

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BOARD OF EDUCATION OF
THE COUNTY OF LINCOLN,
Petitioner,

v.

CATHY McCOMAS, DEBRA LYNN
WHEELER, et al.,
Respondents and Intervenors.

FILED
2019 JUN 28 AM 9:53
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
CIVIL ACTION NO. 13-AA-63
JUDGE CARRIE WEBSTER

ORDER AFFIRMING, IN PART, AND REVERSING, IN PART,
ADMINISTRATIVE LAW JUDGE DECISION

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BY: _____

This matter came before the Court on the appeal by the Petitioner, Lincoln County Board of Education ("Board"), of a decision ("Decision") rendered by the Administrative Law Judge ("ALJ") of the West Virginia Public Employees Grievance Board on April 17, 2013, in the case styled *Cathy McComas, et al. v. Lincoln County Board of Education and Department of Education*,¹ Docket No. 2011-1169-CONS. Specifically, the Respondents, Cathy McComas, Debra Lynn Wheeler, Tammy Renee Parsons, and Susie Carol McCann, all claim they should be classified as "Executive Secretaries" as opposed to their current classifications of "Secretary III." Trina Barrett, Marsha Weaver and Angie Prichard all intervened in the grievance below.

Upon review of the Petition for Appeal, the underlying administrative record, the parties' legal memoranda, and the applicable law, the Court is of the opinion that the Decision of the Grievance Board must be affirmed in part and reversed in part for the reasons set forth more fully below.

FINDINGS OF FACT

1. Respondents, Greivants below, were employed by the Board and each was classified as "Secretary III," and each was responsible to one or more of the Board's Directors.
2. Respondents had no other classification title.

¹ The Department of Education refers to the West Virginia Department of Education which had previously intervened into the operation of the Lincoln County Board of Education pursuant to *West Virginia Code* §18-2E-5, but has since returned control to the Board.

3. Trina Barrett was employed by the Board and classified as Payroll Coordinator, Accountant III, and Executive Secretary.

4. Marsha Weaver was employed by the Board and classified as Insurance Coordinator, Accountant I/II, and Executive Secretary.

5. Angie Prichard was employed by the Board and classified as Food Service Coordinator and Executive Secretary.

6. Trina Barrett, Marsha Weaver and Angie Prichard were Intervenorers in the grievance below.

7. Trina Barrett, Marsha Weaver and Angie Prichard, Intervenorers, are all directly supervised by either the Superintendent, Assistant Superintendent or Treasurer.

8. Respondents were hired in direct response to Secretary III job postings, and are not directly supervised by either the Superintendent, Assistant Superintendent, or Treasurer.

9. Respondents filed a grievance, below, claiming they were each misclassified as Secretary III and should each be classified as Executive Secretary because they are performing substantially similar duties as other employees classified as an Executive Secretary, and to give them a lower classification, with a lower pay grade, constitutes discrimination and favoritism.

10. The Respondents only listed one statute, *W. Va. Code* § 18A-4-8, on their initiating form for their Level One grievance, and referenced the content of the particular portion thereof. The form clearly requires the grievant to: "list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted."

11. The same form, once completed by the grievant, is to be reused when appealing to Levels Two and Three.

12. Two of the Respondents, Parsons and McCann, complied with this practice and made no changes to their grievance forms when appealing to Level Three.

13. The two other Respondents, McComas and Wheeler, completed an entirely new grievance form with new allegations at Level Three, for the first time alleging reliance on the Board's erroneous job descriptions.

14. *W. Va. Code* § 18A-4-8 provides the following definition: "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.

15. *W. Va. Code* § 18A-4-8 provides the following definition: "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".

16. The language in the Board's Secretary III job description, almost verbatim, tracks the language in the definition found in *W. Va. Code* § 18A-4-8 for Executive Secretary.

17. The language in the Board's Executive Secretary job description, almost verbatim, tracks the language of the definition found in *W. Va. Code* § 18A-4-8 for Secretary III.

STANDARD OF REVIEW

Review of the Decision is controlled by *West Virginia Code* § 6C-2-5(b), which provides the grounds upon which a decision by the Grievance Board may be reviewed for error. Specifically, *West Virginia Code* § 6C-2-5(b) provides that:

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.

The Court shall "review the entire record that was before the administrative law judge[.]" *West Virginia Code* § 6C-2-5(d). The West Virginia Supreme Court held that "[a] final order of the hearing examiner for the West Virginia Educational Employees Grievance Board made pursuant to *West Virginia Code* 18-29-1, et seq. (1985)², and based upon findings of fact should not be reversed unless clearly wrong." *Cahill v. Mercer County Board of Education*, 208 W. Va. 177, 539 S.E.2d 437 (2000). A circuit court shall review de novo the administrative law judge's conclusions of law. *Holmes v. Board of Education of Berkeley County*, 526 S.E.2d 310, 313 (W. Va. 1999).

DISCUSSION AND CONCLUSIONS OF LAW

W. Va. Code 6C-2-3(j) provides that "The board shall create the forms for filing grievances ... and provide them to chief administrators to make available to any employee upon request." The grievance form promulgated by the West Virginia Public Employees Grievance Board, in compliance with *W. Va. Code* § 6C-2-3(j), clearly requires grievants, on its face, to: "list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted."

The same form, once completed by the grievant, is to be reused when appealing to Levels Two and Three. Two of the Respondents, McComas and Wheeler, completed a completely new grievance form with new allegations at Level Three, for the first time alleging reliance on the Board's erroneous job descriptions.

The purpose of the grievance procedure is to resolve "grievances in a fair, efficient, cost-effective and consistent manner" as described in *W. Va. Code* § 6C-2-3(b), for both the employee and the employer. 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.

Secondly, board-adopted job descriptions become the law in the county, so long as they do not contravene state law. Thus, job descriptions are to be interpreted pursuant to the laws of statutory

² In 2007, the Legislature rewrote the public employees grievance procedure, incorporating provisions of §§ 18-29-1, et seq. into §§ 6C-2-1, et seq.

constructions, and “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” *Syl. Pt. 2, State v. Elder*, 165 S.E.2d 108 (W.Va. 1968). Where statutes, or in this case, Board job descriptions, are not clear on their face, however, but are, rather, ambiguous, the same must be interpreted and a determination made whether or not they contravene State Code.

The Board’s two job descriptions, for Secretary III and Executive Secretary, which should be read *in pari materia*, since a determination as to which applies in each instance is required, are both ambiguous and illegal. The Board’s job descriptions contravene State Code, which, in fact, defines an Executive Secretary with phrasing nearly identical to the Board’s job description for a Secretary III, and which defines a Secretary III with phrasing nearly identical to the Board’s job description for Executive Secretary. 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. Thus, the ALJ’s Decision that the Respondents do not meet the statutory definitions for Executive Secretary was proper, and in that same vein, the ALJ should have held that the Board’s current job descriptions contravened state law and should neither have applied them, nor upheld them. The decision to apply the illegal job descriptions was erroneous.

Finally, pursuant to *W. Va. 156 C.S.R. 1*, § 6.2., “[e]ach administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of *W. Va. Code* § 6C-2-1, et seq.” The Board is required to implement lawful job descriptions and include them with postings *See W. Va. Code* § 18A-4-8b(g)(2). As stated, the Board’s current job descriptions for Secretary III and Executive Secretary are illegal. Thus, the ALJ should have ordered the Board, through the grievance process, to, at a minimum cease applying the illegal job descriptions, and change or otherwise correct the illegal job descriptions to comport with State Code.

Based on the foregoing, the Court concludes that the ALJ's Decision was contrary to the applicable law; clearly wrong in view of the reliable, probative, and substantial evidence on the record; and arbitrary and capricious. The Decision to address new allegations by the Respondents which were not part of the original grievance at Level One was improper and erroneous. The Decision that the Respondents did not meet the statutory definitions of Executive Secretary, as discussed above, was not appealed, and is a final decision, and thus, is affirmed. However, the ALJ went on to apply the illegal job descriptions, which were both ambiguous and in contravention to State Code, and improperly held for the Respondents. The ALJ erred in addressing the job descriptions, and in ultimately applying illegal job descriptions in holding in favor of the Respondents, which is reversed.

DECISION

Accordingly, the Court does hereby **ORDER** that the Petitioner's Petition for Appeal is **GRANTED** and that the Grievance Board's Decision is **AFFIRMED IN PART**, in that Grievants failed to prove that their positions met the statutory requirements of Executive Secretary and failed to prove that they were similarly situated to the Board's Executive Secretaries, as so ruled by the Administrative Law Judge, **AND REVERSED IN PART**, as the grievance could not have been amended at Level Three and the Board's job descriptions for Secretary III and Executive Secretary were contrary to law, and cannot be applied herein. It is further ordered that this matter be **STRICKEN** from the docket of this Court. The objections of any party aggrieved by this Order are noted and preserved.

The Clerk is **DIRECTED** to send a certified copy of this Order to the West Virginia Public Employees Grievance Board, 1596 Kanawha Blvd., East, Charleston, WV 25311-2413, and to all representatives of record at the following addresses:

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ENTERED this 27th day of June, 2019.

Carrie Webster

Judge Carrie Webster

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, KATHY C. DUNN, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN AND FOR SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
MAY 01
2019
KATHY C. DUNN
CLERK OF CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA