BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: 21-0831
(Kanawha County Circuit Court Docket No.:)

KANAWHA COUNTY BOARD OF EDUCATION,
Petitioner-Appellant,

v.

BRENDA HALL and ANTONIA VAUGHAN,
Respondents-Appellees

APPELLEE'S BRIEF

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III. ASSIGNMENT OF ERROR

Please see Appellant's Brief.

IV. STATEMENT OF THE CASE

Appellant has not alleged any factual errors. The Statement of Case consist of the Findings of Fact made by the lower court.

V. SUMMARY OF ARGUMENT

Respondents are sign language interpreters who are long time employees of Petitioner. In 2013, the West Virginia Legislature created a new position, professional interpreter. Petitioner placed both Respondent's into that position. Accordingly, Petitioner began paying Respondents under the teacher pay scale found at 18A-4-2. However, when it did so, Petitioner did not give Respondents service credit for their previous work experience as sign language interpreters. Respondents grieved this to the West Virginia Public Employees Grievance Board (Grievance Board) and prevailed. Hall and Vaughan v. Kanawha County Bd. of Educ., Docket No.: 2014-0282-CONS. The Grievance Board found that as Respondents were paid under the teacher salary schedule, it followed that they should also receive experience increments for their prior years of service as sign language interpreters. Respondent did not appeal that decision.

A very similar issue has been raised between the parties again. Here, the statutory right at issue is a three increment bump for all "classroom teacher[s] certified in special education and employed as a full-time special education teacher." West Virginia Code Section 18A-4-2(e).

Like before, Respondent argues that Petitioners are not "teachers" for the purpose of a certain increment benefit given under Section 18A-4-2. Like before, Respondents filed a grievance over Appellants' erroneous decision. While the Grievance Board sided with Petitioner, the Kanawha County Circuit Court overturned the Grievance Board's decision in a well-reasoned opinion.

Petitioner makes three arguments supporting its contention that its appeal should be granted. Petitioner claims that new statutory language stating that the State Superintendent can determine who qualifies for the benefit at issue means it should win because it has determined that sign language interpreters should not receive the benefit. However, this Court has disfavored retroactive application of changes in the law and, as will be discussed below, the conditions that it has set for this to occur is not present here. Petitioner also claims that the Circuit Court's determination that collateral estoppel applies to this case because of the Grievance Board's earlier determination that Respondents are teachers is erroneous because the issue is different then the prior litigation. However, as will be demonstrated below, the prerequisite conditions for collateral estoppel are met here on the issue of whether Respondents are teachers. Finally, Petitioner argues that without the finding of collateral estoppel, the lower court's decision has no basis and should beoverturned. Again, this position is erroneous. A fair reading of the Circuit Court's decision demonstrates that it independently, correctly, determined that Respondents meet the statutory definition of classroom teacher and the other elements to get the increment increase. Thus, its ruling that Respondents' should receive the three level increment is correct and should be upheld.

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. Appellee believes that oral argument would be appropriate here.

VII. ARGUMENT

The Circuit Court of Kanawha County ruled that Respondents should receive a three level increment "bump" under 18A-4-2(e). The lower tribunal ruled that as a matter of collateral estoppel, it has been established that Respondents are "teachers" as defined by the West Virginia Code. The decision on appeal also found that Respondents were certified in special education and worked full time. Thus, the Court ruled Respondents met the statutory requirements to receive this benefit and overturned the erroneous denial of their grievance by the Grievance Board.

Petitioners allege that this ruling is erroneous because: (1) there has been a change in the statute after Respondents' grievance was initiated; (2) the lower court's ruling on the issue of collateral estoppel iss erroneous; and (3) without the collateral estoppel ruling, there is nothing in the lower court's decision that would support overturning the Grievance Board, which ruled for Petitioners. For the reasons set forth below, each of these contentions are wrong. The lower courts rulings should be affirmed.

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[1]." 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

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[1] "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).

deference to an ALJ's findings of fact, but reviewing *de novo* any ruling of law and the application of law to the facts.

B. STATEMENT OF LAW

At issue is the three step increment "bump" in the salary schedule given pursuant to 18A-4-2. West Virginia Code Section 18A-4-2(e), provides, in pertinent part, that: "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 . . . " Thus, to obtain the three years of experience credit, one must be (1) a classroom teacher, (2) certified in special education and (3) must be a special education teacher full time. Both Respondents satisfy these three elements.

A "classroom teacher" is one of four types of "professional educators" listed in the West Virginia Code. A "professional educator" is s defined in the West Virginia Code as having "the same meaning as 'teacher' as defined in section one, article one, chapter eighteen of this code." W. Va. Code Section 18A-1-1©. And under West Virginia Code 18-1-1 referred to above a "teacher" is defined as: "a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state." A "classroom teacher" is "a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity." Under these definitions, the lower tribunal's decision should be upheld.

C. DISCUSSION

THE LOWER COURT'S DECISION THAT RESPONDENTS SHOULD RECEIVE THE THREE STEP INCREASE IN QUESTION BECAUSE THEY ARE CLASSROOM TEACHERS CERTIFIED IN SPECIAL EDUCATION SHOULD BE UPHELD AND APPELLANT'S PETITION SHOULD BE DENIED.

The Circuit Court of Kanawha County ruled that Respondents should receive a three level increment "bump" under 18A-4-2(e). The lower tribunal ruled that as a matter of collateral estoppel, it has been established that Respondents are "teachers" and "classroom teacher" as defined by the West Virginia Code. The decision on appeal also found that Respondents were certified in special education and worked full time. Thus, the Court ruled Respondents met the statutory requirements to receive this benefit and overturned the erroneous denial of their grievance by the Grievance Board.

Petitioners allege that this ruling is erroneous because: (1) there has been a change in the statute after Respondents' grievance was initiated; (2) the lower court's ruling on the issue of collateral estoppel was erroneous; and (3) without the collateral estoppel ruling, there is nothing in the lower court's decision that would overturn the decision of the Grievance Board, which ruled for Petitioners. Each of these arguments will be addressed in turn.

1. The Petitioners Could Point to No Indicia That the State Legislature Intended the Recent Alteration of the Code Provision at Issue to be Retroactive.

As stated above, when Respondents filed their grievance, the West Virginia Code provision at issue stated, in relevant part, that: "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 . . . " West Virginia Code Section 18A-2-4(e). After the Respondents filed their grievance and after the Grievance Board ruled on the same, the West Virginia State Legislature added the words "as defined by the State Superintendent" after the words "full-time special education teacher." This change, Petitioner contends, makes this issue mute because the State Superintendent has advised that sign language interpreters are not full time special education teachers and, thus, are not eligible for the pay increment. However, Petitioner is mistaken.

Petitioner sites two cases from the West Virginia Supreme Court of Appeals, which both stand for the proposition that "[t]he 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 Comp. Comm'r, 140 W.Va. 572, 86 S.E.2d 114 (1955); and Cassella v. Mylan Pharm., Inc. (In re Petition for Attorney Fees and Costs), 234 W.Va. 485, 766 S.E.2d 432 (W. Va. 2014) (emphasis added). The latter case is particularly instructive. Therein, the prevailing claimant in a workers compensation claim requested attorney fees and costs. Cassella, 766 S.E.2d at p. 434. The workers compensation statute did not provide for this recovery when the claim was filed, however, it was amended to do so while the claim was being litigated. Id.

The added statutory section reads as follows:

> c) Except attorney's fees and costs recoverable pursuant to subsection (c), section twenty-one [§ 22B–2C–21], article two-c of this chapter, an attorney's fee for successful recovery of denied medical benefits may be charged or received by an attorney, and paid by the private carrier or self-insured employer, for a claimant or dependent under this section. In no event may attorney's fees and costs be awarded

pursuant to both this section and subsection (c), section twenty-one, article two-c of this chapter.

(1) If a claimant successfully prevails in a proceeding relating to a denial of medical benefits brought before the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, as a result of utilization review, arbitration, mediation or other proceedings, or a combination thereof, relating to denial of medical benefits before the Office of Judges, Board of Review or court, there shall additionally be charged against the private carriers or self-insured employers, whichever is applicable, the reasonable costs and reasonable hourly attorney fees of the claimant. Following the successful resolution of the denial in favor of the claimant, a fee petition shall be submitted by the claimant's attorney to the Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court, whichever enters a final decision on the issue. An attorney representing a claimant must submit a claim for attorney fees and costs within thirty days following a decision in which the claimant prevails and the order becomes final.

(2) The Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court shall enter an order within thirty days awarding reasonable attorney fees not to exceed $125 per hour and reasonable costs of the claimant to be paid by the private carriers or self-insured employers, whichever is applicable, which shall be paid as directed. In no event may an award of the claimant's attorney's fees under this subsection exceed $500 per litigated medical issue, not to exceed $2,500 in a claim.

(3) In determining the reasonableness of the attorney fees to be awarded, the Insurance Commission, arbitrator, mediator, Office of Judges, Board of Review, or court shall consider the experience of the attorney, the complexity of the issue, the hours expended, and the contingent nature of the fee.

Id. at p. 435, *quoting* West Virginia Code Section 23-5-16©. Importantly, the West Virginia Supreme Court stated that: "Nowhere in the statute at issue are there clear, strong, and imperative words indicating that the statute applies retroactively, nor does such appear by necessary implication." Id. at p. 436.[2]

[2] Ultimately, the Court ruled in favor of the claimant based on the fact that her entitlement to attorney fees and costs did not accrue until *after* the new statutory section was added. Thus, no retroactive application was necessary. Id. at 436-37.

Similarly, the change in the law relied upon by Petitioners contains no "clear, strong, and imperative words indicating that the statute applies retroactively," nor is there any indication that such retroactivity "appears by necessary implication." Indeed, the only argument propounded by Petitioner to support retroactivity is the fact that the "effective date" of Code Section 18A-4-2(e) was not changed when the new language was added. Meaning no disrespect to Petitioner, but that argument makes no sense. If the State Legislature had changed the effective date of the statute to the date in which the new language takes effect, then all the individuals who were given the increment and were paid thereunder, would have had to return the money as they would not have been entitled to the increment pay until after the new effective date. Of course, the effective date was kept the same. That fact is not relevant to our inquiry. As noted above, there is no indicia within the statute that overcomes the significant presumption against a retroactive application of new statutory language.

2. The Lower Court Properly Ruled that Collateral Estoppel Prevents Petitioners From Litigating the Issue of Whether or Not Respondents Meet the Statutory Definition of Teachers.

As this Court is well aware, "[c]ollateral estoppel [also known as issue preclusion] 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, 459 S.E.2d 114 (W. Va. 1995). If these conditions are met, the issue in question can not be litigated again.

Petitioner argues that collateral estoppel does not apply here because the administrative law judge below "misunderstood" the issue and the finding of the grievance board decision upon which it relies, Hall and Vaughan v. Kanawha County Bd. of Educ., Docket No.: 2014-0282-CONS (August 7, 2014). Petitioner argues that the ALJ who authored that Decision did not make a finding that Respondents here were teachers. Petitioner is mistaken.

In that case, the Petitioner herein argued that Respondents' prior history as sign language interpreters could not be counted as experience under the teachers salary schedule because they are not teachers. See id. at p. 7. However, as noted by the Circuit Court, the Grievance Board rejected that argument entirely. The Grievance Board, while citing the proposition that "[s]chool personnel regulations and laws are to be strickly construed in favor of the employees.," *citing* Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979), noted that the work performed by Ms. Hall and Ms. Vaughan meets the definition of "teachers." Id. (noting that the definition of "teacher" encompasses many positions that are beyond the typical view of what that is).

Petitioner quibbles with the language used by the ALJ. The ALJ stated that: 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." Id. Petitioner claim that this is not really a finding, just speculation. However,

this view is incorrect. While the language is inartful, the fact remains that in this part of the Decision, the ALJ raised the argument that Petitioners used then-that Respondents are not teachers, thus their past experience as sign language interpreters should not be considered as teaching experience under the teacher's salary schedule-and rejected it. Part of the basis for such rejection was that Respondent's job duties meet the statutory definition of being a teacher under the West Virginia Code.

In short, the lower tribunal correctly understood the Grievance Board ruling upon which it relied to apply collateral estoppel here. Petitioner's argument is incorrect.

3. The Lower Tribunal Provided a Basis Independent of Collateral Estoppel in Ruling in Favor of Respondents.

Petitioner argued that without collateral estoppel, the Circuit Court gave no independent basis for ruling in favor of Respondents. Again, Petitioner is incorrect.

First, this Court should note that collateral estoppel was used by the lower tribunal as the basis for only part of its ruling; that Respondents meet the definition of "teachers." It made additional rulings crucial to this appeal as well. For example, the Court looked at the definition of "classroom teacher[3]" and found that Respondents meet that definition. In doing so, the Circuit Court agreed with the Grievance Board that Respondents "spend a majority of their work day interpreting the classroom teacher's material and content to their hearing impaired students," fwhich it interpreted to be tantamount to "spending more then half their day conducting

[3]A "classroom teacher" is "a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity."

instructional activities." The lower court then summarized its ruling by stating that: Therefore, Petitioners [Respondents here] meet the definitions of a "professional educator" and "classroom teacher" because they engage in instructional duties with students for more then half their work day." This ruling is made independently of the collateral estoppel issue.

Indeed, a fair consideration of the lower court's ruling demonstrates its correctness. The crux of meeting the definition of a "teacher" in West Virginia is that a person who is "regularly employed for instructional purposes." Of course, Respondents meet this definition. Instruction to an important segment of the student population could not occur without their skills. They are primarily, if not exclusively, employed for instructional purposes.

As a "teacher" under the Code, they are necessarily professional educators, as those two terms have the same definition under the Code. As noted by the lower Court, there are only four types of professional educators and the only one that would apply to Respondents is that of "classroom teacher." Moreover, Respondents comfortably fit within the definition of classroom teacher. Comparing the definition of "teacher" or "professional educator" and "classroom teacher" is that the latter has a "direct" instructional relationship with students and has this direct relationship for more then half of their work day. Here, Respondents clearly have a direct instructional relationship with students and do this work for more then half of their day. Thus, Respondents are "classroom teachers."

Once this finding is made, then the other two factors to determine if Respondents should receive the increment increase-whether they are certified in special education and whether they work full time, are easily met. The lower court found that Respondents are "certified in public

education," and that does not seem to be an issue raised by Appellants. And there is no dispute that they work full time. Thus, the lower court's ruling is correct and should be upheld.

VIII. CONCLUSION

Respondents should prevail for the reasons contained herein.

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KANAWHA COUNTY BOARD OF EDUCATION,
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CERTIFICATE OF SERVICE

I, Andrew J. Katz, counsel Petitioner-Appellant, do hereby certify that I have on the 6th day of January, 2021 caused to be served a true copy of **APPELLEE'S BRIEF** via Electronic Mail to the following individual:

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