15-0662

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 3

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 situation individuals,

Petitioners,

v.

Case No. 11-C-759
Chief Judge Phillip D. Gaujot

MONONGALIA COUNTY BOARD OF EDUCATION
and FRANK D. DEVONO, Superintendent,

Respondents.

ORDER

On January 14, 2014, this Court entered an Order denying the Motions for Summary Judgment of both the Petitioners and the Respondents. The Petitioners' Petition for Writ of Mandamus, Declaratory Judgment, and Injunctive Relief was similarly denied. This Court subsequently entered an Order on February 3, 2014, clarifying that this action was not to be dismissed in its entirety, but would proceed to allow the Petitioners additional time and opportunity to address the questions of fact as identified in this Court's previous Order. Specifically, additional discovery may have been able to provide clarification regarding the roles played by, and responsibilities of, "Interventionists" and "Job Coaches."[1]

In response to this Court's Order, the Petitioners submitted a Motion for Summary Judgment, and accompanying Memorandum in Support, on November 17, 2014. The Respondents filed a Supplemental Memorandum in Support of Motion for Summary Judgment

[1] The Petitioners' pleadings originally included arguments pertaining to the hiring of "Job Coaches." However, said arguments are absent from the Petitioners' most recent Motion for Summary Judgment. This Court shall thus assume that the Petitioners no longer wish to pursue them.

on November 20, 2014, and on November 24, 2014, filed a Reply to Petitioners' Supplemental Memorandum in Support of Motion for Summary Judgment. Also on November 24, 2014, the Petitioners filed a Reply to Respondents' Supplemental Memorandum in Support of Motion for Summary Judgment.

This Court has conscientiously reviewed the parties' pleadings, and surveyed the pertinent legal landscape and hereby **GRANTS** the Petitioners' Motion for Summary Judgment and **DENIES** the Respondents' Motion for Summary Judgment.

STANDARD OF REVIEW

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995) (quoting Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963) and Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)). When considering a motion for summary judgment, courts must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). With this in mind, it must be stated that "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Williams* at Syl. Pt. 2.

FINDINGS OF FACT

The Parties

1. Petitioner American Federation of Teachers – West Virginia, AFL-CIO ("AFT") is an un-incorporated labor organization which represents professional school personnel within the State of West Virginia, and it is the duly recognized representative for certain employees of Respondent Monongalia County Board of Education ("MCBOE").

2. Petitioner Judy Hale is the AFT President and is authorized to act in the best interests of its membership.

3. Petitioners Sam Brunett, Jeanie DeVincent, Shelly Garlitz, and Mike Rogers are AFT members and bring this action on their own behalf and on behalf of each and all other persons similarly situated.

4. Both Petitioners Garlitz and DeVincent are residents of Monongalia County, West Virginia.

Regional Educational Services Agencies ("RESAs")

5. RESAs are established by the West Virginia State Board of Education pursuant to W. VA. CODE § 18-2-26.

6. There are eight (8) educational regions in West Virginia designated as "RESAs," pursuant to 126 C.S.R. 72.2.2.

7. Monongalia County is one of several counties in RESA VII.

8. Each RESA is established to develop, manage and provide services and programs to county school systems. 126 C.S.R. 72.2.1.

9. The purpose of each RESA is to:

    1. Provide technical assistance to low performing schools and school systems;

    2. Provide high quality, targeted staff development;

    3. Facilitate coordination and cooperation among the county boards within their respective regions in areas such as cooperative purchasing, sharing specialized personnel, communications and technology, curriculum development, and operating specialized programs for exceptional children;

    4. Install, maintain and/or repair education related technology equipment and software;

    5. Receive and administer grants; and

6. Develop and/or implement any other programs or services as directed by law or the State Board.[2]

10. The two most significant priorities for RESA are (1) technical assistance and (2) staff development. 126 C.S.R. 72.5.1 – 5.1.2.

11. All RESA regular full-time and regular part-time personnel are non-contractual, will and pleasure employees of the West Virginia Board of Education. 126 C.S.R. 72.3.13.2.

The Contract Between MCBOE and RESA VII

12. On September 27, 2011, MCBOE held a regularly-scheduled board meeting. At the meeting, it took action to expend approximately $626,426.00 from its various funding sources to hire "Interventionists."

13. MCBOE's Meeting Minutes for September 27 and October 11, 2011, set forth its actions. According to the "Individual Item Expenditures Exceeding $3,000," which was part of the Agenda for the Regular Meeting of the MCBOE on September 27, 2011, the following expenditures were approved:

    1. Approval of a blanket purchase order for contracted [I]nterventionist at Pressl[ey] Ridge.
        i. VENDOR: RESA VII, Clarksburg, WV 26301
        ii. FUNDING SOURCE: Title I Neglected & Delinquent

    2. Approval of a blanket purchase order for contracted [I]nterventionist at Skyview.
        i. VENDOR: RESA VII, Clarksburg, WV 26301
        ii. FUNDING SOURCES: Title I

    3. Approval of a blanket purchase order for contracted [I]nterventionist at Mason Dixon.
        i. VENDOR: RESA VII, Clarksburg, WV 26301
        ii. FUNDING SOURCES: Title I

    4. Approval of a blanket purchase order for contracted [I]nterventionist at Brookhaven.
        i. VENDOR: RESA VII, Clarksburg, WV 26301
        ii. FUNDING SOURCES: Title I

    5. Approval of a blanket purchase order for annual fees for tech support, in-service training, workshops, repairs, and WVEIS support for FY 2012.
        i. VENDOR: RESA VII, Clarksburg, WV 26301
        ii. FUNDING SOURCE: General Funds

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[2] W. VA. CODE § 18-2-26(b)(1)-(6).

6. Approval of a blanket purchase order for contracted [I]nterventionist for elementary and middle school students.
    i. VENDOR: RESA VII, Clarksburg, WV 26301
    ii. FUNDING SOURCES: General Funds

14. On October 11, 2011, at a regularly scheduled MCBOE meeting, it took action to expend an additional $27,000.00, for additional personnel positions.

15. Specifically, blanket approval for the following was given:

    1. Approval of blanket purchase order for Job Coach.
        i. VENDOR: RESA VII, Clarksburg, WV 26301

16. MCBOE "general funds" included funds generated by periodic elections to authorize additional Levies.

17. The contract between MCBOE and RESA VII is memorialized by the "Agreement [B]etween Monongalia County Schools and RESA 7," which was executed for the school years 2010-2011, 2011-2012.

18. RESA VII's Strategic Plan,[3] approved by the West Virginia State Board of Education, allows RESA to employ, *inter alia*, "Interventionists" and "Job Coaches."

"Interventionists"

19. "Interventionists" provide personalized training to students who are struggling in reading and math. They are used to supplement the normal lesson plan of the child's regular teacher. The children remain in the class for a portion of the lesson and then are either pulled from the class or segregated within the classroom to receive supplemental instruction from the "Interventionist."

20. "Interventionists" are employed by RESA VII, not MCBOE. Most are assigned to one school and work as little as two and a half hours, or as much as six hours a day. MCBOE uses either Title I or general funds to pay RESA VII for the "Interventionists'" services.

21. "Interventionists" are paid twenty-five dollars ($25.00) per hour, regardless of their level of training or experience. They do not receive benefits such as health insurance, retirement, paid lunch breaks, or planning periods. They are at-will employees and have no right or expectation of being rehired from year to year.

22. The method used to fill "Interventionist" positions begins when the job is posted on the RESA VII website. The main requirement for this position is that the individual be a certified teacher.

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[3] This document was provided to the Court pursuant to its request.

23. At times, RESA VII employees interview the applicant, and other times, both MCBOE and RESA VII employees conduct joint interviews. The hiring decision is ultimately made by the RESA VII Director.

The Allegations

24. The Petitioners allege that the Respondents have violated W. VA. CODE §18A-4-7a, specifically regarding the requisite hiring provisions for "professional personnel."

25. Concerning openings in established, existing, or newly created positions, W. VA. CODE §18A-4-7a(o) details the manner in which they are to be processed.

26. MCBOE contracted with RESA VII to provide MCBOE with "Interventionists" and "Job Coaches," but these positions were allegedly not posted pursuant to the statutory requirements for the hiring of "professional personnel."

27. Certain MCBOE employees and AFT members allege that the Respondents are denying them the opportunity to compete for teaching and professional positions in accordance with the statutory requirements, as the hiring procedures contained in W. VA. CODE §18A-4-7a(o) were not followed.

28. The Respondents allege that county boards of education are statutorily authorized to contract with RESAs to obtain services such as those provided by "Interventionists."

29. The Respondents further allege that "Interventionists" are not teachers, and as such, MCBOE did not act in contravention of its statutory duties concerning their hiring and employment.

30. On December 5, 2011, the Petitioners filed their Petition for Writ of Mandamus, Declaratory Judgment and Injunctive Relief to mandate MCBOE to comply with West Virginia state law in the hiring and treatment of "Interventionists" and "Job Coaches."[4]

CONCLUSIONS OF LAW

1. "Interventionists," as defined, perform the duties of a "teacher," specifically a "classroom teacher."

2. MCBOE exists by virtue of W. VA. CODE § 18-5-1.

3. RESA VII exists by virtue of W. VA. CODE § 18-2-26.

4. W. VA. CODE § 18-1-1(g) defines "teachers" as "a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state."

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[4] This matter was subsequently re-assigned to this Court by Order entered on August 13, 2012.

5. A "teacher" has the same meaning as a "professional educator." W. VA. CODE § 18A-1-1(c). This category includes (1) classroom teachers; (2) principals; (3) supervisors; and (4) central office administrators. W. VA. CODE § 18A-1-1(c)(1)-(4).

6. W. VA. CODE § 18A-1-1(c)(1) defines a "classroom teacher" as "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."

7. School personnel are classified either as "professional personnel" or "service personnel." W. VA. CODE §18A-1-1(a).

8. "'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." W. VA. CODE §18A-1-1(b). "'Other professional employee' means a person from another profession who is properly licensed and who is employed to serve the public schools." W. VA. CODE §18A-1-1(d).

9. "Service person" or "service personnel" are "nonteaching school employee[s] who [are] not included in the meaning of 'teacher' . . . and who [serve] the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides." W. VA. CODE § 18A-1-1(e). *See also* W. VA. CODE § 18-1-1(h).

10. County Boards of Education shall make decisions affecting the hiring of classroom teachers. W. VA. CODE §18A-4-7a.

11. Concerning openings in established, existing, or newly created "professional personnel" positions, W. VA. CODE §18A-4-7a(o) requires them to be processed as follows:

    1. Boards shall be required to post and date notices which shall be subject to the following:

        A. The notices shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

        B. The 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;

3. If one or more applicants 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 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.

12. MCBOE shall hire the teacher with the highest qualification. W. VA. CODE §18A-4-7a(b).

13. In judging an applicant's qualifications, W. VA. CODE §18A-4-7a(c)(1)-(7) sets forth the elements to consider.

14. "The word 'shall', in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969).

15. The West Virginia Constitution states that "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, §1.

16. The "Thorough and Efficient Clause" requires the Legislature to "develop a *high quality* State-wide education system." Syl. Pt. 5, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) (emphasis added).

17. "Public education is a fundamental constitutional right in this State, and a prime function of the State government is to develop a high quality educational system, an integral part of which is qualified instructional personnel. '[T]he State has a legitimate interest in the quality, integrity and efficiency of its public schools in furtherance of which it is not only the responsibility but also the duty of school administrators to screen those [in] ... the teaching profession to see that they meet this standard.'" *Dillon v. Bd. of Educ. of Wyoming Cty.*, 177 W. Va. 145, 351 S.E.2d 58 (1986) (superseded by statute, on other grounds) (internal citations omitted); *see also* Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

DISCUSSION

I. MCBOE was required to hire "Interventionists" pursuant to the statutory requirements of W. VA. CODE §18A-4-7a.

This Court finds that because "Interventionists" are "classroom teachers," a category of "professional personnel," W. VA. CODE §18A-4-7a governs the hiring of these positions. "Interventionists" perform the duties of a "classroom teacher" because their primary responsibility is to engage in "instructional" and "counseling" relationships with students. For this reason, MCBOE, not RESA VII, must hire them, in accordance with the provisions outlined in W. VA. CODE §18A-4-7a. By failing to do so, MCBOE acted in contravention of its statutory duties.

A. "Interventionists" are "classroom teachers."

"Interventionists" perform the duties of a "classroom teacher" as defined by W. VA. CODE § 18A-1-1(c)(1). Pursuant to this code section, "classroom teachers" are professional educators who have a direct instructional or counseling relationship with students and who spend the majority of her/his time in this capacity. A "professional educator" has the same meaning as "teacher." W. VA. CODE § 18-A-1-1(c). W. VA. CODE § 18-1-1(g) defines "teachers" as "a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state."

In the case at bar, the main requirement of an "Interventionist" is that she/he be a certified teacher. Pet'rs' Brief in Supp. of Mot. for Summ. J., Pet. For Writ of Mandamus, Dec. J. and Injunctive Relief ("Pet'rs' Brief in Supp. of Mot. for Summ. J."), Ex. 6, Gabriel Devono Dep. 19:6-16, May 25, 2012 ("G. Devono Dep.").[5] *See also* Pet'rs' Brief in Supp. of Mot. for

[5] Mr. Devono specifically explained that "[t]he main qualification that we ask for, that they're certified employees, that they hold a teaching certificate in the area that we're hiring them at."

Summ. J., Exs. 5, 7, Frank Devono Dep. 8:8-13, May 24, 2012 ("F. Devono Dep."),[6] Donna Talerico Dep. 10:12-15-24, May 24, 2012 ("D. Talerico Dep."). Specifically, "Interventionists" require certification for the level at which the individual is teaching, such as elementary, middle, and secondary school. G. Devono Dep. 20:1-7.[7] Though this certification is not dispositive of the inquiry, it certainly weighs in favor of classifying "Interventionists" as teachers.[8]

Both the general descriptions of "Interventionists" and the job postings for these positions demonstrate that an "Interventionist's" responsibilities cannot be classified as anything other than "instructional" and "counseling" relationships with students, the definition of a "classroom teacher." At the elementary and middle school level, "Interventionists" provide support for students within the "framework for support for personalized learning." D. Talerico Dep. 5:20-24. This framework gives "targeted, direct, supplemental support for at-risk students," who are identified in the primary grades. These students have learning deficits, and the "Interventionists" work with small groups of them utilizing materials prescribed by the Monongalia County curriculum. The support delivered by these "Interventionists" is the result of collaboration with the classroom teacher, school psychologist, and academic coach in determining what the student's needs are and how best to support them. D. Talerico Dep. 6:1-15.

"Interventionists" "work with students who need to have their academics and sometimes social skills advanced." G. Devono Dep. 20:22-24. The main reason they are hired is to help low-

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[6] Petitioners' counsel inquired as to whether the "Interventionists'" requirements would include having "some kind of training and certification as professional educators." Frank Devono responded in the affirmative.

[7] In fact, all of the "Interventionists" deposed had degrees in Education, and three out of the four "Interventionists" deposed on October 14, 2014, had at least one Masters Degree in Education. Pet'rs' Supplemental Mem. In Supp. of Mot. for Summ. J. at 5, ¶17; Deborah Savage Dep.: 6:10-14, Oct. 14, 2014 ("D. Savage Dep."); Trevor McIntyre Dep.: 6:1-8, Oct. 14, 2014 ("T. McIntyre Dep."); Sarah Kelly Dep.: 6:10-13, Oct. 14, 2014 ("S. Kelly Dep."); Erin Arthurs Dep.: 6:20–7:2, Oct. 14, 2014 ("E. Arthurs Dep."). These depositions were appended to Pet'rs' Supplemental Mem. In Supp. of Mot. for Summ. J.

[8] The Court will use the terms "teacher" and "classroom teacher" interchangeably throughout its discussion.

performing students and to work with the classroom teacher. G. Devono Dep. 21:1-4. "Interventionists" work directly with the students and can remove them from their classroom for additional instruction. F. Devono Dep. 6:9-13; 12:6-12. "Interventionists" "provide direct support, not direct instruction like a classroom teacher. The classroom teacher does the direct instruction, but [the 'Interventionists'] do one-on-one supportive program-based instruction with the students." D. Talerico Dep. 10:18–11:3.[9]

However, this Court finds the "Interventionists'" job functions to be more akin to "instruction" as opposed to "support," and specifically, more akin to the statutory definition of a "classroom teacher." Additionally, this Court does not believe that the concept of "support" in an academic context necessarily excludes the element of "instruction," a conclusion readily supported by the evidence as previously discussed. Further support for the Court's conclusion that "Interventionists" are properly classified as "classroom teachers" is the job postings for them. At North Elementary, the following primary responsibilities for the position are listed as follows:

1. Work with school teams to develop and implement strong instructional support and intervention models.

2. Provide high quality instruction and performance support to students who are at-risk in reading/language arts, math, and other core content areas.

3. Utilize identified scientific, research based interventions focused on group and individual student needs.

4. Assist with the implementation of the tiered intervention model of increasingly intense and targeted student interventions and [monitor] student progress according to prescribed procedures.

5. Participate in universal screening, progress monitoring, diagnostic assessment, and analysis of the data to identify students in need of tiered intervention and benchmarking.

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[9] Ms. Talerico notes that an "Interventionist's" responsibility in this regard is "very different" from that of a teacher.

6. Maintain data-based documentation of universal screening, tiered intervention, progress monitoring, diagnostic assessment, and benchmarking.

7. Maintain accurate and complete reports and documentation completed and submitted in a timely manner as required.

8. Monitor and evaluate program goals by gathering data on and reviewing the effectiveness of core instruction, universal screenings, interventions, progress monitoring, and diagnostic assessment.

9. Attend all meetings and professional development activities as assigned.

10. Work cooperatively and collaboratively with staff and parents to share knowledge, convey program goals, develop expertise and skills, and implement with integrity the tiered intervention process.

11. Maintain the confidentiality of school and student records.

12. Perform such other tasks and assume other responsibility as the superintendent or immediate supervisor may from time to time assign.[10]

The job posting for instructional "Interventionists" positions lists the following as the position's primary responsibility: "Provide instructional intervention for students showing weaknesses in reading and math." Pet'rs' Brief in Supp. of Mot. for Summ. J.", Ex. 1, Pg. 2. The previously referenced depositions and job postings make it very clear that "Interventionists" have "instructional" and "counseling" relationships with their students.

Additionally, the record does not indicate, nor have Respondents alleged, that "Interventionists" spend the majority of their time doing anything *other* than engaging in these types of relationships. As the Petitioners explain, "Interventionists" have a "purely instructional" relationship with their students, and the existence of administrative duties in their job responsibilities is scant. Pet'rs' Supplemental Mem. In Supp. of Mot. for Summ. J. at 5, ¶¶18, 19, 21, 8; S. Kelly Dep. 29-31; T. McIntyre Dep. 25:5-7, 27:9-24; D. Savage Dep. 39:13-24. The

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10 Pet'rs' Brief in Supp. of Mot. for Summ. J., Ex. 1, Pg. 1.

Petitioners also rightfully point out that the *statutory definition* of a "classroom teacher," which must guide this Court's analysis, neither mentions nor requires that a "classroom teacher" perform bus duty, lunch duty, monitor the school's hallways, attend faculty senate or staff meetings, or even participate in parent-teacher conferences. Pet'rs' Supplemental Mem. In Supp. of Mot. for Summ. J. at 8.

In contradiction of the conclusion that "Interventionists" are, in fact, "classroom teachers," as defined in our State Code, is that they do not communicate with parents. D. Talerico Dep. 11:1-3. Additionally, Ms. Talerico explained that "Interventionists" "don't do the planning, they don't do the grading, they don't do the assessment." D. Talerico Dep. 10:23–11:1; Pets.' Supplemental Mem. In Supp. of Mot. for Summ. J. at 4, ¶14 (noting that "Interventionists" do not determine a student's grade in a class).

However, this Court finds that the weight of the evidence, as previously discussed, favors a conclusion contrary to the Respondents' position that "Interventionists" are not teachers. This Court finds that "Interventionists" readily meet the definition of "classroom teachers." To rule otherwise would ignore the reality of an "Interventionist's" responsibilities in favor of formalistic interpretation.

Additionally, an argument could potentially be made that "Interventionists" are "paraprofessionals," individuals "certified pursuant to [§18A-3-2a] 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." W. VA. CODE §18A-4-8(i)(66). Though the definition of "paraprofessionals" sounds remarkably similar to the description of "Interventionists," this Court cannot properly classify "Interventionists" as such because "paraprofessionals" are included in

the section establishing employment terms and class titles for "service personnel." "Service person" or "service personnel" are "nonteaching school employee[s] who [are] not included in the meaning of 'teacher' . . . and who [serve] the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides." W. VA. CODE § 18A-1-1(e). *See also* W. VA. CODE § 18-1-1(h). It has already been established that "Interventionists" engage in instructional,[11] i.e. teaching, relationship with students, and the definition of "service personnel" prohibits those employees from teaching.[12]

B. "Interventionists" should be hired pursuant to W. VA. CODE § 18A-4-7a.

"Interventionists" are "classroom teachers," and as such, are "professional educators." Their hiring is thus governed by W. VA. CODE §18A-4-7a because this code section addresses the hiring of "professional personnel," a category which includes "professional educators."

W. VA. CODE § 18A-1-1(c)(1) defines a "classroom teacher" as "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." "Professional personnel" are "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." W. VA. CODE § 18A-1-1(b) (emphasis added). Statutorily, openings in established, existing, or newly created professional personnel positions, shall be processed as follows:

1. Boards shall be required to post and date notices which shall be subject to the following:

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[11] One of the definitions of "instruct" is to "give knowledge to; teach, train," and one of the definitions of "instruction" is "the action, practice, or profession of teaching." In fact, an "instructor" is defined as a "teacher." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 649 (11th ed. 2003).

[12] However, this Court finds the law to be contradictory here because "service personnel" are defined as non-teaching employees, yet "paraprofessionals," a category of "service personnel," facilitate instruction, a word with the same meaning as "teaching."

A. The notices shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

B. The 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;

3. If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within the thirty working days of the end of the 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 positing 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.[13]

In judging an applicant's qualifications, W. VA. CODE §18A-4-7a(c)(1)-(7) sets forth the elements to consider, and the teacher with the highest qualification shall be hired. W. VA. CODE §18A-4-7a(b).

In the case at bar, RESA VII conducted the hiring of the "Interventionists," as opposed to MCBOE,[14] which W. VA. CODE § 18A-4-7a(b) mandates. This section refers to the actions to be

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13 W. VA. CODE § 18A-4-7a(c)(1)-(5).

taken by "a county board [of education]," and expressly absent from the statutory language is the delegation of hiring to another entity, such as a RESA. Put very simply, MCBOE contracted out the hiring of "Interventionists" to RESA VII. Job postings for "Interventionist" positions were created, and posted, by RESA VII, not MCBOE. G. Devono Dep. 10:15–11:2. Interviews could be conducted by RESA VII, MCBOE, or a mixed team of both entities, but the ultimate hiring decision was made by RESA VII. G. Devono Dep. 14:17–15:4. "Interventionists" are, in fact, RESA VII employees. G. Devono Dep. 15:3-4, 8-17; Pets.' Brief in Supp. of Mot. for Summ. J., Ex. 2, Pgs. 1-2. "Interventionists" were not hired pursuant to the statutory procedures as set forth in W. VA. CODE § 18A-4-7a. Further, the record does not indicate that an "Interventionist" applicant's qualifications were evaluated based upon the criteria to be considered pursuant to W. VA. CODE §18A-4-7a(c)(1)-(7).

The Respondents argue that "[t]here is certainly no legal authority for the proposition that RESAs are prohibited from hiring instructional personnel to support the efforts of the county boards of education they serve." Resp'ts' Reply to Pets.' Supplemental Mem. In Supp. of Mot. for Summ. J. at 1. This Court disagrees. First, though it is true that pursuant to 126 C.S.R 72.5.1, one of the two most important responsibilities for a RESA is to "[provide] high quality, targeted staff development designed to enhance the performance and progress of students," this Court does not believe this responsibility includes the express authorization of a RESA to hire "classroom teachers," which "Interventionists" are. The Court in *State ex rel. Boner v. Kanawha County Board of Education* voiced a similar concern, finding "compelling and dispositive" "the absence of any authorization within the statutes that would permit the Board to depart from the

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[14] The contract between MCBOE and RESA VII was memorialized in the "Agreement [B]etween Monongalia County Schools and RESA 7," and RESA VII's Strategic Plan, approved by the West Virginia Board of Education, allows it to employ "Interventionists" and "Job Coaches."

statutory requirements for any particular area of instruction." 197 W. Va. 176, 186, 475 S.E.2d 176, 186 (1996). In the case at bar, our Legislature has *expressly* provided for the hiring of "professional personnel" in §18A-4-7a of our State Code. If 126 C.S.R 72.5.1 is read to permit the hiring of "classroom teachers" by a RESA, the statutory provisions governing the hiring, and employment, of teachers in this State would be virtually eviscerated.[15]

Second, the concept of "support," which the Respondents reference, does not imply the ability to *hire*. Though established "to provide for high quality, cost effective education programs and services to students, schools and school systems,"[16] providing services and programs does not imply "hiring" as was done in this case. This concept is expressly absent from the delineation of a RESA's purpose. W. VA. CODE § 18-2-26(b)(1)–(6).[17] The Legislature has already *specifically* addressed hiring of school personnel, both professional and service, in other parts of the State Code.

Third, the "instructional personnel" to whom the Respondents refer are "professional personnel," specifically teachers, and the Legislature has made very clear who is to hire these employees, and how they are to be hired.

Last, though the State Board of Education *is* authorized to enter into contracts for programs, services, and facilities provided by public and private agencies,[18] the *content* of these contracts undoubtedly cannot supersede a Board's *legislatively* enacted obligations. The contract

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15 In fact, concerning this area of service as detailed in RESA's Strategic Plan, there is not a single mention of hiring, in general, let alone the hiring of teachers. RESA Strategic Plan, Pgs. 9 - 16.

16 W. VA. CODE § 18-2-26(a).

17 Pursuant to W. VA. CODE § 18-2-26(c)(1)(C), the rule establishing RESAs was to provide for a uniform governance structure for the agencies containing "[p]rovisions for the agencies to employ other staff, as necessary, with the approval of the state board and upon the recommendation of the executive director." The Court interprets this provision to mean RESA staff, as opposed to school personnel such as the "Interventionists" at issue here.

18 W. VA. CODE § 18-2-27.

between MCBOE and RESA VII to provide "Interventionists" for Monongalia County Schools is memorialized by the "Agreement [B]etween Monongalia County Schools and RESA 7," which was executed for the school years 2010-2011 and 2011-2012. Pet'rs' Brief in Supp. of Mot. for Summ. J., Ex. 4. RESA VII's Strategic Plan, approved by the West Virginia State Board of Education, allows RESA to employ, *inter alia*, "Interventionists." A strategic plan, no matter how widely endorsed, does not usurp statutory obligations. Neither the contract with RESA nor RESA's Strategic Plan supersede MCBOE's *legislatively* enacted obligations, specifically those requiring it, and not another entity, to hire "professional personnel," which includes "classroom teachers." W. VA. CODE §18A-4-7a(b).

The Legislature was very clear that county boards of education are to hire "professional personnel," an employee category that includes "classroom teachers." It is bedrock principle that "[t]he word 'shall', in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969). Pursuant to W. VA. CODE § 18A-4-7a(a), county boards of education "shall" make hiring decisions regarding new "professional personnel."[19] This obligation on behalf of MCBOE is thus *mandatory*. By failing to conduct the hiring of "Interventionists" pursuant to the requisite West Virginia Code provisions as previously discussed, MCBOE has shirked its statutory responsibilities.

[19] This code section notes that decisions shall be made on the basis of the applicant with the highest qualifications, for those "professional personnel" other than "classroom teachers." However, the section immediately following explains that the same consideration is to be taken into account for the hiring of classroom teachers, a category of professional personnel. W. VA. CODE § 18A-4-7a(b).

II. MCBOE has not adhered to its statutory, and constitutional, duty to provide its children with the most qualified educators.

MCBOE has eschewed its responsibility to provide its students with the most qualified educators by circumventing the statutory procedures for the hiring of, and providing benefits to, "classroom teachers." The Legislature is mandated to provide for a thorough and efficient system of free schools. W. VA. CONST. art. XII, §1. The "Thorough and Efficient Clause" "requires the Legislature to develop a *high quality* State-wide education system." Syl. Pt. 5, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) (emphasis added). "Public education is a fundamental constitutional right in this State, and a prime function of the State government is to develop a high quality educational system, an integral part of which is *qualified* instructional personnel. '[T]he State has a legitimate interest in the quality, integrity and efficiency of its public schools in furtherance of which it is not only the responsibility but also the duty of school administrators to screen those [in] ... the teaching profession to see that they meet this standard.'" *Dillon v. Bd. of Educ. of Wyoming Cty.*, 177 W. Va. 145, 351 S.E.2d 58 (1986) (superseded by statute, on other grounds)[20] (internal citations omitted) (emphasis added). Pursuant to W. VA. CODE §18A-4-7a(b), MCBOE *shall* hire the teacher with the highest qualification.

A. Failing to adhere to the statutory hiring provisions for "classroom teachers" undercuts the Legislature's desire to provide students with the most qualified educators.

In the case at bar, MCBOE has abdicated its hiring of "teachers" to RESA, which has undermined the statutory provisions meant to ensure that the most qualified individuals teach our State's children. As the Petitioners explain, the statutory hiring procedure for "classroom teachers," which this Court has determined "Interventionists" to be, "is a clear manifestation of

[20] This concerned the use of seniority in hiring decisions.

the Legislature's desire to attract the most qualified applicants." Pets.' Mot. for Summ. J. at 17. As the Petitioners note, openings for "professional personnel," which includes "classroom teachers," are to be posted for a certain period of time and in conspicuous locations for "professional personnel" to observe, special skills or criteria are to be listed, postings should be written to ensure that the "largest pool" of *qualified* applicants applies, and favoritism is forbidden. Pet'rs' Supplemental Mem. In Supp. of Mot. for Summ. J. at 12, citing W. VA. CODE § 18A-4-7a(o)(1)(A)-(E).

Additionally, and perhaps most significantly, the Legislature's intent to attract the most qualified applicants is evident when one reviews the criteria a school board is to consider in determining which applicant is the most qualified, pursuant to its obligation per W. VA. CODE § 18A-4-7a(b). However, the record does not indicate that the Respondent considered the criteria contained within W. VA. CODE § 18A-4-7a(c)(1)-(7). Specifically, the Petitioners note that the Respondent has not considered (1) appropriate certification or licensure;[21] (2) amount of experience relevant to the position or relevant teaching experience in the subject area; (3) the amount of course work and/or degree level in the relevant field and degree level generally; (4) academic achievement; (5) relevant specialized training; (6) past performance evaluations; and (7) other measures or indicators of the applicant's relative qualifications. Pet'rs' Brief in Supp. of Mot. for Summ. J. at 16. Certainly, education, experience, and achievement are all highly relevant to determine which applicant is most qualified for a task as delicate and paramount as educating our youth, particularly our needy youth and those children requiring specialized attention.

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[21] However, it has been established that the main requirement for an "Interventionist" position was that the individual be a certified teacher. *See* Pet'rs' Brief in Supp. of Mot. for Summ. J., Ex. 6, G. Devono Dep. 19:6-16.

In fact, the only qualifications required for the three (3) "Interventionist" positions for one school in Monongalia County was "Elementary or Middle School Teacher Reading." Pet'rs' Brief in Supp. of Mot. for Summ. J., Ex. 1, Pg. 1. Similarly, the only qualification required of another Monongalia County "Interventionist" was "Elementary Education; Reading Specialist Preferred." *Id.* at 2. These sparse requirements are undoubtedly a far cry from those articulated by the Legislature, undeniably intended to ensure that the best and the brightest are hired as "classroom teachers,"[22] in furtherance our Legislature's *constitutional* responsibility to provide for a thorough and efficient system of schools. By failing to apply the statutory factors to hiring evaluations, MCBOE is not ensuring that the most qualified applicants are teaching this State's children in the manner dictated by the Legislature.

B. Failing to provide the statutory benefits package to "Interventionists," who are "classroom teachers," undercuts the Legislature's desire to provide students with the most qualified educators.

"Interventionists," who are "classroom teachers," a category of "professional personnel," should have been entitled to receive the statutory benefits as detailed in W. VA. CODE § 18A-4-1 *et seq.* These benefits are certainly part of the Legislature's attempt to attract the best and brightest applicants for "classroom teacher" positions, and failing to provide them to "Interventionists" is another example of MCBOE failing to fulfill its responsibility to ensure the most qualified individuals instruct our State's children.

The Petitioners contend that the statutory benefits per W. VA. CODE § 18A-4-1 *et seq.* provided to "professional personnel," a category that includes "classroom teachers," are intended to attract the best and the brightest, or most qualified, individuals to teaching positions within

[22] In making this observation, this Court is in *no* way intending to imply that the "Interventionists" who were hired did not do their jobs well. Rather, this Court wishes to make clear that the Legislature has developed specific criteria to ensure that the most qualified applicants are hired as "classroom teachers," and the statutory hiring procedures *must* be followed.

this State. Pet'rs' Brief in Supp. of Mot. for Summ. J. at 19. This Court agrees. Certainly, not *all* individuals base their employment decisions on purely economic concerns. However, it is reasonable to infer that in the case of "classroom teachers," the Legislature desired to use such factors as *part* of its efforts to attract the most qualified applicants. It cannot legitimately be argued that a competitive salary and benefits package would *not* weigh in favor of a given position.

In fact, the West Virginia Supreme Court has spoken to the potential adverse consequences of reduced benefits for those in teaching positions in this State. In *State ex rel. Boner v. Kanawha County Board of Education*, the Court observed that "the long-term effect of offering reduced benefits for [hourly] teaching positions could result in the filling of [the homebound positions at issue] with individuals who are less competitive under the statutory criteria established for hiring." 197 W. Va. 176, 180, 475 S.E.2d 176, 180, n.12 (1996). Articulating similar concerns raised in *Boner*, in which full-time teaching positions were eliminated in favor of hourly instructors, the Petitioners explain that in the case at bar, "the most qualified applicants are not nearly as likely to apply for the ['Interventionist'] positions because the most qualified would 'have to take a cut in pay, lose medical benefits, and all other benefits' attendant to being employed by a county board of education." Pet'rs' Reply Brief in Supp. of Mot. for Summ. J. at 10 (citing *Boner*, 197 W. Va. 176, 185, 475 S.E.2d 176, 185 (1996)). Additionally, "experienced teachers could not invoke (and would not continue to accumulate) their seniority rights to secure the position." *Id.* Failing to provide "Interventionists" with statutory benefits deals another blow to the Legislative requirement that the most qualified individuals teach our children.

CONCLUSION

In applying the requisite standard of review in a summary judgment action, this Court finds that no genuine issue of material fact exists concerning whether or not "Interventionists'" are "classroom teachers." This Court finds that they are, pursuant to the statutory definition contained in W. VA. CODE § 18A-1-1(c)(1). They perform the duties of a "classroom teacher" and have a direct instructional or counseling relationship with their students. The record in this case does not indicate that they spend the majority of their time in any other capacity. This Court cannot find that "Interventionists" can be classified as "service personnel" because these employees have non-teaching positions. As "classroom teachers," "Interventionists" should have been hired pursuant to the procedures contained in W. VA. CODE § 18A-4-7a, entitled to the benefits contained in W. VA. CODE § 18A-4-1 *et seq*. Neither occurred in this case, as MCBOE abdicated its statutory responsibility to hire "classroom teachers" to RESA. In doing so, MCBOE has shirked it statutory, and constitutional, responsibility to provide the children of this State with the most qualified "classroom teachers." The hiring criteria to be considered in determining the most qualified applicant, and the benefits to which "classroom teachers" are entitled, are measures put in place to ensure that the most qualified instruct our children.

Despite its ruling in this case, this Court wishes to express its opinion that the "Interventionists" are undoubtedly an asset to our State's children. In fact, there was no dispute that the services "Interventionists" provide are "*necessary*." Summ. J. Hr'g, May 18, 2015 (emphasis added). As the record has made clear, "[t]he opportunity to deploy multiple part-time interventionists, rather than a fewer number of regular full-time employees, results in the ability to offer services to a significantly greater number of students during a school day." Resp'ts' Supplemental Mem. in Supp. of Mot. for Summ. J. at 3 (citing D. Talerico Dep. 13, 17, 40).

"This circumstance exists by virtue of greater flexibility in scheduling multiple interventionists in more than one classroom during the same time period." Resp'ts' Supplemental Mem. in Supp. of Mot. for Summ. J. at 3. This being said, it is highly unfortunate that the existing number of "Interventionists" in our schools will likely be reduced, due to budgetary constraints.

This Court is bound by what the law *is*, not what it would have it *be*. As much as the Court would have wanted to see a different outcome, as it cannot help but feel that this State's students will end up being the losers in this case, the law cannot be re-written, nor can statutes be interpreted in a manner inconsistent with the plain meaning of the words therein. *Vankirk v. Young*, 180 W. Va. 18, 20, 375 S.E.2d 196, 198 (1988). This Court's personal opinion aside, "[it certainly] does not sit as a superlegislature.... It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions." *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986). This Court has put forth its most earnest attempt to reconcile the facts of this case with the law, law which has proved itself to be vague and even contradictory in places.

For the foregoing reasons, the Court **ADJUDGES** and **ORDERS** as follows:

1. The Petitioners' Motion for Summary Judgment is **GRANTED.**
2. The Respondents' Motion for Summary Judgment is **DENIED.**
3. The Circuit Clerk is directed to provide copies of this Order to all counsel of record.

ENTER: June 9, 2015

PHILLIP D. GAUHOT, CHIEF JUDGE

ENTERED June 9, 2015

DOCKET LINE # 84

JEAN FRIEND, CIRCUIT CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

AMERICAN FEDERATION OF TEACHERS - WEST VIRGINIA, AFL-CIO, JUDY HALE, its President, SAM BRUNNETT, JEANIE DeVINCENT, SHELLY GARLITZ and MIKE ROGERS, as representatives of similarly situated individuals,

Petitioners,

v.

Civil Action No. 11-C-759
Judge Gaujot

MONONGALIA COUNTY BOARD OF EDUCATION and FRANK DEVONO, Superintendent,

Respondents.

ORDER GRANTING RESPONDENTS' MOTION FOR STAY

Respondents, The Monongalia County Board of Education and Superintendent Frank Devono, moved this Court to issue a stay of its June 9, 2015 Order granting Petitioners' Motion for Summary Judgment and denying Respondents' Motion for Summary Judgment pending the disposition of an appeal of this Court's decision to the Supreme Court of Appeals of West Virginia. For the following reasons, this Court **GRANTS** Respondents' Motion for Stay:

1. On June 9, 2015, this Court issued an Order granting Petitioners' Motion for Summary Judgment and denying Respondents' Motion for Summary Judgment.

2. West Virginia Rule of Appellate Procedure 28(a) provides that "[a]ny person desiring to present an appeal under Rule 5 may make an application for a stay of proceedings to the circuit court in which the judgment or order desired to be appealed was entered."

3. Respondents state that they intend to appeal this Court's June 9, 2015 Order; therefore, Respondents have requested a stay during the application for and pendency of their appeal.

4. The Court finds that Petitioners will not be significantly harmed by the issuance of a stay. Should Petitioners ultimately prevail following the appeal, Respondents would not be able to use interventionists in Monongalia County Schools unless they hire the interventionists as classroom teachers pursuant to West Virginia Code § 18A-4-1, *et seq.*

5. The Court finds that Respondents will be substantially harmed if a stay is not granted. Respondents state that they will be unable to retain all interventionist positions if they are classified as "teachers" and subject to the procedures set forth in West Virginia Code § 18A-1-1, *et seq.* If the stay is not granted, Respondents will not be able to use interventionists in Monongalia County Schools unless significant funds are expended to comply with this Court's Order, even though this is an issue of first impression and the final resolution of this matter on appeal may hold otherwise. Respondents will also lose valuable services and support that it receives from Regional Education Service Agency ("RESA") VII because, under this Court's Order, it cannot contract with RESA VII for an interventionist's services.

6. Respondents have also made a strong showing that there is a likelihood they could succeed on the merits. As previously noted by this Court, the law surrounding this issue is "contradictory." Order, p. 14, n.12. Given the contradictory nature of the law, Respondents have advanced three arguments that demonstrate a showing that they may succeed on appeal. First, Respondents argue that county boards of education are explicitly authorized under West Virginia law to contract with a RESA to collaborate and implement a strategic plan to assist schools and their students. Therefore, Respondents argue they have authority to contract

with RESA VII for an interventionist's services. Second, Respondents contend that the Supreme Court of Appeals of West Virginia has not prohibited a county board of education from contracting with non-employees for professional services. In *State ex rel. Boner v. Kanawha County Bd. of Educ.*, the West Virginia Supreme Court of Appeals stated that the case did not "present the issue of whether school boards may contract with non-employees for professional services." 197 W. Va. 176, 180, 475 S.E.2d 176, 180, n. 14 (1996). Indeed, the *Boner* case prohibited a county board of education from laying off current, full-time teachers and reassigning the same duties under extracurricular contracts to save money. However, the Supreme Court did not say that a county board of education is prohibited from obtaining teacher services under extracurricular contracts. Third, RESA VII's interventionists are employees of the West Virginia State Board of Education. Therefore, according to Respondents, the interventionist positions are not subject to West Virginia Code § 18A-4-1, *et seq.* because they are not and cannot be employees of the Monongalia County Board of Education. Accordingly, the Court finds Respondents have made a showing of a likelihood to succeed on the merits.

7. The Court finds that the public interest will be served if a stay is granted. Respondents will be permitted to continue offering the valuable reading and math support services that interventionists provide in several Monongalia County schools. As recognized by this Court, "there was no dispute that the services 'Interventionists' provide are '*necessary*.'" Order, p. 23 (citing Summ. J. Hr'g, May 18, 2015) (emphasis added). Additionally, as the Court noted in its Order, interventionists are "undoubtedly an asset to our State's children" and "it cannot help but feel that this State's students will end up being the losers in this case." Order, p. 23-24. Given the significant public interest and potential harm to West Virginia's students, the public interest sharply tilts in favor of granting a stay.

8. In balancing the harms to the parties and the public, the Court finds that Respondents will be actually and significantly harmed if the stay is not granted; however, Petitioners will be only potentially and slightly harmed if this Court grants a stay. Additionally, the harm to the public clearly tilts in favor of granting the stay. Therefore, the balance tips in favor of granting Respondents' Motion for Stay.

9. Because no monetary relief was awarded in this Court's June 9, 2015 Order, the bond requirement under Rule 28(c) of the West Virginia Rules of Appellate Procedure is waived.

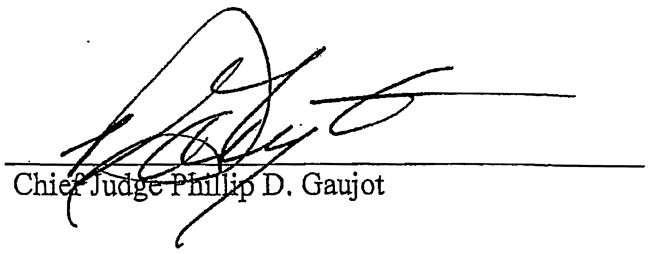
ACCORDINGLY, Respondents' Motion for Stay is **GRANTED**. It is **FURTHER ORDERED** that:

a. this matter is **STAYED** pending final disposition of this case on appeal;

b. the bond requirement under Rule 28(c) of the West Virginia Rules of Appellate procedure is **WAIVED**; and

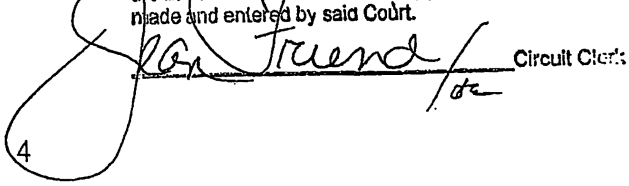
c. The Clerk of this Court is **ORDERED** to send an attested copy of this Order to all counsel of record herein.

Enter: June 24, 2015



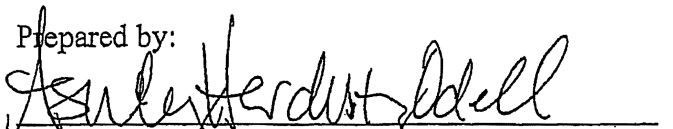
Chief Judge Phillip D. Gaujot

STATE OF WEST VIRGINIA, SS:
I, [illegible], Clerk of the Circuit and Family Courts of [illegible] County, State aforesaid do hereby certify that the above and foregoing ORDER is a true copy of the original Order made and entered by said Court.



Circuit Clerk

Prepared by:



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