



Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

REPLY TO:
407 Neville Street, Suite 120
Beckley, WV 25801
Telephone: 256-6855
ON NET: 557-6855

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

JOHN O'NEAL

v.

Docket No. 89-RESA-616

RESA I

DECISION

Grievant, John O'Neal, was employed by the Regional Education Services Agency (RESA) in Region I as Executive Director until September 6, 1989. He initiated a grievance at Level I September 27, 1989, alleging:

I was hired as RESA I Director on July 6, 1989. Signed a duly executed contract and was dismissed from said employment two months later without any due process. This grievance can be resolved by paying me the remainder of my one year contract and legal expenses.

On October 6, 1989, RESA Board members discussed the grievance and issued the following decision:

During the regular RESA-I Board of Directors' meeting on October 6, 1989, your grievance was denied on the grounds of your voided contract which was not lawfully entered into. This is more fully set forth in the letter of which you received a copy from Dr. Henry Marockie, State Superintendent of Schools.

Appeal to Level IV was made October 19, 1989, where hearing was held November 29, 1989. The parties submitted proposed findings of fact and conclusions of law by January 11, 1990.

The facts of the case are not in dispute. Grievant, along with others, made application for the Executive Director position in July 1989. The posting for the position listed a Masters degree, experience in educational administration and "research will be beneficial" under the heading "qualifications." A job description was attached. RESA's Board of Directors appointed an interview committee which interviewed several candidates and recommended that Mr. Frank Blackwell, Superintendent of Wyoming County Schools, be awarded the position. Mr. Blackwell initially accepted but later declined, as did two other persons who were considered by the screening committee as the second and third most qualified applicants.

On June 5, 1989, Mr. Blackwell, who was then Chairman of the Board of Directors for RESA I, was contacted by Board of Directors member Kenneth Roberts, Superintendent of Schools of McDowell County, who expressed his and others' concern that a special or emergency RESA Board meeting should be scheduled for the purpose of addressing the Executive Director vacancy. Notices of a July 6, 1989 meeting were forwarded to board of education offices in Mercer, Wyoming, McDowell, Raleigh, Summers and Monroe counties, the six county board members in RESA I.¹

¹The record does not reveal whether board offices
(Footnote Continued)

Present at the meeting were Mr. Blackwell; Mr. Roberts; Mr. Dwight Dials; newly-appointed Superintendent of Raleigh County Schools; Mr. Roger Miller, Assistant Superintendent of McDowell County Schools; Mr. Alvin Proffit, newly-appointed Superintendent of Monroe County Schools; Mr. J.W. Shank, a member of the Summers County Board of Education; Dr. Sue Shepherd, Assistant Superintendent of Mercer County Schools; Mr. John Wilcox, ex-Associate Superintendent of Wyoming County Schools and Mr. Demetrius Tassos, Superintendent of Summers County Schools. Minutes of the meeting reflect that, upon Mr. Blackwell's official notice that he was declining the Director position, Mr. Tassos informed the others that, since the screening committee's next two choices had also withdrawn their names from consideration, they should give consideration to hiring the fourth-ranked applicant. He stated grievant, who had accompanied him to the meeting, was the committee's fourth choice. Some discussion ensued and Mr. Dials made a motion to readvertise the position, which was seconded by Dr. Shepherd. The motion failed by a vote of 7-2. The Board then reviewed the applications of the remaining candidates and conducted an interview of the grievant. At the completion of the interview, Mr. Tassos made a motion to hire him for the position which was seconded by Mr. Wilcox. The motion carried by a vote of 5-4. Grievant was subsequently given a written contract with a one-year duration.

(Footnote Continued)

actually received written or verbal notice. On at least one occasion notice was sent via a fax machine.

Dr. Shepherd, who was acting as proxy for Board member William Baker, Superintendent of Mercer County Schools, subsequently brought to his attention what had occurred at the July 6 meeting. In a July 12, 1989, letter to Mr. Blackwell, Mr. Baker requested a Board meeting as soon as possible to review what he considered "improper action in hiring the new RESA Director." This letter was copied to Dr. Henry Marockie, State Superintendent of Schools, RESA Board of Directors members, Dr. Paul Morgan of Concord College, Mildred Jones of Bluefield State College, board of education members of the six counties and their superintendents. At an August 4, 1989 meeting, the Board directed grievant to seek an interpretation from the State Superintendent of Schools concerning the legality of his appointment. In an August 9, 1989, letter, grievant specifically posed to the Superintendent the following questions:

1. Was there a legal quorum for the special meeting held on July 6, 1989?
2. Is Mr. John O'Neal qualified to hold the position of executive director at RESA I?

Grievant attached to this letter copies of his resume, the July 6 meeting minutes, the job posting, RESA I policy and other pertinent information. In a letter dated August 25, 1989, Mr. Marockie responded that the vote taken on grievant's hiring was contradictory to RESA I by-laws and therefore illegal. In response to the second question, he concluded that grievant did not have sufficient experience in educational administration to hold an executive director position.

At a September 6, 1989 meeting, the Board of Directors voted to readvertise the position. At an October 6, 1989 meeting, the Board voted to deny Mr. O'Neal's grievance.

Grievant contends RESA failed to afford him procedural due process before his employment was terminated and also that the action was discriminatory in that the irregularities in voting, cited by Mr. Marockie, had occurred when other persons were hired but no corrective measures had been taken. He requests as relief the difference between the yearly salary of the director position and that of his newly-acquired drivers' education instructor position at Hinton High School in Summers County.

RESA maintains grievant was not entitled to due process since his appointment was an illegal or ultra vires action. Specifically, RESA asserts the appointment was improper because no notice of the June 6 meeting was given as requested by W.Va. Code §§6-9A-1, et seq.; persons ineligible to vote did so; and no quorum existed. For reasons hereinafter discussed, the undersigned concludes that RESA's position is the correct one.

RESA's operating procedures in effect at the time of grievant's hiring provide:

The board of directors will consist of the county superintendent and a board member from each participating county, a representative from Concord College and Bluefield State College (amended February 2, 1979), and one person appointed by the state superintendent of schools. These members will be referred to as regular members.

. . . .

Alternate members appointed by participating boards of education, agencies or institutions will be recognized as the representatives of that board

of education, agency, or institution in the absence of the designated regular member.

Regular members may choose to have a representative of their county or institution represent them in their absence and in the absence of the alternate member. Such representatives shall have the rights and privileges of the regular members whom they are replacing.

. . . .

A quorum shall consist of a simple majority of the regular members or their alternates.

Each participating county board of education shall be limited to one vote. The regular (voting) member must be designated by the participating board of education. Alternate representatives may vote in the absence of the regular representative.

It is conceded that, despite the allotment of only one vote per county board of education, for a number of years county superintendents or their alternates have voted in meetings of the RESA's board of directors. The attendance of these persons have also been used to determine the existence of a quorum. RESA further conceded that its written policy concerning eligible votes conflicts with State Department of Education policy, in effect since 1985, which allows two votes per county but places restrictions upon who may be designated as alternates. State Superintendent Marockie concluded in his letter that the Board was bound by its written policy and, therefore, of the nine persons present at the July 6, 1989 meeting, only six were eligible to vote on grievant's appointment. He also concluded that, regardless of this determination, the vote was also illegal pursuant to State Department of Education policy concerning RESA's. The policy, in effect since 1985, prohibits county board of education members from designating alternates who are not

members of that board. Pursuant to this provision, Mr. Roger Miller, Assistant Superintendent, who was acting as proxy for McDowell County Board of Education member Linda Douglas, and Mr. John Wilcox, ex-Associate Superintendent, acting for Wyoming County Board of Education member Sam Foglesong, would have been ineligible to vote on grievant's hiring.² Dr. Marockie's response concerning grievant's qualifications to hold the job were based on his conclusion that grievant's prior service in Summers County did not constitute experience in educational administration.

The State Superintendent's reasoning concerning the number of votes allotted to each county is flawed, apparently because he was not informed that RESA I had established an unwritten practice which was in compliance with state department policy of allowing both superintendents and county board of education members to cast votes. Mr. Blackwell's testimony at Level IV revealed that the July 6 meeting was procedurally no different from previous meetings he had attended or chaired. It is well-settled that an agency can establish binding policy by its practices as well as by formal promulgation. See Moore v. Ohio County Board of Education, Docket No. 35-87-027-3 (June 30, 1987); Stafford v. Hancock County Board of Education, Docket No.

²Dr. Marockie did not make specific reference to Mr. Miller or Mr. Wilcox but only to "persons ineligible to vote." It should be noted that the minutes of RESA I meetings do not reflect the way a person votes on a particular motion but only the numbers of votes pro or con.

89-15-385 (January 31, 1990). Grievant's appointment could not, therefore, be improper due to both superintendents and county board members voting thereon.

Mr. Marockie's conclusions concerning the ineligibility of certain persons representing county board members to vote were correct. The aforementioned RESA I policy which allows regular members to "choose to have a representative of their county represent them in their absence" is in direct contradiction to State Department of Education regulations which restricts the appointment of alternates of a county board of education to its five members. Although the various RESA's are afforded some latitude in their operation, it is clear they must follow regulations established by the state department. W.Va. Code §18-2-26 in pertinent part provides:

In order to consolidate and administer more effectively existing educational programs and services and in order to equalize and extend educational opportunities, the state board of education shall establish multi-county regional educational service agencies for the purpose of providing high quality, cost effective educational programs and services to the county school systems, and shall make such rules as may be necessary for the effective administration and operation of such agencies.

Pursuant to these provisions, RESA was bound to follow the policy and restrictions concerning the designation of alternates for county boards of education. Mr. John Wilcox, ex-Associate Superintendent of Wyoming County Schools, and Mr. Roger Miller, Assistant Superintendent of McDowell County Schools, were therefore ineligible to vote at the meeting in question. Further, because of their ineligibility to vote, no quorum existed,

rendering grievant's appointment an illegal or ultra vires action. In Freeman v. Poling, 338 S.E.2d 415 (W.Va. 1985), the Supreme Court of Appeals held that such actions are void and bestow no rights upon individuals which require the application of procedural due process safeguards. See also Parker v. Summers County Board of Education, Docket No. 45-89-052 (August 18, 1989). In Parker it was further held that, simply because similar actions have been taken, an agency is not required to perpetuate others in order not to be discriminatory. Moreover, while grievant produced portions of the minutes of board meetings held prior to July 6, 1989, in which county board of education members were represented by their central office personnel, he did not establish that these persons actually voted on other appointments.³ His claim of discrimination is therefore neither factually or legally founded. Because of the holdings herein, it is not necessary to address RESA's contentions that grievant was not qualified for the position and the appointment was void for failure to give adequate notice of the meeting in question.

³In light of Mr. Blackwell's testimony, these persons, in all likelihood, did vote. The minutes, however, reflect that, even so, there may have been enough eligible members present to establish a quorum and render eligible votes on matters proposed. Inasmuch as RESA I does not record in its minutes the way a particular member votes, see note 2, it is impossible to ascertain what if any of RESA I's previous actions, if challenged, might also be rendered void.

Also, October 6, 1989, Board minutes reflect that RESA I formally adopted the two-vote-per-county rule but did not adopt the State Department's proscriptions concerning alternates for county board of education members. The agency would be well-advised to do so.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. At a RESA I Board of Directors meeting held July 6, 1989, grievant was appointed to its Executive Director position by a 5-4 vote. In attendance and voting on the appointment were John Wilcox, ex-Associate Superintendent of Wyoming County Schools, acting for Wyoming County Board of Education member Sam Foglesong, and Roger Miller, Assistant Superintendent of McDowell County, acting for McDowell County Board of Education member Linda Douglas.

2. Grievant served in the position until September 6, 1989, when the Board of Directors voted to vacate and readvertise the position, acting on an advisory opinion of then-State Superintendent of Schools John Pisapia, that the July 6 action was illegal.

CONCLUSIONS OF LAW


1. Unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors, or subordinates, when functioning in their governmental capacity. Freeman v. Poling; Parker.

2. Grievant's July 6, 1989, appointment was unlawful in that two persons who were not eligible pursuant to State Board of

Education regulations voted thereon. The appointment was therefore null and void and bestowed upon grievant no rights to the position. Freeman; Parker; also see Dorsey v. Nicholas County Board of Education, Docket No. 34-87-041-4 (May 28, 1987).

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Raleigh County or the Circuit Court of Kanawha 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 Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: March 30, 1990