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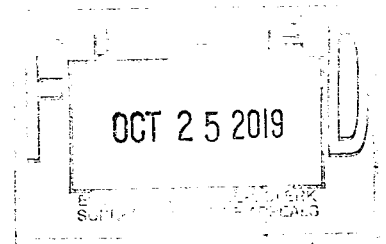
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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: 19-0684

(Kanawha County Circuit Court Docket No.: 13-AA-63)

SUSIE MCCANN AND TAMMY OWENS,  
Petitioners-Appellants,



v.

LINCOLN COUNTY BOARD OF EDUCATION.  
Respondent-Appellee

APPELLANTS' BRIEF

Andrew J. Katz, Esquire  
The Katz Working Families' Law Firm, LC  
The Security Building, Suite 1106  
100 Capitol Street  
Charleston, West Virginia 25301  
(304) 342-5579  
ajk792000@yahoo.com  
*Counsel for Appellants*

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### III. TABLE OF AUTHORITIES

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### III. ASSIGNMENT OF ERROR

1. Whether the lower court erred in overturning the misclassification decision by the West Virginia Public Employees Grievance Board, which ruled that Respondent had adopted an expanded definition of Executive Secretary that was not contrary to the West Virginia Code and that Appellants, who were misclassified as Secretary IIIs, met such expanded definition.

### IV. STATEMENT OF THE CASE

Both Petitioners were employed by Respondent as an Executive Secretary III<sup>1</sup>. Both employees were responsible to one of the Directors who worked for Respondent.

Ms. McCann is employed by Appellee as the Secretary for the Special Education Department. Ms. McCann is incorrectly classified as a Secretary III, even though her immediate predecessor was classified as an Executive Secretary and Appellant has the same duties as the previous occupant of her position. Ms. McCann's immediate supervisor is Jeremy Brunty, Director of Special Education for Lincoln County Schools.

Special Education Director Brunty is responsible for ensuring that special education services are being provided to eligible students in Lincoln County in compliance with State Board Policy 2419 as well as federal and state laws. He also oversees the Critical Skills program and Title Nine compliance. Director Brunty is responsible for federal and state Special Education funding, as well as Medicaid funding and reporting. A large number of employees and resources are involved in providing these services. Providing Special Education services is required by law and an essential responsibility of the Board.

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<sup>1</sup> The Statement of Facts are taken almost verbatim from the Grievance Board's decision below. See JA at pp. 22-29.

In addition to providing routine secretarial and clerical services for Director Brunty, Grievant McCann works with WVEIS8 reports, processes purchase orders, inventories and requisitions, assists teachers in accessing IEP9 sites, prepares and processes large mail projects, schedules and prepares packets for staff meetings.

Tammy Owens has been employed by Respondent for seven years. For the last three years, she has served as the secretary for the Transportation Department. Ms. Owens is classified as a Secretary III and is employed for a 240 day employment term. Appellant took this position after it was vacated by JoAnne Adkins. Ms. Adkins was classified as an Executive Secretary and Grievant performs all the duties and responsibilities that were performed by Ms. Adkins.

The direct supervisor for Ms. Owens is Rod Cummings, the Board's Transportation Director. Transportation Director Cummings is responsible for the Board's fleet of vehicles including the school buses used to transport students to and from school. His department must ensure that all the vehicles are maintained in compliance with state and federal regulations, and that all the vehicles are operated safely. There are many employees in the Transportation Department and various reporting requirements must be met. Safe transportation of students is an essential responsibility of the Board.

Appellant Parsons is responsible for providing routine secretarial and clerical work for the Transportation Department. Her duties include, but are not necessarily limited to, preparing and transmitting reports to the State Department of Education, monitoring diesel and gas inventories, managing the radio to stay in communication with bus operators and deal with emergencies, staying familiar with

transportation policies and procedures, assisting the Director in formulating policy memorandums for the bus operators and preparing the Transportation Department payroll. Appellant Parsons participates in the rotation for covering Tina Black's duties for one hour each day.

Appellants were part of a group of employees classified as Secretary III, that contended that they should have been classified as Executive Secretaries. The West Virginia Public Employees Grievance Board (Grievance Board) ruled in their favor. Respondent here appealed below and prevailed.

#### **V. SUMMARY OF ARGUMENT**

This is a simple case. Appellants work for Directors of Respondent. These Directors have extensive administrative responsibilities. Appellants are classified as Secretary III, but they meet Respondent's definition of Executive Secretary. In fact, the employees who performed the same job with the same duties as Appellants before were classified by Respondent as Executive Secretaries. The lower court ruled that Respondent's job classification definition of Secretary III was "illegal," thus could not be enforced, but gave no argument or reasoning why Respondent's definition of an Executive Secretary was incompatible with the definition in the West Virginia Code. As both this Court and the Grievance Board have both maintained that a county board of education could broaden the definition of a classified employee so long as such broadening did not conflict with the West Virginia Code, as Respondent did adopt a definition of Executive Secretary that broadened, but did not conflict with, the definition of this classification in the West Virginia Code and as this Court has ruled that a public employer must follow its own rules and procedures, the lower court's ruling is erroneous and should be reversed.

## **VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Of course, this Honorable Court best knows if oral argument will assist clarifying any points raised by the parties. Appellants believes that the legal issues involved are not complex and that a hearing would not assist this Court in reaching a decision.

## **VII. ARGUMENT**

Appellants have been performing the work as Executive Secretary, as that term is defined by Respondent. However, they have been classified as a Secretary III, a lower classification, with lower pay. The Grievance Board correctly ruled that Respondent had to follow its own definition of Executive Secretary and classify Appellants thereunder. The lower court erred by reversing the Grievance Board's ruling.

### **A. STANDARD OF REVIEW**

The appeal provisions of W. Va.. Code § 29-6A-7 provide that an appeal may be taken to a circuit court where the final grievance decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the hearing examiner's statutory authority;
- (3) Is the result of fraud or deceit;
- (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

“A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board . . .and based upon findings of fact, should not be reversed unless clearly

wrong<sup>2</sup>." Quinn v. West Virginia v. Comty. Coll., 197 W. Va. 313, 475 S.E.2d 405 (1996).

Further, an appellate court accords deference to the findings below. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). The reviewing court must defer to the ALJ's factual findings that are supported by substantial evidence, and give substantial deference to inferences drawn from these facts. Id. Conversely, there is a *de novo* review of the conclusions of law and application of law to the facts. Id. Quinn, 475 S.E.2d at 408, *citing* Bolyard v. Kanawha County Bd. of Educ., 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995).

Ultimately, an appellate court uses both a deferential and plenary standard of review, giving some deference to an ALJ's findings of fact, but reviewing *de novo* any ruling of law and the application of law to the facts. This Court uses the same standard when reviewing a lower court's ruling as that court is to use in reviewing the decision by the Grievance Board.

## **B. STATEMENT OF LAW**

This is a misclassification grievance. Under the precedent of the Grievance Board: "in order to prevail in a misclassification grievance, the employee must establish that his or her duties more closely match those of another classification than that under which the employee's position is categorized." JA at p. 30 (citations omitted). "A school service employee who establishes, by a preponderance of the evidence, that he or she is performing the duties of a higher West Virginia Code . . . classification than that under which he or she is officially

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<sup>2</sup> "Clearly wrong" is when a decision constitutes a misapplication of the law, entirely fails to consider an aspect of the problem or offers an explanation that runs counter to the evidence offered or offers an implausible explanation. In Re Queen, 196 W. Va. 442, 473 S. E. 2d 483 (W. Va. 1996).



categorized, is entitled to reclassification. Id. (citations omitted). “However, simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render him or her misclassified per se.” Id. (citations omitted).

Moreover, “A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within West Virginia Code §18A-4-8.” JA at p. 35. Randolph County Bd. of Educ. v. Scott, 617 S.E.2d 478 (2005). Importantly, “[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs,” even if those procedures are more generous than employees might otherwise be entitled to. Powell v. Brown, 238 S.E.2d 220 (1977). JA at p. 36.

Here, the two classifications at issue are Secretary III and Executive Secretary. The West Virginia Code defines Executive Secretary as: “a person employed as a secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties.” West Virginia Code Section 8A-4-8(h)(40). And the definition of Secretary III is: “a person assigned to the county board office administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities in purchasing and financial control or any person who has served for eight years in a position which meets the definition of "secretary II" or "secretary III.” West Virginia Code Section 18A-4-8(h)(78). The Grievance Board has noted that “[t]he distinction between the Secretary III and Executive Secretary classifications depends upon the duties and responsibilities of the individual

to whom the secretary is assigned, not the secretary's own duties and responsibilities.” JA at p. 17.

### C. DISCUSSION

#### **APPELLANTS PROVED THAT THEY MEET RESPONDENT’S DEFINITION OF EXECUTIVE SECRETARY AND THE LOWER COURT ERRED IN REVERSING THE GRIEVANCE BOARD ON THAT ISSUE**

Resolving this issue is a simple three step process. First, one looks to the duties and responsibilities of “Executive Secretary” used by Respondent. Respondent defines an Executive Secretary as performing service “as secretary to specific department/department head, assisting to assure that the office operates smoothly and efficiently.” Such individuals “work[] under the direct supervision of the department head/director.” JA at p. 35.

The second step is to determine whether this definition is in conflict with the definition within the West Virginia Code. As the Grievance Board found, it is not. The definition is broader than the one in the Code, but does not contradict it. As the Grievance Board stated, this definition simply represents Respondent’s decision that working for a significant department head satisfies the “important administrative duties” prong of the State’s definition of Executive Secretary. JA at pp. 35-36. There is nothing contrary to the West Virginia Code in this determination.

The third step is to determine whether Appellants performed the duties of an Executive Secretary as defined by Respondent. The Grievance found that they did. JA at p. 36. The lower court did not contradict this finding.

Rather, the lower court, in a very cursory discussion based its decision on its disapproval of Respondent’s definition of Secretary III. The lower court ruled that since, under Respondent’s

definition of that position, a Secretary III works under the Superintendent or a designee, that definition is contrary to the West Virginia Code.

However, the definition of Secretary III is not the issue. Appellants are claiming that they should be classified as Executive Secretaries. That is the definition at issue. As stated above, the expanded definition of Executive Secretary used by Respondent is not contrary to the West Virginia Code, thus is not unlawful.

Having defined the position of Executive Secretary, Respondent must follow its own definition. Thus, it should have classified both Appellants as an Executive Secretary.

#### VIII. CONCLUSION

Appellants should prevail for the reasons contained herein.



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Andrew J. Katz (6615)  
The Katz Working Families Law Firm, LC  
The Security Building, Suite 1106  
100 Capitol Street  
Charleston, West Virginia 25301

MELISSA WILFONG  
By Counsel