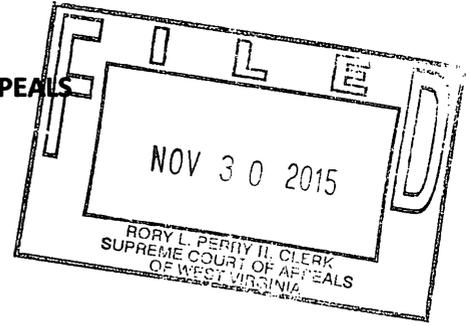


**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
DOCKET NO.: 15-0662**



**MONONGALIA COUNTY BOARD OF EDUCATION and
FRANK D. DEVONO, SUPERINTENDENT
Petitioners,**

v.

**AMERICAN FEDERATION OF TEACHERS,
WEST VIRGINIA CIO, JUDY HALE, its President,
SAM BURNETT, JEANIE DEVINCENT, SHELLY GARLITZ
And MIKE ROGERS, as Representative of similarly
Situated individuals,
Respondents.**

**BRIEF OF AMICUS CURIAE WEST VIRGINIA EDUCATION ASSOCIATION
IN SUPPORT OF RESPONDENT'S POSITION SEEKING AFFIRMANCE OF THE ORDER BELOW**

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I. INTRODUCTION

The West Virginia Education Association (hereinafter referred to as the "WVEA" or "Amicus") is a statewide membership group consisting of, among others, public school teachers, support personnel and administrators¹. It has members throughout the state, including in Monongalia County. The WVEA's membership in Monongalia County, and throughout the state, have an interest in insuring that the procedures and rights provided in the West Virginia Code for the filling of new or existing positions are observed. The WVEA has moved this Honorable Court for permission to file this Brief of Amicus Curiae West Virginia Education Association in Support of Respondent's Position Seeking Affirmance of the Decision Below.

Monongalia Board of Education and Frank Devono filed Petitioners' Brief. Amicus is not going to reply to all points made therein. Rather, the WVEA is going to respond to part two of Respondent's Brief, found at pages 13-17. These pages deals with the issue of whether the so-called "interventionist" are "classroom teachers" and as such, whether they could be hired by a RESA.

To summarize, the lower court correctly ruled that the so-called "interventionists" met the statutory definition of a "classroom teacher" found at 18-1-1(g) and 18A-1-1©(1). As such, the Circuit Court of Monongalia County ruled, they had to be hired by Petitioner Board of Education pursuant to West Virginia Code Section 18A-4-7a (2013) and also be given the same pay and benefits as other public employee classroom teachers. Since the interventionists were hired by a RESA, not by Respondent Board of Education, and since the other procedures set forth in Section 18A-4-7a also were not met, the Circuit Court granted Respondent's Motion for Summary Judgment made below. Petitioners appeal.

¹ Please know that neither the West Virginia Education Association, nor undersigned counsel, is receiving compensation for the drafting or submission of the Brief and please also know that this document was entirely drafted by the undersigned counsel.

Petitioners argue that it is "irrelevant" whether or not the interventionists meet the definition of a classroom teacher. Moreover, Petitioners contend, even if such question is relevant, the interventionists do not meet such definition. However, Petitioners either ignore or fail to answer the most salient grounds for the lower court's order now on appeal. Indeed, nothing in Petitioners' Brief justifies granting this appeal.

II. DISCUSSION

Petitioners argue that there is no relevance to the issue of whether or not interventionists are classroom teachers. In essence, Petitioners contend that RESAs are allowed to hire classroom teachers as occurred here. Obviously, if RESAs can hire teachers, the issue of whether the interventionists are or are not teachers would be irrelevant. Moreover, Petitioners argue that even if this issue is relevant, interventionists are not classroom teachers. However, Petitioners points are not well taken. As the circuit court found, whether or not interventionist are classroom teachers is determinative of this matter and the work interventionist performs demonstrates that they are classroom teachers as defined by the West Virginia Code.

A. THE ISSUE OF WHETHER OR NOT INTERVENTIONISTS ARE CLASSROOM TEACHERS IS DETERMINATIVE OF THIS APPEAL BECAUSE WEST VIRGINIA CODE SECTION 18A-4-7a REQUIRES TEACHERS TO BE HIRED BY BOARDS OF EDUCATION

Petitioner argues that whether or not interventionist fall within the definition of "classroom teacher" is irrelevant because RESAs are empowered to hire teachers. Petitioners state that "there is no legal authority for the proposition that RESAs are prohibited from hiring **instructional personnel**² to

² Petitioners agree that interventionists are "instructional personnel." As will be shown below, this fact demonstrates that interventionists are classroom teachers.

support the educational efforts of the County Board of Education's they serve." Petitioners Brief at page 13 (emphasis added).

However, the statement is simply untrue. As noted by the circuit court below, West Virginia Code Section 18 A-4-7a, which addresses the hiring of "professional personnel," a subset of which includes "professional educators," sets forth the mandatory procedure to be used in hiring these individuals. This statutory provision states that openings in established, existing or newly created professional positions **shall** be processed by the county boards of education posting notices under certain requirements. As this Honorable Court has ruled on numerous occasions the word "shall" denotes a mandatory, nondiscretionary statutory command. See e.g. State ex rel Archer v. County Court, 150 W. Va. 260, 144 S.E.2d 791 (1965). Moreover, the omission of RESAs as a hiring authority in the mandatory procedures set forth in the West Virginia Code pertaining to classroom teachers and the exclusive inclusion of boards of education therein mean that a RESA can not hire a classroom teacher and that a Board of Education must do so under the conditions set forth in the Code³.

Petitioner really offers no coherent argument against this. It attempts to evade the clear language of Section 18A-4-7a by stating the "circuit courts reliance of the word "shall" in [this code section] ignores the context within which that statute is intended to operate." It continues by noting that the statute the West Virginia Code separates the various categories of professional employees into subcategories and that each statutory section "addresses the selection, employment, compensation, protections and duties of school employees based upon job categories." Petitioners Brief at pages 14-15. Petitioner then argues that "all the statutes are predicated on the fact that an individual is employee of

³ This Court has long recognized and followed the principle of "*expressio unius est exclusio alterius*:" the expression of one thing is the exclusion of another. See e.g. Layne v. Hayes, 141 W. Va. 289, 90 S.E.2d 270 (1955).

the school board," but that none of the statutes require that boards of education directly employ all professional employees.

Petitioners point simply doesn't advance its cause. The fact that, in its words, all the statute pertaining to the filling of new or vacant existing teaching positions are predicated on the fact that an individual is employed by the school board indicates that this is precisely what the State Legislature intended. Petitioners offered no law, nor canons of statutory construction, which would indicate otherwise.

Moreover, when it states that "nowhere in any of the statutes are boards required to directly employ, with full salary and benefits, any person providing services within the statutory definition of a particular class of school employees," it ignores the mandatory "shall" language quoted above. In fact, Section 18A-4-7a mandates it by using the word "shall."

Finally, this Court should note the real-world ramifications of Petitioners legal position. Again, Petitioners are arguing that it does not matter whether interventionists are teachers or not. It takes this position because, it argues, RESAs have the authority to hire any "school personnel." See Petitioner's Brief at p. 9⁴. However, if RESAs can hire classroom teachers in a manner and at a wage that it deems appropriate, then the rights afforded under 18A-4-7a are eviscerated. If RESAs can hire classroom teachers to instruct students as they are doing now, they can hire all teachers in this manner, paying the lowest salary and benefits as the market will bare⁵.

⁴ Amicus also notes that Petitioners' attempt at statutory construction of the phrase "on hourly basis or otherwise" contained in the definition of "school personnel" found on page 9 of its Brief is particularly unavailing. Clearly, what is being referred to there is the types of employment, and compensation, that a school board may use, not the entity that employs school personnel.

⁵ Additionally, this Court should note, as stated by Petitioner in its Brief, employees hired by RESAs are "will and pleasure" employees. Thus, if teachers can be hired by RESAs, they will no longer have their current "tenure" rights, which permits employment so long as there is not "just cause" for its termination.

Ultimately, the West Virginia Code sets forth a very specific way in which all classroom teachers have to be hired or positions filled. While the procedures set forth therein provide for a large amount of discretion by school boards, there are certain rights and responsibilities set forth in the West Virginia Code that are mandatory. One such mandatory provision is that the county board of education must do the hiring.

A. THE LOWER COURT CORRECTLY RULED THAT INTERVENTIONISTS ARE CLASSROOM TEACHERS

Petitioners argue that interventionists are not classroom teachers because there are many tasks that they do not perform that are commonly associated with the functions of being a classroom teacher. For example, according to Petitioners, interventionists do not "deliver required curriculum," do not have a regularly assigned classroom for the school year, do not determine a student's grade in class and do work at the direction of a classroom teacher with only a select group of students who need support. However, none of these job attributes are fundamental to the statutory definition of classroom teacher.

The West Virginia Code 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." In Petitioner's entire Brief, it never even attempts to argue that: (1) interventionist do not have an instructional (as well as counseling) relationship with students and (2) the majority of the interventionists time is spent in that capacity. The circuit court found that interventionist instruct (and counsel) students and the majority of their time is spent doing so.

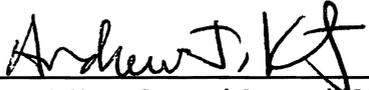
The West Virginia State Legislature did not have to enact the focused definition of classroom teacher that it did. Rather, it could have made grading students, or teaching a specific class classroom curriculum, or having a specific classroom part of the definition of what makes a classroom teacher. However, it chose not to do so. To reiterate, the Legislature, instead, provided a very focused definition of what would constitute a classroom teacher in a public school in West Virginia: a professional educator

who has a direct instructional or counseling relationship with students, such relationship comprising the majority of his or her time. Since interventionists have such relationship with their students and such work comprises a majority of their time, interventionists are classroom teachers. And, as such they must be hired by Petitioner Board of Education pursuant to section 18-4-7a. Thus, the circuit court's Final Order should be upheld and this appeal denied.

III. CONCLUSION

The Final Order of the Circuit Court of Monongalia County should be upheld for the reasons contained herein.

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AMERICAN FEDERATION OF TEACHERS,
WEST VIRGINIA, AFL-CIO, JULY HALE, Its
President, SAM BRUMETT, JEANIE DEVINCENT,
SHELLY GARLITZ and MIKE ROGERS, as representatives
of similarly situated individuals,
Petitioners Below/Respondents

CERTIFICATE OF SERVICE

Please take notice that on the 30thth day of November, 2015, the undersigned counsel did cause to be served a copy via of Brief of Amicus Curiae West Virginia Education Association in Support of Respondents' Position Seeking Affirmance of the Lower Court's Order Below and Motion for Leave to File *Amicus Curiae* Brief on Behalf of the West Virginia Education Association via first class US mail, postage prepaid to the individuals listed below:

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