KAREN JACKSON, .

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Grievant, .

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v. .

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MASON COUNTY BOARD OF EDUCATION, . Docket No. 94-26-011 .

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Employer, .

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and .

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LINDA TATTERSON, .

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Intervenor. .

D E C I S I O N

Karen Jackson (hereinafter Grievant) filed this complaint against the Mason County Board of Education (hereinafter Board) on October 8, 1993. She contends she should have been hired for a fifth grade teaching position at Ordnance Elementary School (hereinafter Ordnance) that she applied for but which was ultimately not filled competitively as a result of certain transfers. After having received adverse decisions at the lowerlevels, Grievant appealed to level four on January 7, 1994,

and requested that this Decision be based upon the evidence already developed. By Order dated January 25, 1994, Linda Tatterson was granted intervening status and the case became mature on March 2, 1994, after receipt of the parties' briefs. The material facts are not in dispute and shall be set forth as follows:

Findings of Fact

1. Grievant is employed by the Board as an elementary teacher and has been teaching for approximately fifteen years.

2. In the spring of 1993, the Board attempted to reduce the number of elementary teachers within its employ. As a direct result, it eliminated two grade level positions at Ordnance for the upcoming 1993-1994 school year. Prior to this reduction in force, there were twenty-one grade level elementary teachers at Ordnance.

3. The least senior teacher in the areas of certification reduced was Ms. Scott, an elementary teacher at Leon Elementary (hereinafter Leon). Ms. Tatterson (hereinafter Intervenor) was transferred from Ordnance to Leon and replaced Ms. Scott, thereby terminating Ms. Scott's employment. The second least senior elementary teacher in the county was bumped by another teacher previously assigned to Ordnance during the 1992-1993 school year. At the beginning of the 1993-1994 school year, there were nineteen grade level elementary teachers at Ordnance.

4. As a result of this reduction in force, Ms. Scott filed a civil suit in Mason County Circuit Court seeking the extraordinary remedy of a Writ of Mandamus to compel the Board toreinstate her to her former position. The Honorable O.C. Spaulding, by letter of opinion dated September 17, 1993, granted Ms. Scott the relief she had requested and ordered the Board to reinstate her. (See footnote 1)

5. Based upon the Circuit Court's Order, the Board reinstated Ms. Scott to her previous position and, in turn, rescinded Intervenor's transfer.

6. On September 21, 1993, Ms. Greer, a fifth grade teacher at Ordnance, died. Intervenor was subsequently contacted by the Board's Personnel Director and told to report to Ordnance on September 27, 1993, to teach the fifth grade class held by Ms. Greer. The Board had always planned on returning Intervenor to Ordnance to teach if Ms. Scott's suit was successful.

7. By Notice dated September 29, 1993, the Board posted a fifth grade teaching position at

Ordnance. Grievant applied for this position.

8. At a meeting on October 5, 1993, the Board officially rescinded Intervenor's transfer and withdrew the posting for the fifth grade position.

Parties' Positions

Grievant contends that Ms. Greer's death created a position vacancy which was required to be posted and filled pursuant to the provisions of W.Va. Code §18A-4-7a. She avers that the Board's assignment of Intervenor to this position was in error because theposition became vacant before the Board had acted to rescind Intervenor's transfer. The Board contends that it was bound by the Circuit Court's Order to reinstate Ms. Scott which, in turn, necessitated that it rescind Intervenor's transfer to Leon and, as a result, the number of elementary teachers at Ordnance was the same at the beginning of the 1993-1994 school year as the previous year. Therefore, the Board argues that the posting was unnecessary because it could legally realign its grade level teachers pursuant to the following language of Code §18A-4-7a:

> Notwithstanding any other provision of the code to the contrary, where the total number of classroom teaching positions in an elementary school does not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified without that position being posted: Provided, That the employee and the county board of education mutually agree to the reassignment.

Intervenor contends that the Board was legally obligated to rescind her transfer and to reassign her to Ordnance as a result of the Court's Order returning Ms. Scott to Leon. Based upon this conclusion, she further avers that requiring the Board to post and fill Ms. Greer's position would create an absurd result.

Discussion

This case involves an issue of statutory interpretation. In particular, the question is whether the Board could rely upon the exception to the general posting requirement contained in Code §18A-4-7a ¶11, to support its personnel transfers taken as a result of Ms. Scott's court-ordered reinstatement to her former position. In interpreting statutory provisions, the key is to determine legislative intent. Farley v. Buckalew, 414 S.E.2d 454 (W.Va. 1992). "In interpreting a statute, each word of the statute

should be given some effect, and if undefined will be given its common, ordinary and accepted meaning." Nelson v. Merritt, 176 W.Va. 485, 345 S.E.2d 785 (1985). Further, "[W]ords used, even in their literal sense, are primarily and ordinarily the most reliable source of interpreting a statute, but statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Hodgson v. Elk Garden Corp., 482 F.2d 529 (4th Cir. 1973). Based upon the undersigned's reading of Code 18A-4-7a ¶11, The answer to the question at issue in this case is no.

Paragraph 11 of section 7a allows boards of education to realign their existing elementary teaching staff in a school if "the total number of classroom teaching positions in an elementary school does not increase from one school year to the next . . ." but a need exists to change the previous teaching assignments because of factors such as changes in student enrollment, etc. The obvious purpose of this statute is to provide boards of education flexibility in changing grade level teaching assignments at the beginning of a school year, within a particular elementary school, if it has the same number of teachers as it had the previous year but it does not need the same number of teachers in the same grade levels, provided the teachers consent to such realignment. The statutory provision was not passed to allow boards of education tobypass the ordinary posting requirements when vacancies are created in teaching positions within an elementary school sometime during the school year. In the instant case, if there had been no reduction in force in the spring of 1993 then the Board would have been required to post and fill the position vacated by Ms. Greer. Further, the fact that the Board implemented a reduction in force does not bring into play the provisions of Code §18A-4-7a ¶11.

Due to the reduction in force, there were two less grade level teachers assigned to Ordnance for the 1993-1994 school year than in the previous year. Further, Ms. Greer's death created a teaching vacancy after the school year had already started. The Board's assignment of Intervenor to Ms. Greer's position, while logical on one hand, was not consistent with the type of "realignment" contemplated by Code §18A-4-7a ¶11. While it is not questioned that Intervenor had a right to a teaching assignment as a result of her removal from the Leon assignment, she did not have a right to the vacancy created by Ms. Greer's untimely death. Consistent with the Board's argument that once Intervenor's transfer was rescinded it could proceed as if no transfer had been made, she should have been reassigned to her former position. However, this position no longer existed. Arguably, she

should have been assigned to the position held by the third least senior teacher in the area of certification sought to be reduced or her previous six grade position should have been resurrected. In any event, Code §18A-4-7a ¶11 cannot be interpreted to stand for the proposition that a board of education may fill vacant positions by transfer as opposedto by hiring when the vacancy is created after the beginning of the school year and when the number of teachers at the school is less than the number of teachers at the school the previous year. In essence, Intervenor's transfer and the Board's subsequent recision thereof had no bearing on the status of the vacancy created by Ms. Greer's death. No realignment of teachers was performed simply by assigning Intervenor to Ms. Greer's former position and leaving every other teacher in place.

Based upon the discussion heretofore, it is determined that the Board erred in not posting and filling the vacated fifth grade teaching position at Ordnance consistent with the hiring provisions of Code §18A-4-7a. There is no evidence to indicate that after the position was posted, albeit for a short time period, any evaluation was performed of the applicants' qualifications. Therefore, Grievant cannot establish that she is entitled to the position she seeks as she cannot support the conclusion that she was or is the most qualified. The only appropriate remedy is to require the Board to remove Intervenor from the position and post the position for the proper period of time so that it may be filled based upon an assessment of the applicants' qualifications. The Board is free to determine the appropriate assignment of Intervenor as a result of her removal from said position.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. W.Va. Code §18A-4-7a ¶11 creates an exception to the mandatory posting requirements of Code §18A-4-7a ¶6. Lloyd v. Kanawha Co. Bd. of Educ., Docket No. 91-20-327 (Oct. 29, 1991).

2. In order for a board of education to take advantage of the realignment provision contained in W.Va. Code §18A-4-7a ¶11, the following conditions must be met: First, the realignment must take place at the beginning of the school year; Second, the realignment must be necessary because the number of students in each grade level has changed from the previous year; Third, the teachers who are to be reassigned must agree to such assignment; and Fourth, the teachers must be certified in the areas of their assignment.

3. In the instant case, the total number of grade level classroom teaching positions at Ordnance was decreased from twenty-one at the beginning of the 1992-1993 school year to nineteen at the beginning of the 1993-1994 school year. After the beginning of the 1993-1994 school year, the number of grade level classroom teaching positions changed when one teacher died and another teacher was transferred back to the school. Under these facts, the Board was not free to realign the teachers' assignments pursuant to W.Va. Code §18A-4-7a ¶11.

4. Grievant has failed to establish a legal entitlement to the vacated fifth grade teaching position at Ordnance because no evaluation of her credentials and qualifications was performed pursuant to W.Va. Code §18A-4-7a ¶1.

Therefore, this case is hereby **GRANTED IN PART** and **DENIED IN PART**. It is hereby **ORDERED** that the Mason County Board of Education shall post and fill the fifth grade teaching position previously held by Ms. Greer at Ordnance Elementary School consistent with the above discussion. Ms. Tatterson shall be removed from said position and reassigned to a newly-created position, vacant position or placed on the county's transfer list pursuant to the Board's discretionary authority to make assignments of professional personnel. It would be reasonable for the Board to wait until the beginning of the 1994-1995 school year to effectuate this remedy if it determines that waiting to do so would benefit the students' education.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

April 27, 1994

Footnote: 1 *This letter of opinion was followed by a Final Order dated September 29, 1993.*