MARY N. MARTIN, et al.,

Grievants,

v. **DOCKET NO. 02-41-212**

RALEIGH COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) , filed their joint grievance on March 26, 2002, stating, "Violation of state law 18A-2-13." As relief, Grievants sought, "To count every meal prepared - And to count Breakfast meals as 3/4 of a lunch meal as stated in state law."

The grievance was denied at Level I and Level II, and Level III was waived by Respondent. Grievants are represented by WVSSPA Attorney John E. Roush, Esq. (See footnote 2) and Respondent is represented by its attorney, Erwin Conrad, Esq. A Level IV hearing was held August 19, 2002, at the Grievance Board's Beckley office to supplement the record developed at the lower levels, after which the parties agreed to submit their proposed findings of fact and conclusions of law by September 9, 2002, whereupon the matter became mature for decision. The following material facts are undisputed:

FINDINGS OF FACT

1. Respondent employs Grievants as regular service personnel in the cook classifications at many different county schools.

2. Respondent attempts to staff all schools based on a ratio of 120 meals per day per cook. In calculating this ratio, a student lunch is counted as one meal, and a student breakfast is counted as one-half meal. Meals served to adult faculty and staff are not counted.

3. Respondent does not have an official Board policy establishing the 120:1 ratio, but relies on the discretion of its Food Services Director, Rose Cook.

4. No schools are staffed at exactly the 120:1 ratio. The staffing level ranges from 71 meals for the one cook at Sophia Elementary, to 123 meals per cook for the 5.5 cooks at Beckley/Stratton. The

average is 107 meals per cook.

DISCUSSION

Grievants contend that Respondent does not properly staff its kitchens because it counts breakfast as one-half of a meal and does not count adult meals at all for staffing purposes. According to Grievants, W. Va. Code § 18A-2-13 requires Respondent to count breakfast as three-fourths of a meal for staffing purposes. Respondent argues that the three-fourths meal specification in that Code section is optional, not mandatory. This is a non-disciplinary grievance in which the Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18- 29-6, 156 W. Va. C. S. R. 1 § 4.21.

The general facts are undisputed: Respondent counts breakfast as one-half of a meal and lunch as one meal, and staffs all of its kitchens at a 120:1 meal-to-cook ratio. Only meals served to students are counted - meals served to teachers and staff are not counted. All cooks in Raleigh County are affected by this practice. "A board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code 18A-4-8 [1993] are met." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994). Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997).

West Virginia Code § 18A-2-13 is titled, “Recommended guidelines for full-day and half-day cooks.” It states, “The following guidelines are optional guidelines that county boards may use when scheduling full-day and half-day cooks,” and lists a table of number of meals, number of cooks, and average number of meals served per cook's hours worked. The table is based on a 90:1 meal-to-cook ratio, or 12 meals per hour. Following the table which lists entries for up to 900 meals (10 cooks), the section states, “A meal prepared for a school lunch shall be established as a whole meal. Other meals shall be equal to three fourths of a school lunch meal.”

If Respondent counted breakfasts as three-fourths of a meal instead of one-half meal, while keeping its 120:1 target ratio, then all but two of its 32 schools would need additional kitchen staff. The additional staff would decrease the actual amount of work per cook, while raising Respondent's employee expenses.

Other than W. Va. Code § 18A-2-13, Grievants point to no other authority that mandates Respondent make the staffing change requested. However, following the accepted rules of statutory

construction, it is clear that the legislature did not intend for any part of this section to be mandatory. The Grievance Board has previously found the entire section to be optional. Miller v. Lincoln County Brd. of Educ., Docket No. 97-22-083 (Jul7 23, 2997).

"'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' N.L.R.B. v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' Pristavec v. Westfield Ins. Co., 400 S.E.2d 575 (W. Va. 1990), citing Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E.2d 194 (1925)." Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992).

"'In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.' Meadows on Behalf of Professional Employees of W. Va. Educ. Assoc. v. Hey, 399 S.E.2d 657, n. 9 (W.Va. 1990), citing Hodge v. Ginsberg, 303 S.E.2d 245 (W.Va. 1983)." Lasure, *supra*. As Grievant points out, it is well established that the word "shall," in the absence of language in the statute showing contrary intent on the part of the legislature, should be afforded a mandatory connotation. Nelson v. Public Employee Ins. Bd., 171 W. Va. 445, 300 S..E.2d 86 (1982); Jackson v Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997).

In this case, the word "shall" cannot be read in the absence of words showing a contrary intent. The words "recommended," "optional," and "may" when given their literal and plain meanings indicate that W. Va. Code § 18A-2-13 is not mandatory. Although the word "shall" is used in the last sentence of the section, it follows its permissive precursors, and is used in the same context, not a separate section or even subsection, that wouldremove it even slightly from the context. It is clearly intended by the legislature to explain the basis for the numbers listed in the foregoing table, not as a broad mandate to all county boards of education whether they choose to follow the "recommended guidelines" or not. Even read in a light most favorable to the employees, nothing in W. Va. Code § 18A-2-13 can be construed as mandatory. This literal construction does not lead to an absurd result, and does not lead to any injustice. Therefore, Grievants have not met their burden of proving that

Respondent must be compelled to follow the three-fourths meal specification in making its staffing decisions.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

2. "A board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code 18A-4-8 [1993] are met." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994). Byrd v. Cabell County Bd. of Educ., Docket No. 96- 06-316 (May 23, 1997).

3. "'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' N.L.R.B. v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such constructionwould lead to injustice and absurdity.' Pristavec v. Westfield Ins. Co., 400 S.E.2d 575 (W. Va. 1990), citing Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E.2d 194 (1925)." Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992).

4. "'In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.' Meadows on Behalf of Professional Employees of W.Va. Educ. Assoc. v. Hey, 399 S.E.2d 657, n. 9 (W.Va. 1990), citing Hodge v. Ginsberg, 303 S.E.2d 245 (W.Va. 1983)." Lasure, *supra*.

5. The kitchen staffing guidelines meal-to-cook ratios and meal values specified in W. Va. Code § 18A-2-13 are optional, and county Boards of Education are not obligated to use those figures. Miller v. Lincoln County Brd. of Educ., Docket No. 97-22-083 (Jul7 23, 2997).

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 13, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Mary N. Martin, Patricia Bair, Debbie Cook, Shirley Cook, Leatha Davis, Donna Dunbar, Kay Glover, Patricia Gorsky, Vicki Greer, Linda Holly, Violet Honaker, Deanna McGinnis, Deborah McKinney, Corrine Scurlock, Polly Smith, Wanda Tolliver, Beverly Toney, Betty Treadway, Sandy Trump and Betty Wriston.

Footnote: 2

Grievants' attorney agreed to accept service of the Level IV decision in the matter on behalf of his clients.