IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent Below, Petitioner,

v. **No. 21-0831**

BRENDA HALL and ANTONIA VAUGHAN,

Petitioners Below, Respondents.

PETITIONER'S BREIF

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II. Assignments of Error

A. Did the circuit court err in not finding that this issue is moot now that the law pertaining directly to this matter has been amended?

B. Did the circuit court err in applying collateral estoppel to the issue of whether or not Respondent Grievants should receive the pay increase provided for in West Virginia Code § 18A-4-2(e)?

C. Did the circuit court err in independently determining that Respondents are teachers?

III. Statement of the Case

A. Parties

Respondent, Kanawha County Board of Education is the statutory entity which controls and manages the public schools in Kanawha County, through the Superintendent. The Respondents are employed at Capital High School, a Kanawha County public school, as Education Sign Language Interpreters who work with students who are hearing impaired.

B. Procedural History

On August 29, 2019, Respondents filed a grievance contending that they should have received a three-step pay increase authorized for special education teachers, arguing that they are special education teachers.[1] This pay increase would move Respondents up three years on the salary schedule.

The grievance, at Level One, was heard by Anne Charnock, the designee of the county Superintendent, on October 8, 2019. By a decision dated October 15, 2019, the grievance was denied.[2]

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[1] Appendix p. 1-2
[2] Appendix p. 6-10

Respondents appealed the Level One decision to Level Two, mediation.[3] The mediation was unsuccessful an unsuccessful mediation order was entered on March 3, 2020.[4] Respondents then appealed to Level Three on March 6, 2020.[5]

After a Level Three hearing, the Administrative Law Judge ("ALJ"), Judge Landon Brown, issued a decision on this matter on November 24, 2020, denying the grievance.[6] Respondents appealed that decision on January 6, 2021, to the Circuit Court of Kanawha County.[7] Judge Ballard reversed the decision by a final order dated September 14, 2021.[8] Petitioner filed a notice of appeal to the West Virginia Supreme Court of Appeals on October 14, 2021.

C. Statement of the Facts

The increase in pay Respondents argue they should have received was established in the 2019 Legislative Session and codified in W. Va. Code § 18A-4-2(e). At the time this grievance was filed this subsection stated, "each classroom teacher certified in special education and employed as a full-time special education teacher shall be considered to have three additional years of experience only for the purposes of the salary schedule."[9] This pay increase is paid out by the Board of Education and then reimbursed by the West Virginia Department of Education ("WVDE").[10] Due to the WVDE being the ultimate funding source, the WVDE issued guidance to Board of Education on who was to receive this pay increase.[11] That guidance specifically outlined exactly which employees the WVDE would consider as a "classroom teacher certified in special education." Based on the guidance, Petitioner concluded that Respondents are not

[3] Appendix p. 11-12
[4] Appendix p. 14
[5] Appendix p. 16
[6] Appendix p. 70-86
[7] Appendix p. 87-91
[8] Appendix p. 162-175
[9] This subsection was later amended, as discussed further in this brief.
[10] Appendix p. 74 and p. 165
[11] Appendix p. 50-51 and p. 65-67

"classroom teachers certified in special education" because they do not have (1) a teaching certificate and (2) a special education endorsement, both of which were stated by the WVDE as required to get this increase.[12]

The crux of this issue is that Respondents believe they are classroom teachers who are certified in special education. This belief is based on a Grievance Board Decision dated August 7, 2014, with these same Respondents as Grievants.[13] That grievance was regarding whether the Respondents should get their years of experience as educational sign language interpreters counted for the statutorily allowed "experience pay." The decision stated that Respondents should be paid under the teacher pay scale, because they were professional employees and get their years of experience counted for increment pay. The main justification for this is that other professionals who are also not teachers but who are paid on the teacher pay scale get that experience pay. This decision did not classify Respondents as teachers, however, or have any finding stating the same.

The Grievance Board Decision at issue in this matter, found that Respondents are not licensed teachers certified in special education and therefore do not get this pay increase.[14] The determining factors in this decision was that the ALJ found the WVDE's interpretation of the statute to be reasonable. That interpretation required a person to be a licensed teacher in order to be considered a "teacher." It further required a licensed teacher to have a certification, otherwise known as an endorsement to their license, in special education in order to be considered "certified in special education."[15]

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[12] Appendix p. 50-51 and p. 65-67

[13] This Grievance Decision was not included in the Appendix, but cited throughout the record. The citation for this Decision is Hall and Vaughn v. Kanawha County Bd. of Educ., Docket No. 2014-0282-CONS (August 7, 2014).

[14] Appendix p. 82-85.

[15] Appendix p.97

Respondents do not have teaching licenses thus they do not have a special education endorsement that would allow them to teach special education. The Grievance Board Decision did not state definitively whether or not the Respondents are teachers, instead it relied on the fact that Respondents did not meet the WVDE's guidance of "classroom teacher certified in special education." The ALJ found that neither the WVDE's interpretation of West Virginia Code § 18A-4-2(e), nor the Respondent's decision to follow the WVDE guidance, was clearly erroneous and denied the grievance on that basis.

On July 5, 2021, after the Grievance Board Decision was entered and the briefing was concluded in the circuit court, but before the Final Order was entered, West Virginia Code § 18A-4-2(e) was amended to state, "each classroom teacher certified in special education and employed as a full-time special education teacher, *as defined by the State Superintendent*, shall be considered to have three additional years of experience only for the purposes of the salary schedule." (emphasis added). In reversing the Grievance Board decision and granting this grievance, the Circuit Court did not consider this amendment to the statute in any part of its analysis. In one part of the Final Order the new language was excluded with ellipses,[16] in another part of the order the new language was omitted without providing ellipses.[17] No mention of the amended language was made in this Final Order.

The court stated in the Final Order that due to collateral estoppel and the Grievance Board 2014 opinion, Respondents are classroom teachers.[18] The court further found that Grievants are certified in Special Education.[19] In making this finding, the court stated that the WVDE's interpretation West Virginia Code of § 18A-4-2(e) was clearly erroneous stating the statute "does

[16] Appendix p. 168
[17] Appendix p.165
[18] Appendix p.168-172
[19] Appendix p. 172-174

not require an individual to have a certification as a special education teacher. Rather, it requires that that the person be [']certified in special education.['] If the Legislature intended the requirement to be a [']certified in special education teacher,['] it would have written the law to mean exactly that."[20]

IV. Summary of Argument

The circuit court was clearly wrong in reversing the Grievance Decision. The Court failed to consider that the amended language in West Virginia Code § 18A-4-2(e) shows that the legislature clearly intended that this statute be interpreted in the manner in which the WVDE, through the State Superintendent, wished it to be interpreted.

Additionally, the circuit court was clearly wrong in deciding that Respondents are classroom teachers on the basis of collateral estoppel. The court relied on a Grievance Decision that decided an issue different from the issue in this case, which was whether Grievants could be paid on the teacher pay scale and receive years of experience increment pay on that pay scale. The Grievance Board in that case stopped short of classifying Grievants as teachers and instead analyzed them as classified as "Other Professional Personnel," who are also paid on the teacher pay scale. Therefore, the reliance on collateral estoppel in order to say that Grievants are classroom teachers is a clearly wrong application of the doctrine because the issues in these two cases are not identical and the court misinterpreted the findings of the case it relied on.

Lastly, if you remove the collateral estoppel doctrine from the court's decision and independently assess if Respondents are classroom teachers, as the ALJ did in the Grievance Decision, it is not clearly wrong that the WVDE defined "classroom teacher certified in special

[20] Appendix p. 173

education and employed as a full-time special education teacher" to mean a certified teacher with a special education endorsement. Therefore, the circuit court erred in reversing the Grievance Board Decision.

V. Statement regarding Oral Argument and Decision

Petitioner believes that the facts and legal arguments will be adequately presented in the briefs and record on appeal but welcomes the opportunity for oral argument if the Court determines that oral argument would be helpful or necessary.

VI. Argument

Standard of Review

The Supreme Court of Appeals has established that "[w]hen reviewing the appeal of a public employees' grievance, the Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the administrative law judge." Syl. pt. 1, Martin v. Barbour Cty. Bd. of Educ., 228 W. Va. 238, 719 S.E.2d 406 (2011). This review requires a combination of both deferential and plenary review. Cahill v. Mercer County Board of Education, 208 W.Va. 177, 539 S.E.2d 437 (2000). Under these standards of review, this Court, as with the circuit court, is obligated to give deference to factual findings and credibility determinations rendered by an ALJ in a employee grievance. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed by this Court *de novo*.

In that review, this Court will only overturn a decision of a hearing examiner for one of the stated appealable reasons in W.Va. Code § 6C-2-5, which are, 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.

W. Va. Code § 6C-2-5.

A. Did the circuit court err in not finding that this issue is moot now that the law pertaining directly to this matter has been amended?

The first issue that should have been considered and addressed in the circuit court's Final Order is that the law that created the pay increases at issue here was amended, mooting this issue by clarifying that the State Superintendent's interpretation shall be followed.

When this matter was first grieved, the statute stated "(e) Effective July 1, 2019, each classroom teacher certified in special education and employed as a full-time special education teacher shall be considered to have three additional years of experience only for the purposes of the salary schedule.... W. Va. Code § 18A-4-2(e)." The WVDE , through its Office of School Accounting, which reports to the State Superintendent, put out guidance on how counties were to interpret "classroom teacher certified in special education and employed as a full-time special education teacher." Id. The guidance stated that county boards were to interpret that language to mean licensed classroom teacher who is certified in special education.[21] The Adminstative Law Judge in the Grievance Board decision found that to be a reasonable interpretation, stating, "The West Virginia Supreme Court of Appeals has routinely held, ['][i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.['] " Syl. Pt. 4, Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, Dillon v. Bd. of County of Mingo, 171 W. Va. 631, 301 S.E.2d 588

[21] Appendix p. 34-69

(1983). The Decision went on to state, "[t]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dep't of Educ., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing* In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)). This is a correct restatement of the law and legal precedent of the standard of review.

As for the burden of proof, the Administrative Law Judge correctly stated the standard of proof and what is required to meet it, stating,

> Grievants have the burden of proving their grievance by a preponderance of the evidence. Grievants are not charged with just supplying an equitable alternative interpretation of a statute. Where the evidence equally supports both sides, a party has not met its burden of proof. An alternative interpretation or alternate plausible application in contrast to an employer's implementation of a rule or law isn't sufficient grounds for the undersigned to overrule Respondent's actions.

It is clear through this analysis that the WVDE, through the State Superintendent, may properly interpret the statute to determine who should get this pay increase. The Legislature then codified the conclusion of this analysis, by amending the relevant pay increase section of the statute to state, "(e) Effective July 1, 2019, each classroom teacher certified in special education and employed as a full-time special education teacher, *as defined by the State Superintendent*, shall be considered to have three additional years of experience only for the purposes of the salary schedule...." W. Va. Code § 18A-4-2(e) (emphasis added)." This added language that is pertinent to this issue was excluded with ellipses in the circuit court's final order. However, this language was extremely important and effectively mooted the issue going forward.

When the Grievance was being decided at Level Three, the ALJ had to use legal reasoning to make the determination that Petitioner did not act clearly wrong or arbitrarily and capriciously. It is Petitioner's argument that that reason alone should mean the Greivance Decision should not

have been overturned. However, if that was not persuasive enough to the circuit court, the statute's amendment should have certainly been determining and persuasive of legislative intent in order to find this issue of interpretation mooted.

Insofar as there was a need to determine what interpretation of the statute should have been used prior to the amendment, there should be some analysis of whether this amendment should be considered retroactive. "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." Syl. pt. 4, Taylor v. State Compensation Comm'r, 140 W.Va. 572, 86 S.E.2d 114 (1955)." Syl. Pt. 2, In re Petition for Attorney Fees and Costs: Cassella v. Mylan Pharm., Inc, 234 W.Va. 485, 766 S.E.2d 432 (2014). Petitioner argues that the legislature intended to give the statute retroactive effect because it did not change the effective date of the pay increase language in dispute. The effective date in the statute remained July 1, 2019. The amendment was strictly clarifying language to the existing language, it did not remove or change any rights that Respondents already had. Therefore, the effect if the amendment should be considered retroactive and render the need for further interpretation of who is a "classroom teacher certified in special education" no longer needed. The court erred in not addressing the amendment to the statute and finding this entire issue moot.

B. Did the circuit court err in applying collateral estoppel to the issue of whether or not Respondent Grievants should receive the pay increase provided for in West Virginia Code § 18A-4-2(e)?

The circuit court primarily relied on the doctrine of collateral estoppel in determining that Respondents were classroom teachers, which in turn affected its decision to also find Respondents certified in special education. Petitioner argues that the collateral estoppel doctrine was incorrectly applied by the circuit court.

As stated in the circuit court's Final Order, "Collateral estoppel will bar a claim if four conditions are met: "(1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." State v. Miller, 194 W.Va. 3, 9, 459 S.E.2d 114, 120 (1995). . Petitioner disputes the first requirement of a collateral estoppel claim, because the issue previously decided that the court relied on was not identical to the one present in this action. The circuit court incorrectly determined that previous decision was identical to the present issue due to (1) misinterpreting the previous issue and (2) misinterpreting the previous finding.

Respondents have continuously alleged that they are "classroom teachers." This claim is based in a Grievance Board decision involving the same respondents and petitioner in this matter. In Hall and Vaughn v. Kanawha County Bd. of Educ., Docket No. 2014-0282-CONS (August 7, 2014, the issue was whether or not Grievant should get the experience pay that is granted generally to "teachers" under the teacher pay scale.

In this case, the Grievants had previously been considered service personnel. Due to a change in the law, the county Board of Education decided to reclassify them as professional employees and pay them under the teacher pay scale. The Board of Education did not believe that this entitled Grievants to the experience pay for the time that they were classified as service personnel, but were doing the same job they were doing when they were reclassified. The statute regarding that pay stated, "each *teacher* shall be paid an equity increment amount as applicable for his or her... years of experience. . .." W. Va. Code § 18A-4-2(c). (emphasis added). This is a different subsection in W. Va. Code § 18A-4-2 than the one that is at issue in the present matter,

and a completely different raise, with different qualifying factors. Importantly, W. Va. Code § 18A-4-2(c) does not have the amendment language in the statute that exists now in W. Va. Code § 18A-4-2(e). Furthermore, what is being decided here, which is if the WVDE's interpretation of W. Va. Code § 18A-4-2(e) is reasonable in light of the wording of the statute, is different than what was being decided in the previous case. The previous case cited no interpretation by the WVDE clarifying what "teachers" meant in that subsection.

The issue that the Board had in the previous case with providing the experience pay was that it did not find Grievants to be teachers and the statute specifically provides this pay is for teachers. Without any guidance from the WVDE on who this increase was for, the ALJ in that case analyzed the issue. The LJ found that importantly, school nurses were granted this experience pay by statute even though they are not teachers. Hall and Vaughn at 5-9.

After some discussion about the definitions of "professional educator" and "classroom teacher," the ALJ stated in the Decision,

> Grievants do not appear to argue that they are professional educators, so the remaining category of professional personnel applies:
>
> "Other professional employee" means a person from another profession who is properly licensed and who is employed to serve the public schools. This definition includes a registered professional nurse, licensed by the West Virginia Board of Examiners for Registered Professional Nurses, who is employed by a county board and has completed either a two-year (sixty-four semester hours) or a three-year (ninety-six semester hours) nursing program....

W. Va. Code §18A-1-1(d). "Other Professional Employee" is not a teacher classification.

At all points during the analysis, the ALJ analyzed the Grievants (current Respondents) as "Other Professional Employees" not "Classroom Teachers." There is one confusing part of this

Decision that Respondents and the circuit court rely on, forgetting the rest of the analysis. The paragraph states,

> While Respondent asserts, essentially, that a teacher means a teacher, and, thus the salary schedule does not apply to Grievants, the proposition is obviously not so simple. First, the code defines a "teacher" as any number of things that are not the common usage of the word. As "Instructional purposes" is not defined in either chapter, **it could certainly be said** that Grievants are employed for "instructional purposes" as they are directly conveying the instruction of the classroom teacher to their assigned students through sign language interpretation. **They would, therefore,** meet the definition of "teacher" in chapter eighteen and the salary schedule would directly apply.

Hall and Vaughn at 7. (emphasis added). This is not a finding. This is a proposition of what could be found. It is after this proposition that the ALJ wrote, "As it is clear that [']other professional['] professional personnel must be paid under the [']teacher['] schedule, despite not being teachers in the common use of the word, it naturally follows that experience credit must be granted for [']other professional['] professional personnel even though it is not [']teaching['] experience, per se." Persuasive in this argument was that nurses were receiving this experience pay even though they are not teachers. In this vein, the decision states, "it would simply make no sense to pay "other professional" professionals who are not teachers under the [']teacher['] schedule, yet deny them the experience increment pay because they are not teachers." Id. at 9-10.

There was no finding that Educational Sign Language Interpreters are teachers. The decision was that Educational Sign Language Interpreters should be paid under the teacher pay scale, same as other job classifications that meet the "Other Professional Personnel" definition. The decision supposes that Educational Sign Language Interpreters might be able to be considered as teachers, but that is not a finding that would invoke the collateral estoppel doctrine.

C. Did the circuit court err in independently determining that Respondents are teachers?

The circuit court relied solely on collateral estoppel and the decision that Petitioner asserts was incorrectly interpreted to determine that Respondents are teachers. If collateral estoppel does not apply because of the reasons mentioned above, the circuit court gave no independent analysis as to how it finds the ALJ's decision to be clearly wrong. The ALJ's decision worked through an analysis as to how it was determined that Respondents are not teachers who would receive this pay increase and evaluated its reasonableness. That analysis took into consideration the WVDE's guidance of how the Respondent is to determine who is to receive the pay increase. In finding that the WVDE interpretation of "classroom teacher certified in special education" was reasonable, the ALJ correctly evaluated this issue. Without collateral estoppel, the circuit court erred on disregarding the WVDE's reasonable interpretation of its statute when all Respondents were able to provide was an alternative interpretation of "classroom teacher certified in special education." Respondents did not meet their burden of proof.

It should also be mentioned that Educational Sign Language Interpreters can be either considered service personnel or professional personnel. In Kanawha County, they are considered professional personnel, as has already been discussed. Because they are professional employees they are paid on the professional pay scale, otherwise known as the teacher pay scale. When the WVDE makes determinations for who is a "teacher" and who is not a teacher, for the purposes of a specific statute, is does so globally for the whole state. Just because a county has made a certain type of employee a professional employee, when there was an option to keep them as service employee, does not mean that every county has made the same decision. Therefore, in another county where the Educational Sign Language Interpreter position is still a service personnel position, there is not a question as to whether they are "teachers." They would clearly not be

teachers, as teachers have to be professional personnel. Thus, it is more important to determine what qualities, job duties, education level, and certifications make a person a teacher, not what pay scale they are paid under since that may differ county to county and the teacher scale is used for a variety of non-teacher positions. The WVDE's reliance on teaching degree and special education certification, in light of this, is reasonable. Anything less would be inconsistent from county to county.

VII. Conclusion

Petitioner asserts that the circuit erred in finding that Respondents were entitled to the three-step pay increase. Petitioners respectfully request the Final Order of the circuit court be reversed, and the decision of the Administrative Law Judge be reinstated.

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Kanawha County Board of Education

Respondent Below, Petitioner,

v. **No. 21-0831**

Brenda Hall and Antonia Vaughan,

Petitioners Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned, Lindsey D.C. McIntosh, Counsel for the Kanawha County Board of Education hereby certifies that on the 13th day of January, 2022, I served the foregoing ***PETITIONER'S BRIEF***, to the following:

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