PATRICIA ALLEN, ET AL., Grievants,

v. Docket No. 96-41-287

RALEIGH COUNTY BOARD OF EDUCATION, Respondent,

and

DONNA PATE, Intervenor.

D E C I S I O N

The grievants, Patricia Allen, Susan Daniels, Karen Coalson, and Paula Thompson are employed as a teachers for the respondent, Raleigh County Board of Education (Board). They filed this grievance alleging that:

> The Raleigh County Board of Education violated WV Code 18A-4-7a by failing to post a newly created kindergarten position at Daiels [sic] Elementary School. To resolve this dispute, the Grievant[s] request that the position in question be posted and filled in accordance with the provisions of the governing statute.

By letter dated June 3, 1996, Donna Pate, through her representative, intervened and appeared at the Level II hearing held on June 12, 1996. Following adverse decisions at the lower levels, on or about July 5, 1996, the grievance was appealed to Level IV. The parties agreed that a decision could be made based upon the lower level record along with supplemental findings of fact and conclusions of law. For administrative purposes, the case was transferred to the undersigned on December 4, 1996. The case became mature for decision on January 22, 1997. The facts as developed from the record in this matter are not in dispute. The Board was mandated to increase kindergarten classes from one-half day in length to a full day for the 1996-1997 school term. In 1995-1996, Daniels Elementary and Shady Spring Elementary each had a one-half day kindergarten class taught by the same teacher. She would teach at the schools on alternating days, with each class alternating on Fridays. One week a class would meet Monday, Wednesday and Friday while the other would meet Tuesday and Thursday. (See Administration Ex. No. Three). Two full-time kindergarten teachers would be needed for 1996-1997. To accomplish this, the respondent gave the choice of schools to Donna Pate, who had taught in 1995-1996. She chose to teach full-time at Daniels. Allowing the

teacher to choose was consistent with existing policy. At Shady Spring, due to a change in school enrollment, a sixth grade teaching position was eliminated. The sixth grade teacher was qualified to teach kindergarten and agreed to be moved to that position. Both kindergarten positions were filled without posting.

The grievants contend that the changing of the kindergarten from a half day to a full day created a new position and increased the number of elementary positions at Daniels by one-half a position. As a result, the grievants argue that the new position at Daniels should be posted. Their authority is W.Va. Code §18A-4-7(a). The pertinent part as cited by the grievants is as follows, "Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days..."

The respondent contends that West Virginia law permitted realignment. Another paragraph of W.Va. Code §18A-4-7(a) would allow the position to be filled by a realignment where the total number of teaching positions within the particular elementary school does not increase. The respondent further contends that the number of teaching positions at Daniels did not increase andposting was not necessary. The applicable paragraph of §18A-4-7(a) states:

> **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.

The term "notwithstanding" allows the paragraph above to have priority over the other requirements of the statute when certain conditions occur. In the instant case, the statute requires posting of every position, except **"...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..."**

The statute seems clear that realignment is proper without posting, within that condition. However, the grievant argues that a new half position was created even though the number of teachers has not changed. Therefore, the number of teachers does not necessarily equal the number of teaching positions. However, again it seems clear that W.Va. Code §18A-4-7(a) specifically states that the

total number of classroom teaching positions is the number to be used in determining whether there is an increase or decrease. The total did not increase and the statute relieves the respondent of the obligation to post.

There is no authority for the grievant's interpretation of the statute. Although, their argument is interesting, it cannot be assumed that the legislature would have intended to create a distinction between the terms “teaching positions” and “teachers” without a rationale for doing so. That rationale has not been demonstrated. The burden is upon the grievant to prove each and every element of his case. There being no evidence to support their theory as to the interpretation of thestatute in question, the burden of proof has not been met. Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988). Also, “in the ordinary case, absent any indication that doing so would frustrate [the legislature's] clear intention or yield patent absurdity, [a court's] obligation is to apply the statute as written.” Hubbard v. United States, 115 S.Ct. 1754, 1759, 131 L. Ed.2d 779 (1995).

Accordingly, the following findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Daniels Elementary and Shady Spring Elementary Schools both changed from one- half day kindergarten to full day kindergarten to be effective for the 1996-1997 school term.

2. Prior to that school year, the one-half day kindergarten classes at both Daniels and Shady Spring were taught by the same teacher, Donna Pate, the intervenor, on a rotating basis.

3. Upon deciding to change to full day kindergarten at Daniels and Shady Spring, the respondent elected to fill one position by allowing the preceding year's teacher to select her full-time position from either Daniels or Shady Spring.

4. Donna Pate chose Daniels.

5. As a result, the number of teachers at Daniels remained the same as the year before, although the number of teaching positions had increased by one-half.

6. The respondents interpreted W.Va. Code §18A-4-7a as not requiring the posting of the position, and did not do so.

7. The grievants contended that a new position or at least a half position had been created and that the statute required posting.

CONCLUSIONS OF LAW

1. The grievants have the burden of proving each element of a grievance of this nature by a preponderance of the evidence. Randolph v. Harrison County Bd. of Educ., Docket No. 17-88- 001-2 (June 30, 1988).

2. W.Va. Code §18A-4-7a does not require the posting of a vacant classroom teaching position when the position can be filled by a certified teacher through a realignment of existing personnel and the total number of classroom teaching positions does not increase.

3. "In the ordinary case, absent any indication that doing so would frustrate [the legislature's] clear intention or yield patent absurdity, [a court's] obligation is to apply the statute as written. Hubbard v. United States, 115 S.Ct. 1754, 1759, 131 L. Ed.2d 779 (1995).

Accordingly, this grievance is **DENIED**

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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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JAMES D. TERRY

Administrative Law Judge

DATE: June 9, 1997