SHARON BURTON and .

JANET HARLOW, et al. .

Grievants, .

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v. .

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WOOD COUNTY BOARD OF EDUCATION, . Docket Number: 94-54-438

Respondent, .

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and .

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WINIFRED GARRISON, .

LINDA BEOUGHER, SUE WOODWARD and .

MELINDA BAILEY, et al. .

Intervenors. .

D E C I S I O N

This grievance was filed as a group grievance on April 14, 1994, pursuant to the grievance procedure for education employees, West Virginia Code §18-29-1 et seq. (See footnote 1) Ms. Burton is a teacher with the Wood County Board of Education (hereinafter Board) and she represents a

group of forty-seven professional employees. Ms.Harlow is employed as a custodian for the Board and she represents nine other service employees. Both Ms. Beougher and Ms. Bailey are teachers for the Board and they represent seven and fourteen employees respectively. Ms. Garrison represents nine other service employees who work for the Board; and finally Ms. Woodward is a principal representing her own interests in the matter.

The parties agreed that the matter could begin at level two of the grievance procedure where both a preliminary and evidentiary hearing was held. The parties entered into a set of stipulations of fact and, after an adverse decision was rendered at level two on August 19, 1994, it was requested that this Decision be based upon the record developed at that level. All parties have, at one time or another, filed briefs explaining their legal arguments. The case became mature for decision on September 26, 1994.

There are no material issues of fact as the case involves only a question of law. The following stipulations of fact are hereby adopted as the Undersigned's appropriately made findings of fact. (See footnote 2)

Stipulations of Fact

1. Rayon School originally was built in 1920 and was located in Wood County, West Virginia, at the address of 1508 Rayon Dr., Parkersburg, West Virginia. The student capacity is 300. This facility sits beside a major street, Rayon Drive, and consists of 2.33 of acres property.

2. Rayon School ended the [1993-1994 school] year with approximately 259 students, 21 professional employees and 8 service personnel.

3. Martin School was built in 1986 and is located at 1301 Hillcrest St., Parkersburg, West Virginia. Martin School has a student capacity of 440 and sits on 54 acres of property on a side road with no major traffic problems.

4. Martin School was built as a segregated facility for the severely and profoundly handicapped children, providing excellent facilities such as an indoor swimming pool and therapy pool, the only facility in Wood County to have such facilities.

5. In 1993 and 1994, in compliance with an agreement with the United States Department of Education, Office of Civil Rights, all students at the Martin School had reviews of their IEPs [Individual Evaluation Plans].

6. As a result of the new IEPs, most students were assigned new placements on the continuum outside of Martin School, a segregated facility.

7. At the end of the 1993-1994 school year, approximately three students were left at Martin School after having received their placement from separate schools. Since then, all placements requiring a separate facility have been revised leaving no necessity for a separate facility.

8. Also, two county wide school programs were assigned to Martin School in the year 1993-1994, including a PreschoolHandicapped Program serving 6 - 8 children and a half day Preschool Speech Program serving approximately 18 children.

9. In addition, students received adapted Physical Education courses at the Martin School making use of the swimming pool and therapy pool.

10. Rayon School, at the close of the 1993-1994 school year, also had a county wide program placed in the facility for the teaching of approximately 11 intermediate mildly mentally impaired students.

11. It has been the practice of the Board under the direction of the West Virginia Office of Special Education Programs and Assurances to place county wide programs for the disabled with a low incidence exceptionality in facilities where room is available. These county wide programs draw students from all over the county and not just in the facility's attendance area.

12. In trying to decide what to do with the facility previously known as the Martin School, the Board considered moving the students and staff from Rayon to the Martin facility.

13. Rayon and Martin School are approximately .4 of a mile apart and are located in the same attendance area of Wood County. Rayon School is on the boundary line of the attendance area while the Martin School is more centrally located to a large number of the students who walk to the school.

14. An opinion was sought from the Superintendent of the West Virginia State Department of Education on how to deal with themoving of the students and staff from the proposed closed Rayon School to the proposed closed Martin School.

15. {This stipulation simply indicated that the record contains various State Superintendent of Schools Opinions. This stipulation is not properly a stipulation of fact.}

16. After having public meetings on March 15, 1994, as required by law, the Board decided on March 22, 1994, to close Martin School and to close Rayon school. It was decided that all students and staff located previously at Rayon School would be transferred to the building previously named

Martin School in order to allow for the use of the newer and updated facility.

17. In making this decision, the West Virginia State Department of Education's Superintendent's Opinion was relied upon by the Board and was distributed to the public at the aforementioned hearings.

18. On March 29, 1994, the Board, by written letter, sought permission from Dr. Henry Marockie to change the Comprehensive Educational Facilities Plan to reflect the above action taken on March 22, 1994, said approval being granted by the State Department of Education on May 12, 1994.

19. After review of the available facilities and room space for the upcoming school year, the Board has established that the following students will be at the [new] Rayon school located at 1301 Hillcrest Street, Parkersburg, WV, for the school year 1994-95:

A. Approximately 275 students from the attendance area of Rayon School;

B. The county wide program for handicapped preschoolers serving approximately 6 - 8 children;

C. The county wide program for communications disorder preschoolers serving approximately 18 students in half-day programs;

D. The county wide program for intermediate, severe and profoundly disabled based upon the low incidence exceptionality rule serving approximately four students;

E. The county wide program for the intermediate mild and mentally impaired and disabled based upon the low incidence exceptionality rule serving approximately 11 students.

Discussion

The grievants allege that the Board's closing of the Rayon Elementary School and subsequent assignment of those students and staff to the Martin School was either a consolidation or merger

pursuant to the provisions of W. Va. Code §18A-4-8f. Therefore, they contend that the teaching and service positions should have been posted for bid by the Board and filled pursuant to Code §§18A-4-8f and 8b, as opposed to having been filled by "relocation" or transfer. Both the Board and the intervenors contend that the Board's action was proper because there was neither a merger of the two schools nor a consolidation of schools as those terms are defined in Code §18A-4-8f. Respondents rely on three opinions from the State Superintendent of Schools for support of this argument. Further, it is argued that Code §18A-4-8f does not operate to give service personnel the same rights as professional personnel even assuming there existed a consolidation or merger. Finally, Respondents allege that grievants cannot demonstrate a violation of Code §18A-4-8b.

W. Va. Code §18A-4-8f, provides, in pertinent part,

> Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers, as defined in section one [§ 18A-1-1], article one of this chapter, who vote to do so, in accordance with procedures established herein, and who are employed by a county board of education, the board shall give priority to classroom teachers in any school or schools to be closed as a result of a consolidation or merger when filling positions in the new school created by the consolidation or newly created positions in existing schools as a result of the merger. . . . The teachers in the school or schools to be closed shall have priority in filling new positions in the new or merged schools for which the teachers are certified and meet the standards set forth in the job posting on the basis of seniority within the county: Provided, That a teacher shall only receive priority for filling a position at a school impacted by a merger, or consolidation with the position being created by the influx of students from a consolidated or merged school into the school receiving students from their closed school or grade level. The most senior teacher in the closed school or schools shall be placed first, the second most senior shall be placed next and so on until all the newly created positions are filled, or until all the teachers in the closed school or schools who wish to transfer into the newly created positions are placed: Provided, however, That if there are fewer new positions in the newly created school or merged school than there are classroom teachers in the school or schools to be closed, the teachers who were not placed in the new positions shall retain the same rights as all other teachers with regard to seniority, transfer and reduction in force: Provided further, That nothing herein shall be construed to grant any employee additional rights or protection with regard to reduction in force.
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> For the purposes of this section only, a consolidation shall mean when one or more schools are closed, or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to a new school. For purposes of this section only, a merger shall mean when one or more schools are closed or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to another existing school. [Emphasis added].

Obviously, the definitions of the terms "merger" and "consolidation" are of vital importance to

analyzing the issues inthis case. The closing of Rayon Elementary School and the transfer of those students to Martin School either created a consolidation, a merger, or a "relocation" as the Board suggests. However, the key to this case rests with a determination as to whether Martin should be classified as a "new school" or an "existing school." It is obvious that Rayon School was closed and those students were assigned elsewhere. The Board contends that Martin should be classified as a "vacant" school and not an "existing school" because the classes were eliminated for a time.

The February 24, 1994, State Superintendent's Opinion cited in finding of fact number 14 was given as a direct response to a request from the Board's Assistant Superintendent concerning the facts at issue herein. In this opinion, Mr. Marockie opined that the closing of Rayon and transfer of personnel to Martin was neither a merger nor consolidation; therefore, there was no need to post the positions. The facts were analogized to the scenario where a school's staff and students are transferred to a vacant building. The problem with this analogy is that Martin was never a vacant, unused school building. It was simply closed at the end of one school year and reopened at the beginning of the next with additional students and staff being added to serve the same and additional students as the year before.

Under the clear and unambiguous language of Code §18A-4-8f, the Board's action at issue herein resulted in a merger of the students and staff at Rayon with the students, staff and facilities at Martin. "One or more schools [were] closed . . . and thestudents who previously attended the closed schools or grade levels [were] assigned to another existing school." Therefore, to the extent that the February 24, 1994 opinion states otherwise, it is clearly wrong. However, the fact that there was a merger does not mean that grievants are entitled to the relief they seek.

First, under Code §18A-4-8f, there is no evidence of record that would support a finding that any new positions were created by the influx of students as a result of the merger. All inferences from the evidence indicate that the same teachers are going to be teaching the same classes to the same students. Therefore, the priority for positions discussed in Code §18A-4-8f does not arise given the current facts.

Second, with regard to W. Va. Code §18A-4-8b, "[b]oards shall be required to post and date notices of all job vacancies of existing or newly created positions in conspicuous places for all school service employees to observe for at least five working days" [Emphasis added]. Again, the evidence does not support a finding that any service personnel position vacancies exist as a result of the

merger. (See footnote 3) Therefore, grievants cannot prevail on their claim because no violation of law has been established

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. West Virginia State Superintendent of School's opinions are entitled to great weight unless clearly wrong. Bailey v. Morgan Co. Bd. of Educ., Docket No, 91-22-150 (Oct. 31, 1991).

2. To the extent that the February 24, 1994 State Superintendent of School's opinion at issue herein, stands for the proposition that the closure of the Rayon School and transfer of its students and Staff to Martin School was not the result of a merger, said opinion is clearly wrong given the clear and unambiguous language of W. Va. Code §18A-4-8f.

3. Grievants have failed to establish by a preponderance of the evidence a violation of W. Va. Code §18A-4-8f or 18A-4-8b. Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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

January 25, 1995

Footnote: 1For purposes of economy, the names have been omitted from this Decision. The record does reflect the names of the grievants who have properly joined this suit.

Footnote: 2The language of the stipulations have been edited with regard to grammar.

Footnote: 3It is true that Code §18A-4-8f does not apply to service positions created as a result of a consolidation or merger. However, the hiring priority created for service positions was already contained in Code §18A-4-8b prior to Code §18A-4-8f being enacted. The provisions of 8b would obviously apply during a merger or consolidation if a vacancy existed.