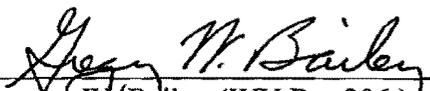
Where extracurricular coaching contracts are issued and executed on an annual basis, a county board of education has the authority to consider and approve a coach compensation schedule that will be offered for the performance of extracurricular coaching contracts during the next ensuing school year. Such a course of action does not amount to prejudgment because school employees have no right to notice and have a hearing upon the terms to be offered by a county board of education for a contract yet to be entered.

The Respondent offered evidence of the intent to afford the Petitioners notice and a hearing upon the proposed changes in contract terms, even though no clear legal right to such notice and a hearing exists.

In the present case, Superintendent Lundeen testified that it was her intent to provide all affected employees with notice and an opportunity for hearing upon changes in compensation levels that may arise in connection with the new compensation schedule. There was no evidence that the Board would regard the notice and opportunity for hearing procedure as pretextual. The Board was free to exercise its discretion in making a decision upon any hearing requested, including a decision to modify the proposed compensation schedule.

CONCLUSION

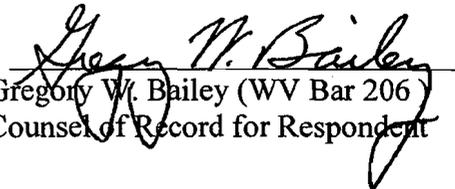
The Circuit Court's order upholding the decision of the West Virginia Public Employee's Grievance Board should be affirmed.

Signed: 
Gregory W. Bailey (WV Bar 206)
Counsel of Record for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2011, true and accurate copies of the foregoing **Response to Petition for Appeal** were deposited in the U.S. Mail in a postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Bradley J. Pyles, Esquire
Pyles & Turner
Post Office Box 596
Logan, West Virginia 25601
Counsel for Petitioners

Signed: 
Gregory W. Bailey (WV Bar 206)
Counsel of Record for Respondent