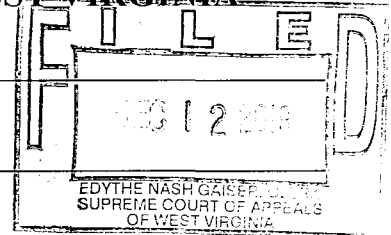


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 19-0684



SUSIE MCCANN and TAMMY OWENS,

Respondents Below, Petitioners,

v.

LINCOLN COUNTY BOARD OF EDUCATION,

Petitioner Below, Respondent

RESPONDENT'S BRIEF

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STANDARD OF REVIEW

The grounds for appealing a Grievance Board decision are set forth in West Virginia Code § 6C-2-5(b):

A party may appeal the decision of the administrative law judge on the grounds that the decision:

- (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
- (2) Exceeds the administrative law judge'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.

On appeal, "[t]he court shall review the entire record that was before the administrative law judge. ..." W. Va. Code § 6C-2-5(d). *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W. Va. 238, 719 S.E.2d 406 (2011).

"When reviewing the appeal of a public employees' grievance, this Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews decisions of the administrative law judge." *Martin v. Barbour Cty. Bd. of Educ.*, 228 W. Va. 238, 239, 719 S.E.2d 406, 407 (2011). In *Martin*, this Court articulated the following standard of review:

2. 'Grievance rulings involve a combination of both deferential and plenary review. . . [A] circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations . . . Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.' Syl. pt. 1, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).

3. 'A final order of the [Grievance Board], made pursuant to W. Va. Code, [6C-2-1], et seq. [], and based upon findings of fact should not be reversed unless clearly wrong.' Syl. pt. 1, *Randolph Cnty. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989).

Id.

SUMMARY OF ARGUMENT

Petitioners erroneously argue, directly or indirectly, that (1) the respondent's job descriptions could and should be considered in the examination of the appropriate classification of the petitioners; (2) the respondent's job description for Executive Secretary does not contravene the definition of Executive Secretary in State Code; and (3) they meet the respondent's definition of Executive Secretary as contained in its job description. *See Pet. Brief.*

The Circuit Court correctly applied the relevant statutes, holding that and the petitioners clearly met the Secretary III class title as found in West Virginia Code § 18A-4-8 and the petitioners were not entitled to the Executive Secretary classification. The Circuit Court's Order was not arbitrary, capricious, an abuse of discretion or otherwise contrary to the law and should thus be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary in this case because the facts and arguments are adequately presented in the briefs and the record on appeal, and the decisional process would be not be significantly aided by oral argument.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT THE PETITIONERS WERE NOT ENTITLED TO THE EXECUTIVE SECRETARY CLASSIFICATION.

Neither the Administrative Law Judge ("ALJ") nor the Circuit Court Judge ("Judge") found that the petitioners met the statutory definition of "Executive Secretary" as outlined in West Virginia Code § 18A-4-8(h), part of their original claims. "Executive secretary" means a person employed as secretary to the county school superintendent or as a secretary who

is assigned to a position characterized by significant administrative duties.” *Id.* The decision of the ALJ was not appealed by the petitioners on this point and is not contested in the instant appeal.

Neither the ALJ nor the Circuit Court Judge found that the petitioners proved that they were similarly situated to any other secretary employed by the Board who hold the title Executive Secretary, their original claims, and, as a result, the ALJ held that the petitioners failed to prove favoritism or discrimination. The decision of the ALJ was not appealed by the petitioners on this point, either, and is not contested in the instant appeal. In fact, the petitioners did not appeal the ALJ Decision at all. Thus, it is uncontested that the petitioners do not meet the statutory definition of Executive Secretary. It is only the issues surrounding the respondent’s erroneous job descriptions that give rise to this appeal.

The ALJ ruled that the petitioners were entitled to the Executive Secretary class title as a result of the Board’s job descriptions, an issue first raised at Level Three of the grievance procedure by the petitioners. The Board appealed this portion of the ALJ’s Decision, and the Judge appropriately found that the job descriptions should not have been considered by the ALJ; even if it were appropriate to consider new matters raised at Level Three, the job descriptions contravened the statutory definitions of Executive Secretary and Secretary III and could not be applied; and the petitioners clearly met the Secretary III class title as found in West Virginia Code § 18A-4-8. “Secretary III means 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.’” *Id.*

A. The Circuit Court Correctly Held that the Job Descriptions Should Not Have Been Considered at Level Three.

The Judge held that “Issues not raised in the Level One grievance forms should not have been entertained by the ALJ at Level Three, and the decision to address the new allegations regarding the job descriptions exceeded the ALJ’s authority and was arbitrary and capricious, and therefore, erroneous.” *Order*, 4 (*App.*¹ at 5). The only grievance forms supplied in the Appendix, relative to the named petitioners, is that of Susie McCann. There is no Tammy Owens in the records, only a Tammy Parsons.² Both Level One forms indicate that they are “Requesting uniformity of secretaries in Central Office. Code 18A-4-8.” (*App.* at 57-58) As they each worked in different departments, their forms diverged with Petitioner McCann, indicating that “Director of Special Education is my supervisor that definitely has significant administrative duties”; while Parsons/Owens indicated that “director of transportation is my supervisor that has significant administrative duties.” *Id.*

A review of the Level One Decisions for petitioners McCann and Parsons/Owens reveals no mention of job descriptions or the application thereof. (*App.* 45-50). The only arguments were uniformity and the application of the statutory definitions for Executive Secretary in West Virginia Code § 18A-4-8. At Level Two, both petitioner McCann and petitioner Parsons/Owens used the same form as they did in Level One, with no change in the allegations/claims and no change in the “statutes, policies, rules, regulations or agreements” claimed to have been violated.

¹ All references to what is labeled Joint Appendix, Volume I, will be “*App.*” followed by a number. The undersigned did not have an opportunity to review the proposed Appendix or Table of Contents before its filing by counsel for Appellants. The copy supplied to the undersigned with Appellants’ Brief was not numbered consecutively, so the numbers are those added tracking the numbers in the Table of Contents. Additionally, the undersigned’s copy of the Brief and Appendix were not postmarked as indicated on the Certificate of Service attached to Appellant’s Brief, indicating October 25, but were, instead, postmarked October 30, 2019.

² This name change is referenced in the Petitioner’s Brief Table of Contents beside the “Level One Decision for Ms. Owens (then Parsons).” (*App. TOC*).

(*App. 61-62*). Again, at Level Three, both petitioner McCann and petitioner Parsons/Owens used the same form as they did in Level One and Level Two, with no change in the allegations/claims and no change in the “statutes, policies, rules, regulations or agreements” claimed to have been violated. (*App. 66-67*).

In defending the grievances of the petitioners herein, the respondent was clearly only on notice that one statute, West Virginia Code § 18A-4-8, was at issue. Each petitioner made reference to a portion of the statute in their grievance forms, that being the allegations that their supervisors had “significant administrative duties,” (*App. at 57-58, 61-61, 66-67*).

The Judge, noting the pre-printed language on the grievance form, found that “The form clearly requires the grievant to: ‘list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted.’” *Order, 2 (App. at 3)* These petitioners were also commended by the Judge for using the same forms when appealing through the three levels of the grievance process. *Order, 2 (App. at 3)*. The form was created in compliance with West Virginia Code § 6C-2-3(j). Of course, avoiding surprise claims is clearly the intent of the pre-printed language on the grievance forms so that the respondents will be on notice of all claims and can be prepared to defend the contents of the claims for which they are on notice.

The claim, not found on the grievance forms, that the petitioners met the definition of Executive Secretary found in the respondent’s job description, was a significant departure from the claim outlined on the grievance forms. The only issue raised by the petitioners throughout their grievance appeals was whether each met the statutory definition of Executive Secretary as defined in West Virginia Code § 18A-4-8, and it was appropriately held by the Judge to be the only issue that should have been addressed by the ALJ at Level Three of the grievance procedure.

B. The Circuit Court Correctly Held that Respondent’s Job Descriptions were Contrary to Law.

Petitioners’ argument is that the respondent’s job description for Executive Secretary “is broader than [sic] the one in the Code, but does not contradict it.” *Petitioners’ Brief* at 10. Board-adopted job descriptions become the law in the county, so long as they do not contravene state law. “A county board of education may utilize its own expanded job description for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. Va. Code § 18A-4-8.” *Powell v. Lincoln County Bd. of Educ.*, Docket No. 2010-0592-LinED (Feb. 14, 2011)³; see also *Gregory v. Mingo County Bd. of Educ.*, Docket No. 95-29-006 (July 19, 1995)⁴; *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (Apr. 15, 1991)⁵ (holding that a school service employee who establishes, by a preponderance of the evidence, that he is performing the duties of a higher W. Va. Code § 18A-4-8 classification than that under which he is officially categorized, is entitled to reclassification”). In this case, the issue was whether the petitioners were properly classified as Secretary IIIs or whether their duties more closely matched the duties of the Executive Secretary classification title. In making such a determination, the examination of both the Secretary III and Executive Secretary job descriptions and statutory definitions were, and need to be, examined.

West Virginia Code § 18A-4-8 provides the following definitions:

“Executive secretary” means a person employed as secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties;

* * * * *

³ <https://pegb.wv.gov/Decisions%20Docs/dec2011/powell.pdf>

⁴ <https://pegb.wv.gov/Decisions%20Docs/dec1995/gregory.pdf>

⁵ <https://pegb.wv.gov/Decisions%20Docs/dec1991/hatfield.pdf>

“Secretary III” means 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”;

Neither of these definitions describes the job of a secretary. To make that determination, an examination of additional definitions is required, including that of Secretary II and Secretary I, which are defined as follows:

“Secretary I” means a person employed to transcribe from notes or mechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines...

“Secretary II” means a person employed in any elementary, secondary, kindergarten, nursery, special education, vocational, or any other school as a secretary. The duties may include performing general clerical tasks; transcribing from notes; stenotype, mechanical equipment or a sound-producing machine; preparing reports; receiving callers and referring them to proper persons; operating office machines; keeping records and handling routine correspondence. Nothing in this subdivision prevents a service person from holding or being elevated to a higher classification;

W. Va. Code § 18A-4-8. As a result, all secretary classification titles must be read *in pari materia* to discern the duties and distinctions among the definitions.

The language in the Board’s Secretary III job description, almost verbatim, tracks the language in the definition found in West Virginia Code § 18A-4-8 for Executive Secretary. And the language in the Board’s Executive Secretary job description, almost verbatim, tracks the language of the definition found in West Virginia Code § 18A-4-8 for Secretary III.

A close examination reveals that nothing in the job description for Executive Secretary requires that the secretary work for the superintendent or the assistant superintendent to be classified as an Executive Secretary; however, that very language is found in the job description for the Secretary III position. When reading the two job descriptions together, it is clear that they

were not broadening the definitions in the statute—they simply contravened the statute by erroneously transposing the two definitions, or the two job description titles.

Just like the statutory definitions of the secretary classification titles must be read together, so must the secretary job descriptions of the respondent. None should be read in isolation. When doing the same, it is clear that the Secretary III and Executive Secretary job descriptions contravened the clear and unambiguous language in the statutory definitions.

As was correctly noted in the Order of the Circuit Court,

The Board’s job descriptions do not expand state law, as argued by the Respondents, but rather, are an illegal contravention to State Code. To have the secretary to the superintendent classified as a Secretary III, as is the result of the Board’s job descriptions, is illegal, as it contravenes the definitions found in *W. Va. Code* § 18A-4-8. This example clearly highlights the error in the Board’s descriptions, the titles on the same are reversed.

Order, 5 (App. at 6). As a result, the Judge correctly held that the respondent’s job descriptions, including that of Executive Secretary, were contrary to law and could not be applied.

As the application of the definitions in the job descriptions was the only issue on appeal, and the job descriptions are contrary to law, it is of no consequence that the petitioners met the definition found in the illegal Executive Secretary job description. The outcome is, instead, to bolster the findings and conclusions of the ALJ and Judge, below, that the petitioners met the statutory definition of Secretary III, as each work for a director of a department as outlined in that illegal job description. As stated previously:

West Virginia Code § 18A-4-8 provides the following definitions:

“Executive secretary” means a person employed as secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties;

* * * * *

“Secretary III” means 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.”

Clearly, the petitioners were appropriately classified as Secretary IIIs.

CONCLUSION

For all the reasons set forth in this brief and such other reasons as may appear in the record, the Respondent Lincoln County Board of Education respectfully requests that this Court AFFIRM the Circuit Court’s decision.

Respectfully submitted,

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EDUCATION
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