

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Supreme Court Docket No. 15-0662  
Civil Action No. 11-C-759 (Circuit Court of Monongalia County)**

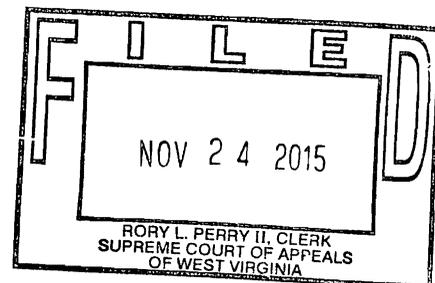
**MONONGALIA COUNTY BOARD OF EDUCATION  
and FRANK DEVONO, SUPERINTENDENT,  
Respondents Below, Petitioners,**

**v.**

**AMERICAN FEDERATION OF TEACHERS-  
WEST VIRGINIA, AFL-CIO, JUDY HALE,  
its President, SAM BRUNETT, JEANIE DEVINCENT,  
SHELLY GARLITZ, and MIKE ROGERS,  
as representatives of similarly situated individuals,  
Petitioners Below, Respondents**

**AMICUS CURIAE BRIEF FILED ON BEHALF OF THE WEST  
VIRGINIA SCHOOL SERVICE PERSONNEL ASSOCIATION  
AND THE WEST VIRGINIA AFL-CIO**

**THE AMICUS CURIAE BRIEF IS FILED IN SUPPORT THE RESPONDENTS  
AND SEEKS AFFIRMATION OF THE DECISION OF THE CIRCUIT COURT**



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**STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE**

The West Virginia School Service Personnel Association is an incorporated employees’ association which represents nonprofessional school personnel within the state of West Virginia. The West Virginia School Service Personnel Association is affiliated with the American Federation of Teachers – West Virginia, AFL-CIO, but maintains a separate staff and functions independently of the American Federation of Teachers – West Virginia, AFL-CIO in many ways.

The West Virginia AFL-CIO is a federation of 406 local unions, over 60 districts, and 13 central bodies from 58 national and international labor unions representing 123,000 West Virginia active and retired working men and women from every walk of life. The West Virginia AFL-CIO is affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with a total membership in excess of 13 million active working men and women. The West Virginia AFL-CIO works to assist in the development of jurisprudence establishing educational and classroom teacher standards for West Virginia. The American Federation of Teachers-West Virginia, AFL-CIO, is a member of the West Virginia AFL-CIO.

## **STATEMENT OF THE CASE**

The amicus curiae anticipate that the forthcoming brief of Respondents will provide a more than adequate identification of the parties and the back drop of the current controversy. Accordingly, the amicus curiae will not burden the court with a full restatement of the facts of the case, but will be content with the following brief recitation.

The Monongalia County Board of Education, Respondent, is a quasi-public corporation created by statute for the management and control of the public schools of Monongalia County, West Virginia. Dr. Frank Devono, Respondent, serves as the county superintendent of the Monongalia County Board of Education.

The American Federation of Teachers – West Virginia, AFL-CIO, Petitioner, is an unincorporated labor organization which represents professional school personnel within the State of West Virginia. Judy Hale, Petitioner, was the President of the American Federation of Teachers – West Virginia, AFL-CIO, at the time the present action was initiated.<sup>1</sup> Petitioners Sam Brunett, Jeanie DeVincent, Shelly Garlitz and Mike Rogers are members of the American Federation of Teachers – West Virginia, AFL-CIO.

The Regional Education Service Agencies are established by West Virginia Code §18-2-26 with the purpose of:

- (1) Providing technical assistance to low performing schools and school systems;
- (2) Providing high quality, targeted staff development designed to enhance the performance and progress of students in state public education;
- (3) Facilitating coordination and cooperation among the county boards within their respective regions in such areas as cooperative purchasing; sharing of specialized personnel, communications and technology; curriculum development; and operation of specialized programs for exceptional children;
- (4) Installing, maintaining and/or repairing education related technology equipment and software with special attention to the state level technology learning tools for public schools program;
- (5) Receiving and administering grants under the provisions of federal and/or state law; and
- (6) Developing and/or implementing any other programs or services as directed by law, the state board or the regional council.<sup>2</sup>

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<sup>1</sup> Christine Campbell currently holds the office of President of the American Federation of Teachers – West Virginia, AFL-CIO.

<sup>2</sup> West Virginia Code §18-2-26(b)

There are eight Regional Education Service Agencies in West Virginia. Regional Education Service Agency VII, hereinafter referenced as RESA, is the Regional Education Service Agency which serves the Monongalia County Board of Education and eleven surrounding counties.<sup>3</sup>

On September 27, 2011, the Monongalia County Board of Education voted to expend \$626,426.00 to contract with RESA VII to provide "Interventionists". The funding for this expenditure included a mixture of federal grant funds from Title I and general funds derived from local sources.<sup>4</sup>

In the 2011-2012 school year after consultation with Respondents, RESA VII posted positions for Interventionists on its web site.<sup>5</sup> The main requirement or qualification to become an Interventionist was certification as a teacher.<sup>6</sup> These individuals were to work in Respondents' elementary and middle schools. The decision as to who was hired as an Interventionist rested solely with RESA VII and its Executive Director Gabriel Devono.<sup>7</sup> Ultimately, RESA hired approximately twenty-seven different individuals in that capacity for the 2011-2012 school year and a like number in subsequent years.<sup>8</sup> The Interventionists were paid twenty-five dollars per hour regardless of their experience or qualifications and received no other benefits.<sup>9</sup>

These Interventionists were designated to provide personalized training, *i.e., instruction or educational services*, for students who were having difficulties with math

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<sup>3</sup> Appendix p. 195

<sup>4</sup> Appendix pp. 22 & 151

<sup>5</sup> Appendix p. 182

<sup>6</sup> Appendix p.91

<sup>7</sup> Appendix pp. 186 & 188

<sup>8</sup> Appendix p. 121

<sup>9</sup> Appendix pp. 96, 87, 116, 121 -122, & 147

and reading.<sup>10</sup> This duty was and is performed within the public school attended by the student in need of assistance with math and reading.<sup>11</sup>

## **ARGUMENT**

### **Standard of Review**

Legal issues are reviewed *de novo* and factual issues are reviewed on the clearly wrong standard of review. Appalachian Power Co. v. State Tax Dept., 466 S.E.2d 424 (W. Va. 1995); Burgess v. Porterfield, 469 S.E.2d 114 (W.Va. 1996). The question of whether the Interventionists were actually classroom teachers involves a determination of facts as well the application of the law to the facts of the case. The questions of whether Petitioners' utilization of Interventionists was contrary to law and the Constitution of the State of West Virginia are legal questions.

- **The Interventionists are classroom teachers as defined by statute.**

To determine if the Interventionists are, by statutory definition, classroom teachers, it is necessary to review the pertinent statutes.

West Virginia Code §18A-1-1(b) provides:

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<sup>10</sup> **Appendix pp. 344 -345 & Joint Appendix II, Deposition of Sandy Devault, pp. 7 & 9; Appendix p. 152**

<sup>11</sup> **Appendix, pp. 129, 133 - 134**

"Professional person" or "professional personnel" means those persons or employees who meet the certification requirements of the state, licensing requirements of the state, or both, and includes a professional educator and other professional employee;

West Virginia Code §18-1-1(g) provides the following:

"Teacher" means a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state;

West Virginia Code §18A-1-1(c) provides, in pertinent part, the following:

"Professional educator" has the same meaning as "teacher" as defined in section one, article one, chapter eighteen of this code. Professional educators are classified as follows: (1) "Classroom teacher" means a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity;

...

The Interventionists are required to have certification as a teacher. This means that they meet the definition of professional person or professional personnel. The Interventionists are clearly employed for instructional purposes, which means that they meet the definition of teacher and professional educator. Classroom teacher is a category within the general rubric of professional educator or teacher. A classroom teacher has a direct instructional or counseling relationship with students and spends the majority of his or her time in that pursuit. As the circuit court correctly held, the

Interventionists have a direct instructional or counseling relationship with students and spend the vast majority of their time in pursuit of that relationship.

It is quite clear that the Interventionists were classroom teachers. This fact has consequences related to the manner in which these individuals were employed, which we will examine in the next section of argument.

Petitioners argued that the Interventionists were employed in a support rather than a direct instructional role. While the circuit court was correct in dismissing this assertion, even had it accepted that argument, the Petitioner's actions would not pass statutory muster. West Virginia Code §18A-1-1(e) provides, in addition to employment of professional personnel, the following category of employees:

"Service person" or "service personnel", whether singular or plural, means a nonteaching school employee who is not included in the meaning of "teacher" as defined in section one, article one, chapter eighteen of this code and who serves the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides. Any reference to "service employee" or "service employees" in this chapter or chapter eighteen of this code means service person or service personnel as defined in this section;

Among the county board of education employees who work as service persons or personnel, we find the following:

"Paraprofessional" means a person certified pursuant to section two-a, article three of this chapter to perform duties in a support capacity including, but not limited to, facilitating in the instruction and direct or indirect supervision of students under the direction of a principal, a teacher or another designated professional educator.  
(Emphasis added)  
West Virginia Code §18A-4-8(i)(71)

Consequently, if the Interventionists are not classroom teachers because they serve in a support capacity rather than being involved in direct instruction, then they would be service personnel who meet the definition of the paraprofessional classification. Just as the legislature has directed how classroom teachers are hired, it has also directed how service personnel are hired. We will briefly examine that area in the next section of argument also.

- **The method by which Respondent employed the classroom teachers, which it labeled as Interventionists, was contrary to law.**

"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, Smith v. State Workmen's Compensation Com'r, 219 S.E.2d 361 (W. Va. 1975). Keeping this dictum in mind, let us review the pertinent statutes to discern the legislative intent.

First, West Virginia Code §18-5-1 provides:

Each county school district shall be under the supervision and control of a county board of education, which shall be composed of five members, nominated and elected by the voters of the respective county without reference to political party affiliation. No more than two members shall be elected from the same magisterial district.  
(Emphasis added)

This section makes it mandatory that the board of education supervise the school system. A county board of education cannot delegate that authority to another body such as RESA.

Second, West Virginia Code §18-5-4(a) provides:

The county board shall meet upon the dates provided by law, and at any other times the county board fixes upon its records. Subject to adequate public notice, nothing in this section prohibits the county board from conducting regular meetings in facilities within the county other than the county board office. At any meeting as authorized in this section and in compliance with the provisions of chapter eighteen-a of this code, the county board may employ qualified teachers, or those who will qualify by the time they enter upon their duties, necessary to fill existing or anticipated vacancies for the current or next ensuing school year. Meetings of the county board shall be held in compliance with the provisions of chapter eighteen-a of this code for purposes relating to the assignment, transfer, termination and dismissal of teachers and other school employees.

The permissive term "may" in the above-quoted statutory language clearly means that the board of education is not required to employ teachers at every single meeting. However, the intent that it is the county board of education that is charged with the duty of employing such teachers as are employed is beyond dispute.

Third, West Virginia Code §18A-4-7a provides, in pertinent part, the following:

(a) A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications: Provided, That the county superintendent shall be hired under separate criteria pursuant to section two, article four, chapter eighteen of this code.

(b) In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

- (1) Appropriate certification, licensure or both;
- (2) Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;
- (3) The amount of course work, degree level or both in the relevant field and degree level generally;
- (4) Academic achievement;
- (5) In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to the performance of the duties of the job;
- (7) Past performance evaluations conducted pursuant to section twelve, article two of this chapter and section two, article three-c of this chapter or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;
- (8) Seniority;
- (9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;
- (10) In the case of a classroom teaching position, the recommendation of the principal of the school at which the applicant will be performing a majority of his or her duties; and
- (11) In the case of a classroom teaching position, the recommendation, if any, resulting from the process established pursuant to the provisions of section five, article five-a, chapter eighteen of this code by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

(c) In considering the filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant's qualifications: Provided, That if one or more permanently employed instructional personnel apply

for a classroom teaching position and meet the standards set forth in the job posting, each criterion under subsection (b) of this section shall be given equal weight except that the criterion in subdivisions (10) and (11) shall each be double weighted.

(d) For a classroom teaching position, if the recommendations resulting from the operations of subdivisions (10) and (11), subsection (b) of this section are for the same applicant, and the superintendent concurs with that recommendation, then the other provisions of subsections (b) and (c) of this section do not apply and the county board shall appoint that applicant notwithstanding any other provision of this code to the contrary.

...

(p) Openings in established, existing or newly created positions shall be processed as follows:

(1) Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. At their discretion, boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants only if fewer than three individuals apply during the first posting subject to the following:

(A) Each notice shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

(B) At least one notice shall be posted within twenty working days of the position openings and shall include the job description;

(C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;

(D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and

(E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant;

(2) No vacancy shall be filled until after the five-day minimum posting period of the most recent posted notice of the vacancy;

(3) If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the first posting period;

(4) A position held by a teacher who is certified, licensed or both, who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years; and

(5) Nothing provided herein shall prevent the county board of education from eliminating a position due to lack of need.

The above-cited language requires that the county board of education post classroom teacher vacancies and sets out the standards utilized to fill the positions from the pool of applicants with an obvious intent to hire the most qualified applicant.

If the Interventionist positions are considered service personnel or paraprofessional positions, the legislature has provided similar language providing for the posting of such vacancies and the filling of the vacancies according to certain criteria. Toward this end, West Virginia Code §18A-4-8b provides, in pertinent part, the following:

(a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as

defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies.

Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

(5) Substitute service personnel who hold a classification title within the classification category of the vacancy;

(6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and

(7) New service personnel.

The very existence of the statutory systems cited above which define classroom teachers and paraprofessionals and the process by which such employees are hired imposes a mandatory duty on the county board of education to employ classroom teachers (or paraprofessionals) rather than meeting that need through independent contractors. See O'Connor v. Margolin, 296 S.E.2d 892 (W. Va. 1982) and California

School Employees Association v. Willits Unified School District of Mendocino County,  
243 Cal.App.2d 776, 52 Cal. Rptr. 765 (1966).<sup>12</sup>

- **Respondent's method of employing classroom teachers, labeled as Interventionists violate the Constitution of the State of West Virginia.**

The State of West Virginia "is required constitutionally to provide "a thorough and efficient system of free schools[,]" Syl. Pt. 3, in part, Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); West Virginia Constitution, Article XII, §1. It is self-evident that employing classroom teachers with the highest possible qualifications is a necessary component of providing a thorough and efficient system of public schools.

In order to attract individuals with the highest qualifications to classroom teacher positions, the legislature has provided a variety of benefits as incentives. These benefits include, but are not limited to, contracts of employment (West Virginia Code §18A-2-5 & West Virginia Code §18A-2-6); due process rights in matter involving transfer (West Virginia Code §18A-2-7); suspension and termination (West Virginia Code §18A-2-8); medical insurance (West Virginia Code §5-16-1, et seq.), personal leave (West Virginia Code §18A-4-10); paid holidays (West Virginia Code §18A-5-2); and retirement benefits (West Virginia Code §18-7A-1, et seq.).

No one can doubt that a position carrying all the benefits listed above would tend to draw more qualified candidates than a job merely paying \$25.00 per hour and

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<sup>12</sup> Both cases involved the question of whether janitorial employees of the state governments could be replaced by independent contractors. In both cases, the issue was resolved in favor of meeting the needs of the state by employees rather than independent contractors based upon statutes authorizing the employment of state employees in a janitorial capacity.

nothing else. In State ex rel Boner v. Kanawha County Board of Education, 475 S.E.2d 176 (W. Va. 1996), the West Virginia Supreme Court of Appeals held that while there might not be a direct correlation between the quality of the applicants and the generosity of benefits offered by a job, it admitted that “ ... the long-term effect of offering reduced benefits for ... teaching positions could result in the filling of ... positions with individuals who are less competitive under the statutory criteria established for hiring”.

It appears that the Petitioners have weighed the short term benefit of cost-savings against the long-term benefit of quality of the educational experience of children and have opted for the former. Such a course of action ignores their constitutional obligations.

**West Virginia School Service Personnel Association  
and The West Virginia AFL-CIO,  
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**CERTIFICATE OF SERVICE**

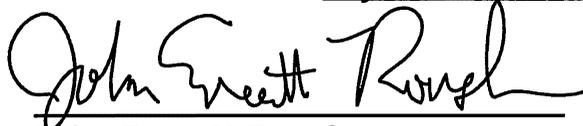
I, John Everett Roush, Esq., counsel for West Virginia School Service Personnel Association, certify that I have served the original and ten true copies of the foregoing "Amicus Curiae Brief Filed On Behalf of The West Virginia School Service Personnel Association" on the following by hand-delivery on this the 24<sup>th</sup> day of November 2015, to:

Rory L. Perry, II, Clerk of the Court  
West Virginia Supreme Court of Appeals  
State Capitol, Room E-317  
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Charleston, WV 25305

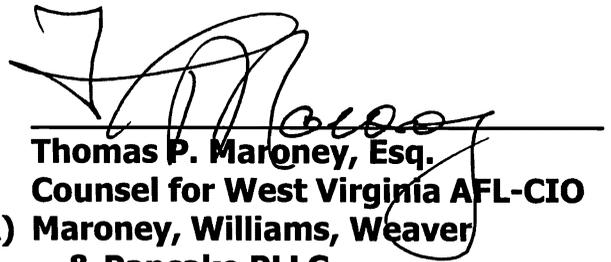
Further I, John Everett Roush, Esq., counsel for West Virginia School Service Personnel Association, hereby certify that I have served a true copy of the foregoing "Amicus Curiae Brief Filed on Behalf of The West Virginia School Service Personnel Association" on the following by placing the same in a correctly addressed envelope, First Class postage prepaid, in the United States Mails, on this the 24<sup>th</sup> day of November 2015, to:

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