MARILYN BURGESS, et al

v. Docket No. 95-41-268

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

Grievants Marilyn Burgess, Betty Aliff, Lora Bartrum, Shirley Carr, Nancy Miller, and Lettie Watson are school service employees of the Raleigh County Board of Education (Board). (See footnote 1) They initiated this complaint on or about May 19, 1995, protesting the failure of the Board to post certain jobs at Marsh Fork Elementary School. Their immediate supervisor was without authority to address the matter and the grievance was denied at Level II following a hearing held June 1, 1995. The Board, at Level III, declined to consider the complaint and appeal to Level IV was made June 19, 1995. The parties subsequently agreed that a decision could be rendered on the record developed at Level II. Proposed findings of fact and conclusions of law were submitted by September 18, 1995.

The facts of the case are uncontroverted. (See footnote 2) On April 3, 1995, the Board voted to close, effective July 1, 1995, Pettus Elementary School, which served students in grades kindergarten through 6, Mt. View Elementary School, which also served students in grades kindergarten through 6, and Marsh Fork Middle School which served students in grades 6 through 8.

Simultaneous to the closures, the Board "created" Marsh Fork Elementary School out of the Marsh Fork Middle School facility, effective the beginning of the 1995-96 school year. There is no evidence of record that the school's physical plant was altered in any way. Marsh Fork Elementary was to serve K through 6 students from the Pettus, Mt. View and Marsh Fork attendance areas. 7th and 8th grade students who would have attended Marsh Fork Middle were assigned to Marsh Fork High School.

The grievants were assigned to Mt. View during the 1994-95 school year. After receiving notice and hearing per W.Va. Code §18A-2-7, (See footnote 3) in the spring of 1995, they were placed on a transfer list pending reassignment for the 1995-96 school year.

The school service staff at Marsh Fork Middle were also placed on the transfer list. In early April

1995, in response to aninquiry from Personnel Director Emily Meadows, Marsh Fork Middle School Principal Gary Rumberg advised that five of those employees wished to remain at the Marsh Fork Middle site. (See footnote 4) Relying on November 17, 1993 and March 25, 1992 opinions of the State Superintendent of Schools, Director Meadows and Superintendent Dials concluded that the Board was under no legal obligation to post their positions as vacant. At some point, the grievants were so advised. This complaint ensued.

The grievants assert that Marsh Fork Elementary is a new school; that any positions assigned there, including those held by former Marsh Fork Middle employees, are, therefore, new positions; and that W.Va. Code §18A-4-8b, ¶7 required that they be posted. The Board relies on the cited opinions of the State Superintendent of Schools and urges that they be afforded deference. (See footnote 5)

Code §18A-4-8b, ¶7 requires county boards of education "to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five workingdays." (See footnote 6) The opinions relied on do not cite this provision, or other statute. It is clear, however, that the State Superintendent, in addressing fact patterns markedly similar to that presented here, has concluded that unless there is to be a substantial change in the duties of the school service employees who will be "retained" at their worksites, there are no new positions created. The undersigned finds that the Superintendent's fact-based analysis is not clearly wrong and, therefore, accords it the deference mandated in Smith v. Bd. of Educ. of Cty. of Greenbrier, 452 S.E.2d 412 (W.Va. 1994).

To supplement the Superintendent's conclusions, the undersigned specifically finds that none of the positions targeted herein were "newly created" within the meaning of Code §18A-4-8b. Simply stated, the record reveals that the reconfiguration of schools merely changed the name of the Marsh Fork Middle employees' worksite and made slight alterations in the age and grade of students they would serve. To say that their posts were "transformed" into new positions by these actions would be to distort the applicable statutory provision.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Raleigh 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 28, 1995

Footnote: 1Ms. Aliff and Ms. Watson are custodians; Ms. Carr, Ms. Miller and Ms. Bartrum are cooks; and Ms. Burgess is a secretary.

Footnote: 2The parties stipulated to the most pertinent facts. Other findings have been based on various exhibits submitted at the Level II hearing.

Footnote: 3The statute, in relevant part, provides,

> *The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, except that for the school year one thousand nine hundred eighty-nine - ninety only, the superintendent shall have until the fourth Monday of April to provide an employee with such written notice. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of this statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education.*

Footnote: 4The record is unclear, but it appears that there were no other service employees at the school. It is presumed that any employee who "left" merely bid on and received a post at a different school and that their Marsh Fork Middle positions were then posted as vacant. In any event, the grievants target only those posts which were retained.

Footnote: 5The November 17, 1993 opinion is a direct response to an October 25, 1993 request of Superintendent Dials. This opinion incorporates the March 25, 1992 opinion by reference. As discussed herein, both address fact patterns similar to that in the present case.

Footnote: 6It should be noted and perhaps stressed that this is the only portion of Code §18A-4-8b relied upon by the grievants. They do not assert that they had any right to the positions under further provisions of the statute which address reductions-in-force of school service employees. It appears that while the closure of schools may have ultimately resulted in a countywide loss of positions, the grievants were at no time at risk of having their employment terminated.