

JANET NEWHOUSE, et al.

v. DOCKET NO. 95-24-344

MARION COUNTY BOARD OF EDUCATION

DECISION

Grievants, Janet Newhouse, Lucinda Allard, Linda Gillett, Kim Helmick, Pauline Raikes and Kathy Ramsey, are all employed by the Marion County Board of Education, Respondent, as secretaries. At Levels I and II, individual grievances were either denied or waived to the next level. At Level III, the six grievances were consolidated and Respondent denied the grievance on July 25, 1995. Grievants appealed to Level IV and an evidentiary hearing was held on November 3, 1995, at the Grievance Board's Elkins Office. [\(See footnote 1\)](#) This case became mature on December 19, 1995, at the close of the briefing period.

Grievants alleged the following:

[t]he action of the Board in awarding to Jennifer Corwin the Secretary III position in the Accounting Department (the position to which she is now assigned) formerly held by Loretta Chase without posting the vacancy of such position, was in violation of the provision of WV Code [sic] 18A-4-8b, the seventh paragraph thereof. The action of the Board was arbitrary and capricious, an abuse of discretion, discriminatory and not in the best interest of the school system.

The relief requested by the Grievants is to post the position in accordance with the posting provision of W.Va. Code §18A-4-8b, which provides:

Boards shall be required 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 working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filed within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

In order to better understand the instant grievance, two prior grievances should be noted. First, in Newhouse v. Marion Co. Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994, Errata Notice Sept. 23,

1994), Janet Newhouse won an individual grievance which instated her into the Secretary III position which was then held by Ms. Corwin. Therefore, Respondent transferred Ms. Corwin from that position to receptionist and also assigned her other miscellaneous duties in Respondent's central office. Allegedly, the transfer and terms of her employment were changed without her consent, without written notification and without the benefit of a hearing or majority vote by the Respondent as required by W.Va. Code §18A-2-6. ([See footnote 2](#))

W.Va. Code §18A-2-6 provides:

[a]fter three years of acceptable employment, each service personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status: Provided, That a service personnel employee holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year. The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the then current year, or by written resignation of the employee before that date, except that for the school year one thousand nine, to initiate termination of a continuing contract. The affected employee shall have the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment. Those employees who have completed three years of acceptable employment as of the effective date of this legislation shall be granted continuing contract status.

Based on the alleged violation of the above Code section, Ms. Corwin filed a grievance. After reaching Level IV, Ms. Corwin and the Marion County Board of Education, Docket No. 94-24-1094, reached a settlement. Consequently, Senior Administrative Law Judge Sue Keller Ordered the following, based upon the parties' settlement:

1. That Mrs. Corwin and the Marion County Board of Education shall continue all terms of Secretary III 261 day continuing contract for the 1994-95 school year and Mrs. Corwin shall be assigned miscellaneous duties as designated by the Superintendent until July 1, 1995.

2. On July 1, 1995, Mrs. Corwin's 261 day contract as Secretary III shall continue for the 1995-96 school year and she shall be jointly assigned to Accounting, where she will have insurance or other duties as assigned by the supervisor, Mr. Kid Wade, and to the Superintendent's Office.

3. On or before April 1, 1996, Mrs. Corwin shall be evaluated for a more permanent placement or arrangement.

FINDINGS OF FACT

1. In Newhouse, Ms. Newhouse was employed by Respondent as a Secretary III with a 261-day employment contract before being terminated by Respondent because Respondent determined that her position was "excess".

2. Throughout all of these grievances, Ms. Corwin has been employed by Respondent as a Secretary III with a 261-day employment contract.

3. In Newhouse, it was ordered that Janet Newhouse be instated into the Secretary III position held by Ms. Corwin. However, Respondent retained Ms. Corwin in an excess "floater" position, and she was assigned miscellaneous duties and temporarily filled a receptionist position when another employee was ill.

4. Before the settlement of the Corwin case, Respondent was verbally informed that Loretta Chase, a Secretary III who primarily handled all insurance duties, was planning on retiring.

5. As the result of the settlement in the Corwin case, Mrs. Corwin retained a position in Respondent's Central Office.

6. Mrs. Chase's retirement was accepted by Respondent on June 19, 1995.

7. On June 19, 1995, Respondent voted to "abolish" Mrs. Chase's position; however, in reality, the position which was abolished was the floater position held by Ms. Corwin.

8. All of Mrs. Chase's responsibilities and duties remained intact as a single position.

9. Subsequently, Ms. Corwin was assigned all of the duties of Mrs. Chase's position, with the addition of a few other duties which Ms. Corwin voluntarily agreed to perform. ([See footnote 3](#))

10. Respondent never posted the position previously occupied by Mrs. Chase before assigning it to Ms. Corwin.

DISCUSSION

Grievants assert that Mrs. Chase's "position" was not abolished, but remained intact and should have been posted in accordance with W.Va. Code §18A-4-8b. In support of this allegation, Grievant proved that prior to Mrs. Chase's retirement, Ms. Corwin did not have an office, desk, equipment or any ascertainable permanently assigned duties. However, after Mrs. Chase's position was "abolished," Ms. Corwin was voluntarily assigned all of Mrs. Chase's insurance duties, occupied the desk previously occupied by Mrs. Chase, and basically picked up right where Mrs. Chase had

stopped.

Respondent maintains that it merely reassigned duties among its staff, and that the staff members involved have voluntarily accepted the additional duties.

Mr. Edge, Assistant Superintendent of Marion County Schools, testified that he felt Respondent had entered into the Corwin settlement because Respondent thought Ms. Corwin would prevail in her grievance. Other factors in Respondent's decision to settle the Corwin case were: (1) Respondent did not want to have a reduction in force of school service personnel during the 1995-1996 school year; (2) Respondent had been apprised earlier that Mrs. Chase would be retiring and (3) Respondent thought that the Newhouse decision was wrong, but they did not want to appeal the case because of the costs associated with an appeal to a Circuit Court.

Even though Respondent did not want the expenses associated with an appeal, it retained Mrs. Corwin as a "floater", an excess position, until a position would open up; i.e., Mrs. Chase's position. Then, when Respondent filled Mrs. Chase's position, Mr. Edge testified:

[i]n our mind it was simple. We had a continuing contract for an employee and we had a vacancy with the division. We equated it exactly the same as if you have eight bus drivers and one retires and you simply take eight bus routes and redivide it among 7 drivers. That's how we equated it in our minds, to 8.5 Secretary IIIs in the accounting department who have 261 day contracts and one of them retiring. It was that straight forward.

Even applying the above bus operator analogy to the facts in this case does not result in the outcome Respondent posits. Mr. Edge, in his example, speaks of redividing busroutes, which is not what Respondent did in the instant case. Furthermore, Respondent's intent to circumvent and violate the posting requirements of W.Va. Code §18A-4-8b seems to have been formed when it entered into the Corwin settlement, even though the violation of the statute did not occur until Respondent placed Ms. Corwin into Mrs. Chase's vacant position.

Previous bus operator cases are also consistent with this decision. For example, in Mullins v. Logan Co. Bd. of Ed., Docket No. 94-23-283, (Sept. 25, 1995), five bus operators filed a grievance after the school board had reorganized some bus runs and had failed to post the alleged "newly created" bus runs. In denying the grievance, the Administrative Law Judge placed emphasis on the fact that "no positions of employment or newly created job opportunities were created by the Board's reconfiguration," Id. at 10, and that "[t]he Board has the same number of employment positions after the reconfiguration as it had before, with the only difference being that some employees have been

transferred from one job site to another." Id.

However, in the case currently before the undersigned, the number of positions and people employed decreased by one when Mrs. Chase's position became vacant. Subsequently, while having no identifiable duties, equipment or desk, Ms. Corwin was assigned all of Mrs. Chase's duties and desk. Therefore, Respondent had not realigned or reconfigured any position, but merely placed Ms. Corwin in a vacant position which should have been posted pursuant to W.Va. Code §18A-4-8b.

[\(See footnote 4\)](#) It should also be noted that since the statutory language of W.Va. Code §18A-4-8b is sufficiently clear and mandatory, it should be applied rather than construed. [\(See footnote 5\)](#) One must also remember that school personnel laws and regulations are to be strictly construed in favor of the employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979); Yoho v. Marshall Co. Bd. of Educ., Docket No. 25-86-073-2 (Dec. 3, 1986).

Also, in support of it's position, Respondent, in it's brief, cites the following conclusions of law from two cases:

1. County Superintendents have the authority to make organizational changes in their administrative staff when the personnel involved accept these changes. Napier v. Logan Co. Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. County Superintendents may reassign duties among employees without posting a new position, so long as no new position is created. Payne v. Fayette Co. Bd. of Educ., Docket No. 94-10-144 (Sept. 28, 1994).

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However, Respondent's reliance on Napier and Payne is faulty, as these cases are easily distinguishable from this case. In Napier, after an assistant superintendent resigned, the duties of that position were realigned to bring it more in line with the delineation of assistant superintendent duties in other counties. In the process, five duties of that position were voluntarily distributed among three other administrators, and the resulting position was posted and a new assistant superintendent was hired for this newly-aligned position. While in Payne, after the retirement of a crew leader, the duties of that position were split between two existing foremen and the crew leader position was abolished.

In this case, Respondent retained excess personnel, after an unfavorable decision by the Grievance Board against Respondent, with the intent to "slide" that person into another position, which would soon be vacant because of a pending retirement, without posting the new vacancy. Mrs.

Chase's position was not changed through a realignment process with the posting of the resulting position, as in Napier, nor was it divided among other personnel as in Payne. Rather, it remained intact, with a few minor additions, and was given to Mrs. Corwin, without being posted.

Whether intentional or not, Respondent's actions were clearly a circumvention of W.Va. Code §18A-4-8b. When examining the totality of the circumstances, Mrs. Chase's position was not abolished; her duties still existed as a single unit, even after Mrs. Chase retired and Respondent "abolished" her position. In reality, Respondent by "abolishing" Mrs. Chase's position made it clear that Respondent was not going to hire additional staff, because it had, in effect, already filled Ms. Chase's position before she retired. Therefore, Respondent was really abolishing the excess floater position, which was created when Respondent decided to retain Mrs. Corwin by way of the Corwin settlement.

In addition to the foregoing formal findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievants have the burden of proving their case by a preponderance of the evidence. Napier v. Logan Co. Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. The posting provision of W.Va. Code §18A-4-8b provides:

Boards shall be required 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 working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filed within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

3. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W.Va. 1986); Webster County Board of Education v. Johns, 447 S.E.2d 599 (W.Va. 1994).

4. Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. Pullano v. City of Bluefield, 342 S.E.2d 164 (W.Va. 1986).

5. School personnel laws and regulations are to be strictly construed in favor of the employee.

Morgan v. Pizzino, 256 S.E.2d

592 (W.Va. 1979); Yoho v. Marshall Co. Bd. of Educ., Docket No. 25-86-073-2 (Dec. 3, 1986).

Accordingly, the grievance is GRANTED and Respondent is ORDERED to post and fill the position in question in accordance with the requirements of W.Va. Code §18A-4-8b.

DATED: January 16, 1996 Jeffrey N. Weatherholt Admn. Law Judge

[Footnote: 1](#)

This case was originally set for hearing on October 4, 1995, but was continued for good cause shown.

[Footnote: 2](#)

It should be noted that Ms. Corwin's grievance was without merit. This Grievance Board has held, in Gillman v. Logan Co. Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991), that an employee cannot successfully grieve a county board of education's action in reasonably and correctly implementing an earlier grievance decision. See also, Epling v. Boone Co. Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990); Adams v. Cabell Co. Bd. of Educ., Docket No. 94-06-520 (May 15, 1995); and Belcher v. Mingo Co. Bd. of Educ., Docket No. 95-29-024 (July 26, 1995).

[Footnote: 3](#)

Even though the testimony differed between Respondent's two witnesses, Respondent did not contest the fact that Ms. Corwin accepted all of duties that Mrs. Chase performed prior to her retirement and that only a few minor duties were added once Mrs. Corwin was assigned this position.

[Footnote: 4](#)

The Supreme Court of Appeals of West Virginia has consistently upheld the posting of vacant positions in public schools. For example, see Board of Educ. v. DeFazio, 378 S.E.2d 656 (W.Va. 1989); State ex rel. Rose v. Raleigh County Bd. of Educ., 367 S.E.2d 223 (W.Va. 1988); and Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W.Va. 1987).

[Footnote: 5](#)

This is a customary rule of statutory construction, as evidenced by Syllabus Point 3 of Pullano v. City of Bluefield, 342 S.E.2d 164 (W.Va. 1986), which states "where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation."