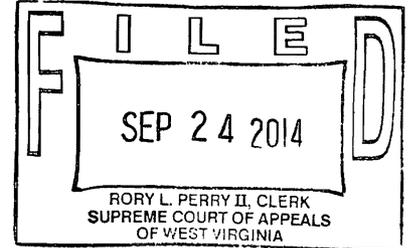


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**THE BOARD OF EDUCATION
OF THE COUNTY OF LEWIS,
Respondent below, Petitioner,**



**v. Appeal No. 14-0521
 (Civil Action No. 13-AA-142)**

**TONYA R. BOHAN,
Petitioner below, Respondent.**

BRIEF FILED ON BEHALF OF RESPONDENT TONYA R. BOHAN

**John Everett Roush, Esq.
Legal Services
West Virginia School Service Personnel Association
1610 Washington Street East
Charleston, WV 25311
Telephone # 304-346-3544
State Bar ID # 3173
jroush@wvsspa.org**

Table of Contents

Table of Authorities	3
Issues Raised	3
o Did the circuit court err in finding that Respondent’s substitute call-out system which placed Respondent at the bottom of the rotating substitute seniority list after the cancellation of the Jane Lew assignment constituted a violation of West Virginia Code §18A-4-15?	3
o Did the circuit court err in directing Respondent adopt a procedure which complied with the requirements of West Virginia Code §18A-4-15?	4
Statement of Case	4
Summary of Argument	7
Statement Regarding Oral Argument	8
Argument	8
Standard of Review	8
Statutory Construction	9
o A SUBSTITUTE CALL-OUT PROCEDURE WHICH PLACES A SUBSTITUTE AT THE BOTTOM OF THE ROTATION LIST WHEN SAID EMPLOYEE ACCEPTS A SUBSTITUTE ASSIGNMENT THAT IS CANCELED DOES NOT COMPLY WITH THE REQUIREMENTS OF WEST VIRGINIA CODE §18A-4-15.	9
o A CIRCUIT COURT DOES NOT EXCEED ITS AUTHORITY IN DIRECTING A COUNTY BOARD OF EDUCATION TO ADOPT A SUBSTITUTE CALL-OUT SYSTEM THAT COMPLIES WITH THE REQUIREMENTS OF WEST VIRGINIA CODE §18A-4-15.	13

Table of Authorities

Cases

<u>Lee-Norse Co. v. Rutledge</u> , 291 S.E.2d 477 (W. Va. 1982).....	10
<u>Martin v. Randolph County Board of Education</u> , 465 S.E.2d 399 (W.Va. 1995).....	7
<u>Miners in General Group v. Hix</u> , 17 S.E.2d 810 (W. Va.1941).....	10
<u>Morgan v. Pizzino</u> , 256 S.E. 2d 592 (W.Va. 1979).....	8
<u>Randolph County Board of Education v. Scalia</u> , 387 S.E.2d 524 (W.Va. 1989)	7

Statutes

<u>West Virginia Code §18A-4-15(a)</u>	7
<u>West Virginia Code §18A-4-15(b)</u>	7, 8

Other Authorities

The New Oxford American Dictionary, 2 nd edition (2005).....	9
---	---

Issues Raised

- Did the circuit court err in finding that Respondent's substitute call-out system which placed Respondent at the bottom of the rotating substitute seniority list after the cancellation of the Jane Lew assignment constituted a violation of West Virginia Code §18A-4-15?

- Did the circuit court err in directing Respondent adopt a procedure which complied with the requirements of West Virginia Code §18A-4-15?

Statement of Case

Tonya R. Bohan, Respondent, is employed by Petitioner as a substitute secretary. The Board of Education of the County of Lewis, Petitioner, is a quasi-public corporation created by statute for the management and control of the public schools of Lewis County.

Respondent initiated an employment grievance pursuant to West Virginia Code §6C-2-1, et seq., on August 24, 2012. Dr. Joseph Mace, Petitioner's superintendent of schools, conducted a conference on September 18, 2012. By decision dated October 2, 2012 and received October 4, 2012, Dr. Mace denied the grievance.

Respondent filed an appeal to level II on October 15, 2012. A mediation session was held on January 29, 2013, but proved unsuccessful.

Respondent appealed to level III on February 6, 2013. Administrative Law Judge Brenda Gould, Esq., conducted a level III hearing on July 19, 2013. By decision issued on October 3, 2013 and received on October 7, 2013, Ms. Gould denied the grievance on the basis that placing Respondent at the bottom of the rotating substitute seniority list after the cancellation of the Jane Lew assignment did not violate law or regulation and was

not arbitrary and capricious. Respondent appealed to the Kanawha County Circuit Court pursuant to West Virginia Code §6C-2-5 on October 29, 2013. By order entered on April 10, 2014, the circuit court reversed the administrative law judge's decision. Petitioner initiated an appeal to the West Virginia Supreme Court of Appeals on May 8, 2014.

Petitioner uses an automated system to call substitute secretaries from a list of substitute secretaries in seniority order on a rotating basis when a substitute is needed to fill the position of a regularly employed secretary who is absent on a temporary basis. The substitute secretary whose turn it happens to be is called and offered the assignment. If he or she declines the assignment, the next substitute on the list is called and offered the assignment and so on until a substitute accepts the assignment. When the need for a substitute secretary arises again, the next substitute on the list is called and offered the assignment until that position is filled. When the bottom of the list is reached, the process starts again at the top of the list following the same procedure.

On July 29, 2012, Respondent received a call to substitute as a secretary at Jane Lew Elementary School. Respondent accepted the position, but was suspicious because she believed that substitute secretaries were not normally utilized at schools during the summer when students are not present.¹ Respondent contacted Petitioner's

¹ Appendix p.44

administration and learned that her suspicions were justified.² She was told not to report to work at Jane Lew Elementary School. However, Respondent was still “placed at the bottom of the rotating list” of substitute secretaries for the next callout.

Actually, Respondent stayed at the same place on the substitute list. By “placing at the bottom of the list”, it is meant that the next substitute to be called and offered an assignment would be the substitute directly below Respondent on the list. The rotation would continue all the way through the list, then return to the top and continue until Respondent was reached. Respondent went from the next substitute to receive an opportunity to work in the position of an absent secretary to a situation in which every other substitute secretary on the list, below and above Respondent, would receive an opportunity to work before Respondent would receive another opportunity.

The next substitute opportunity after the one described in the paragraphs above occurred on August 13, 2012. Debbie Lough, a less senior substitute secretary than Respondent, received this call-out and worked from August 14, 2012 until August 24, 2012 at Jane Lew Elementary School.³

² Appendix pp. 44-45. Petitioner failed to mention in its brief Respondent’s good faith role in determining that a mistake had occurred.

³ Appendix pp. 40-42.

Summary of Argument

West Virginia Code §18A-4-15(b) provides that substitutes are called for assignments to work in temporary positions from a rotating list based upon seniority. Each substitute receives one opportunity to work per rotation of the substitute list, whether the substitute accepts or declines the assignment.

On July 29, 2012, Respondent was offered and accepted a substitute assignment to work at Jane Lew Elementary School. Prior to Respondent reporting to work, the assignment was canceled. Petitioner treated that canceled assignment as Respondent's opportunity for a substitute assignment for that rotation of the substitute list.

Accordingly, Petitioner called the next substitute on the rotating substitute secretary list for the next available substitute assignment. Respondent contends that the cancellation of the assignment to Jane Lew Elementary School and her placement at the bottom of the list had the effect of depriving her of an assignment and an opportunity to substitute for that particular rotation. Hence, Respondent should have received the next available assignment.

Respondent contends that the circuit court did not exceed its authority. The direction of the circuit court to Petitioner to adopt a call-out system that complied with the law is appropriate.

Statement Regarding Oral Argument

Respondent believes that the facts and legal arguments are adequately presented in the briefs and record on appeal and that the decisional process would not be significantly aided by oral argument.

Argument

Standard of Review

Prior to addressing the issues in this appeal, let us first address the standard of review that this Court will apply. The West Virginia Supreme Court of Appeals has held that it applies the same standard of review to circuit court orders as does the circuit court applies to decisions of the administrative law judge. This standard requires that an order of the circuit court may not be reversed on an evidentiary finding unless this findings is clearly wrong. Randolph County Board of Education v. Scalia, 387 S.E.2d 524 (W.Va. 1989) The West Virginia Supreme Court of Appeals has explained how the “clearly wrong” standard of review for factual questions is applied in Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W.Va. 1995).⁴ In Martin, the Court held that the reviewing body in such situations must, “uphold any of the ... factual findings that are supported by substantial evidence, and ... owe substantial deference to inferences

⁴ In Martin, the West Virginia Supreme Court of Appeals construed the statutory language of West Virginia Code §18-29-7. The language in this section of law was similar to the language found in West Virginia Code §6C-2-5 with regard to the standard of review for factual questions.

drawn from these facts. Further, the ... credibility determinations are binding unless patently without basis in the record.” The reviewing body would nonetheless be obligated to “determine whether the ... findings were reasoned, i.e., whether he or she considered the relevant factors and explained the facts and policy concerns on which he or she relied, and whether those facts have some basis in the record.”

On legal issues or the application of the law to facts, decisions are reviewed de novo. Martin v. Randolph County Board of Education, 465 S.E.2d 399 (W.Va. 1995). The current appeal involves legal issues. Hence, a de novo review of the decision would appear to be appropriate.

Statutory Construction

The long-time rule of statutory construction for school personnel laws and regulations is that they must be strictly construed and in favor of the employees for whom they were designed to protect. Morgan v. Pizzino, 256 S.E. 2d 592 (W.Va. 1979)

Let us now turn to the issues presented by this appeal.

- **A SUBSTITUTE CALL-OUT PROCEDURE WHICH PLACES A SUBSTITUTE AT THE BOTTOM OF THE ROTATION LIST WHEN SAID EMPLOYEE ACCEPTS A SUBSTITUTE ASSIGNMENT THAT IS CANCELED DOES NOT COMPLY WITH THE REQUIREMENTS OF WEST VIRGINIA CODE §18A-4-15.**

The circuit court concluded that a system of substitute call-out in which a substitute assignment that an employee accepts, but is subsequently canceled through no fault of the substitute, count as a substitute's turn or opportunity during a rotation does not comply with the requirements of West Virginia Code §18-4-15. Petitioner assert that the circuit court was correct.

Let us briefly review the applicable law and then apply it to the facts of the present case.

West Virginia Code §18A-4-15(a) provides that in certain circumstances, a substitute can fill the absence of a regular employee on a temporary basis. The method by which substitutes are called is outlined in West Virginia Code §18A-4-15(b), which provides in pertinent part, the following:

Service personnel substitutes shall be assigned in the following manner:

(1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b [18A-4-8b] of this article. Length of service time is calculated from the date a substitute service person begins assigned duties as a substitute in a particular category of employment.

(2) All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments.

In essence, all the substitutes in a particular classification category are placed on a list by seniority order. When a substitute is needed, the next employee on the list is called and offered the assignment. If he or she declines the assignment, the next substitute is called and offered the assignment and so forth until a substitute agrees to accept the assignment. When another substitute is needed, the substitute on the rotating list immediately below the employee who accepted the first assignment is offered the next assignment with the same procedure followed until this second assignment is filled.

On July 29, 2012, it was Respondent's turn for an opportunity to serve as a substitute secretary. Respondent was offered the opportunity to substitute at Jane Lew Elementary School and she accepted the assignment. Due to her suspicion that the offer was a mistake, Respondent acted in good faith and called the matter to the attention of the administration so that the mistake was corrected. However, her acceptance of the mistaken offer of an opportunity to substitute should not have constituted her "turn" for that rotation of the substitute secretaries. This is the crux of the present appeal.

West Virginia Code §18A-4-15(b) references substitute assignments as both an "assignment" and as an "opportunity". Chapter eighteen-a of the code does not define either term. In such situations, the West Virginia Supreme Court of Appeals has held

In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Miners in General Group v. Hix, 17 S.E.2d 810 (W. Va.1941), *overruled, in part, on other grounds by Lee-Norse Co. v. Rutledge*, 291 S.E.2d 477 (W. Va, 1982).

“Assignment” is defined as:

A task or piece of work assigned to someone as part of a job or course of study ... the allocation of a job or task to someone...
The New Oxford American Dictionary, 2nd Edition (2005)

“Opportunity” is defined as:

A set of circumstances that makes it possible to something ... a chance for employment or promotion ...
The New Oxford American Dictionary, 2nd Edition (2005)

Respondent was certainly “assigned” to the Jane Lew Elementary School position, but the cancellation of the job rescinded that assignment. Similarly, cancellation of the assignment removed the Respondent’s opportunity to work that assignment. Given these circumstances, the elimination of the assignment or opportunity to work at Jane Lew Elementary School should have restored Respondent to the status she held immediately before receiving the offer to work at Jane Lew Elementary School on July 29, 2012. It should have continued to be her turn for the next assignment or

opportunity. The next assignment or opportunity after July 29, 2012 occurred on August 13, 2013. Respondent was entitled to that opportunity/assignment and, accordingly, the compensation awarded by the circuit court.

- **A CIRCUIT COURT DOES NOT EXCEED ITS AUTHORITY IN DIRECTING A COUNTY BOARD OF EDUCATION TO ADOPT A SUBSTITUTE CALL-OUT SYSTEM THAT COMPLIES WITH THE REQUIREMENTS OF WEST VIRGINIA CODE §18A-4-15.**

West Virginia Code §6C-2-5 provides:

The court shall review the entire record that was before the administrative law judge, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the administrative law judge, or may remand the grievance to the administrative law judge or the chief administrator for further proceedings.

The authority to determine that the Petitioner's substitute call-out system violated West Virginia Code §18A-4-15 is certainly within the jurisdiction of the circuit court. Implicit in such a conclusion is the direction to amend the procedure so that it does comply with the requirements of law. Once the board of education accepts the verdict that its prior procedure did not comply with state law, amending that procedure is clearly required.

In essence, Petitioner does not accept the verdict of the circuit court concerning the legality of its prior procedure. Petitioner's challenge to the authority of the circuit court is really simply an assertion the circuit court incorrectly decided the main legal issue. The validity of the circuit court's legal reasoning was covered in the prior point of argument and that is the only real issue in this appeal.

TONYA R. BOHAN, Respondent

By counsel,



John Everett Roush, Esq.

Legal Services

West Virginia School Service Personnel Association

1610 Washington Street East

Charleston, WV 25311

Telephone # 304-346-3544

State Bar ID # 3173

jroush@wvsspa.org

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, John Everett Roush, Esq., counsel for the Petitioner, hereby certify that I have filed the original and ten copies of the foregoing "Brief Filed on Behalf of Respondent Tonya R. Bohan" on the following by hand delivery, this the 24th day of September 2014 to:

Rory L. Perry, II, Clerk of the Court
West Virginia Supreme Court of Appeals
State Capitol Complex
1900 Kanawha Boulevard East
Charleston, WV 25305

Further, I John Everett Roush, Esq., counsel for Appellant, certify that I have served a true copy of the foregoing "Brief Filed on Behalf of Respondent Tonya T. Bohan" on the following by placing the same in a properly addressed envelope, First Class Postage Prepaid, in the United States Mails, on this the 22nd day of September 2014, to:

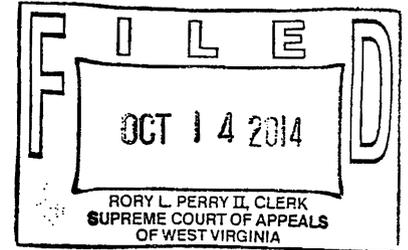
Denise Spatafore, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Boulevard, Suite 310
Morgantown, West Virginia 26501



John Everett Roush, Esq.
Legal Services
West Virginia School Service Personnel Association
1610 Washington Street East
Charleston, WV 25311
Telephone # 304-346-3544
State Bar ID # 3173
jroush@wvsspa.org

October 9, 2014

Rory L. Perry II
Clerk of Court
West Virginia Supreme Court of Appeals
State Capitol RM E-317
1900 Kanawha Blvd. East
Charleston, WV 25305



Re: Lewis County Board of Education v. Tonya R. Bohan
No. 14-0521

Dear Mr. Perry:

Pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, Petitioner does not believe a reply brief is necessary in this matter. Respondent's brief has not raised any issues that have not been thoroughly addressed in Petitioner's original Brief, so a reply brief will not be filed.

Please place this letter in the Court file in the above-captioned matter to reflect that Petitioner has exercised its discretion in determining a reply brief need not be filed. Thank you for your assistance in this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Denise M. Spatafore by JRS".

Denise M. Spatafore

cc: John E. Roush, Esquire