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' REPLY BRIEF

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III. DISCUSSION

RESPONDENT DID NOT DEMONSTRATE THAT THE LOWER COURT'S ERRONEOUS RULING SHOULD BE UPHELD

In their opening brief, Appellants demonstrated that the lower court's order should be reversed because they have been performing the work as Executive Secretary, as that term is defined by Respondent, while being classified by Respondent as a Secretary III, a lower classification, with lower pay. Appellant's position is consistent with the ruling made by the The West Virginia Public Employees Grievance Board (Grievance Board) below. Appellee makes two points in its Brief. First, it argues that the lower court correctly ruled that the Grievance Board was wrong to consider the above-referenced argument because it was not raised by Appellant's on their grievance forms. Second, Appellee contends that the positions of Executive Secretary and Secretary III must be read in para materia, and that such comparison demonstrates that the lower court correctly ruled that Respondent need not be bound by its own definitions. However, as will be demonstrated herein, neither of Appellee's points are telling.

1. Neither the Lower Court, nor Appellee Credit the Administrative Law Judge's Authority to Fashion Remedies to Assure Equity is Accomplished, Including Permitting the Amending of Grievances.

The West Virginia Code of State Rules gives significant power to an Administrative Law Judge to fashion remedies in order to see that equity is done to the parties. See 156 C.S.R. Section 1.6.2 (stating that "[e]ach administrative law judge has the authority and discretion to control the proceedings of each grievance assigned such judge and to take any action considered

appropriate consistent with the provisions of West Virginia Code [Section] 6C-2-1 *et seq.*" This Court has recognized the same authority. See Graf v. West Virginia University, 429 S.E.2d 496, 503 (WV. 1992).

This authority includes permitting employees to amend their grievances. As stated by the Grievance Board:

> Neither the Grievance Board's procedural rules nor the Code address the amendment of grievance claims. Further, although the Code refers to level three as an "appeal," the administrative law judge does not review the propriety of the level one decision, but rather considers the claim completely anew. As neither the procedural rules nor the Code specifically prohibit "amendment" of a claim between levels, the question then becomes whether Respondent would be prejudiced by allowing the changes made in the statement of grievance here.

Goodson et al. V. Fayette County Board of Education, Docket No.: 2014-1654-CONS at p. 6 (November 12, 2015); Casteel v. Wayne County Board of Education, Docket No.: 2018-0317-WayED at p. 6 (November 21, 2018). Neither the lower court nor Appellee discusses the power of an administrative law judge to permit the amending of a grievance if no prejudice would enure to the employer. However, such right is clear under this Court's jurisprudence, the Code of State Regulations and the precedent of the Grievance Board.

2. Appellee's Contention That it was at a Disadvantage at the Level III Hearing Because it Did not Receive Notice of the Refinement in Appellant's Argument is Disengenuous at Best; In Fact, Appellee Did Have Such Notice and was Not Prejudiced.

In Respondent's Brief, the following argument is made: "[i]n defending the grievances of the petitioners herein, the respondent was clearly only on notice that one statute, West Virginia Code [Section] 18A-4-8, was at issue. Each petitioner made reference to a portion of the statute

in their grievance forms, that being the allegation that their supervisors had "significant administrative duties." Respondent's Brief at p. 5. Thus, Respondent is trying to convince this Court that it was prejudiced by a lack of notice at the Level III hearing below.

What Respondent fails to mention is that petitioners' grievances were consolidated before the Level II mediation with two other grievants who had a similar claim. Joint Appendix at p. 43. This is relevant because, as the lower court noted, two of the grievants, McComas and Wheeler, amended their Level III grievance forms to allege reliance on Respondent's job descriptions to support its grievance. See Joint Appendix at p. 5. These grievance forms would have been filed immediately after the Level II mediation and well before the Level III hearing was held. As the parties were all part of a consolidated grievance, Respondent did, in fact, have ample notice of the position of the Grievants below and had ample opportunity to defend against the same at the Level III hearing.

True, Petitioner's did not alter their Level III grievance forms to include the argument here, but their co-grievants did. Considering that Petitioners were part of a consolidated grievance, the fact that their grievance forms were not identical to the other two grievants is not important. As the Grievance Board has noted:

> The Supreme Court has repeatedly admonished the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. See Duruttya v. Board of Educ., . . .382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), Spahr v. Preston County Bd of Educ., . . .391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), Hale v. Mingo County Bd. of Educ., . . .484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims). The

grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." Spahr, 391 S.E.2d at 743.

Goodson, supra at pp. 5-6. Thus, under this Court's jurisprudence, the fact that two of four grievants in a consolidated grievance changed their grievance forms, but not two others is not dispositive. Indeed, the ALJ did not try to separate which grievants amended what when she reached her decision and that was correct. Nor did the lower court; it ruled for Appellee regardless of what was included on the Level III grievance form. Even Appellee has never contended during the entire process that Petitioners should be treated differently then the other grievants, despite the difference in the Level III grievance forms.[1]

The ultimate issue is whether Respondent had proper notice of the allegations the grievants made in order to prepare for the Level III hearing. Clearly it did. Thus, the failure of both Respondent and the lower court to recognize the authority of an administrative law judge to allow the amendment of a Level III grievance form, absent prejudice, demonstrates that the lower court erred and that this appeal should be granted.

3. Respondent and the Lower Court are Incorrect that It's Definitions of Executive Secretary and Secretary III Must be Read *In Para Materia* Because the Key Definition, Executive Secretary, is Not Ambiguous.

Without citing any legal authority, Respondent claims that this Court "must" consider its definitions of Executive Secretary and Secretary III together, as well as the statutory definitions

[1] Indeed since the issue of whether grievants's duties satisfied Respondent's definition of Executive Secretary was litigated at Level III, this would be an example of where "the pleadings conform to the evidence."

of these two positions. Respondent's Brief at pp. 6-7. Without using the term, Respondent is arguing that an *in para materia* reading of the definitions is necessary, which is also what the lower court determined. However, again, both Respondent and the lower court are mistaken.

The lower court did, unlike Respondent, correctly state the law pertaining to an when *in para materia* reading is appropriate and when, as here, it is not: "'where the language of the statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of statutory interpretation.'" Lower Court Order at pp. 4-5 (*citing* State v. Elder, 165 S.E.2d 108 (W. Va. 1968). The lower court then stated that Respondent's position descriptions are "ambiguous" without saying why. Id. at p. 5.

As stated in Appellant's Brief, Respondent defines an Executive Secretaries 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. There is nothing ambiguous about this. There is no ambiguity about what a "secretary" is or what a "department" or department head" is. Neither the lower court, nor Respondent discuss Respondent's definition of Executive Secretary to show any sort of ambiguity. Indeed, neither could have done so because no ambiguity exits.

Without ambiguity, Respondent's definition of Executive Secretary must be given its plain meaning unless such definition contradicts the West Virginia Code. Again, neither Respondent, nor the lower court even attempted to argue that the Grievance Board erred in finding that Respondent's expanded definition of Executive Secretary, by itself, violates any

Code provision. Nor is there any argument that Petitioners do, in fact, do the work as defined by Respondent. Thus, the lower court erred and this appeal should be granted.

IV. CONCLUSION

Appellants should prevail for the reasons contained herein and in Appellants' Brief..

SUSAN MCCANN
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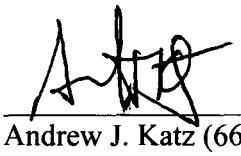

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