**LOUISE POPE, EARL SPENCE, and**

**ROGER MASSIE,**

**Grievants,**

**v. DOCKET NOS. 98-29-071/073/076**

**MINGO COUNTY BOARD OF EDUCATION,**

**Respondent,**

**and,**

**EVERETT CONN,**

**Intervenor.**

## DECISION

Grievants Louise Pope, Earl Spence, and Roger Massie each filed a grievance against Respondent Mingo County Board of Education ("MBOE"), alleging violations of W. Va. Code §§ 18A-2-8, and 18A-4-7a, when Respondent placed Intervenor Everett Conn in the position of Director of Maintenance without posting the position. As the grievances involved the same set of facts, and all Grievants sought as relief to be placed in the position, the grievances were consolidated at Level IV for hearing and decision. (See footnote 1) The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings.

## Findings of Fact

1. Grievant Pope has been employed for 32 years by MBOE, and is an Aide.
2. Grievant Spence has been employed for 25 years by MBOE, and is Supervisor of Transportation.
3. Grievant Massie has been employed by MBOE as an instructor of heating and air conditioning at the Mingo County Vocational School for 13 years.
4. On September 11, 1997, MBOE posted a vacancy for Director of Maintenance as a Central

Office service personnel position, and accepted applications for the position from Grievants, and other interested persons. Grievants and one other applicant were interviewed by Assistant Superintendent Johnny Fullen. The Superintendent of Schools at that time, Intervenor Everett Conn, interviewed five applicants for the position.

5. Mr. Conn reviewed the applications with Mr. Fullen, and ranked the applicants. None of the Grievants was ranked in the top two candidates.

6. The vacancy was not filled within 20 days of the posting. Mr. Conn decided not to fill the vacancy, based upon perceived pressure from the State Board of Education. The posting wasvoided on December 19, 1997, and Mr. Conn assumed the duties of the position while also serving as Superintendent.

7. On or shortly after January 5, 1998, the State Board of Education voted to intervene in the Mingo County School System.

8. Intervenor had a three year contract as Superintendent, ending June 30, 1998, at an annual salary of $62,000.00. On January 8, 1998, MBOE notified Intervenor that his contract would not be renewed. The contract provided that if MBOE did not renew it, Intervenor would be returned to a 12 month, 261 day position. The only 261 day positions other than Superintendent, were Assistant Superintendent, Treasurer, transportation employees, and maintenance employees. Intervenor agreed to resign as Superintendent, and accept the 240 day position of Director of Maintenance, effective January 12, 1998, with a one year contract. Intervenor also agreed to advise the new Superintendent and the Title I Director, should either need his assistance. He agreed to a reduced salary, and draws the same salary as an Assistant Superintendent adjusted to reflect the position is a 240 day position, rather than a 261 day position.

9. Intervenor has been employed by MBOE for 23 1/2 years. He was a teacher, Chief Fiscal Officer, Assistant Superintendent, and Superintendent.

## Discussion

Grievants bear the burden of proving the allegations of their grievances by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievants advanced various arguments. Grievants Pope and Spence argued the Director of Maintenance is a service personnel position, and that the position should have been posted and filled

in accordance with W. Va. Code §§ 18A-4-8b and 18A-4-8g, and that they should have been allowedto take the state competency test for qualifying for the position. Grievant Pope also argued the vacancy had to be filled within 20 days of the September 17, 1997 posting. Grievant Massie argued it was arbitrary and capricious, and an abuse of discretion to place Intervenor in the position without posting it. MBOE and Intervenor argued the posting had been withdrawn due to pressure from the State Board of Education, and when Intervenor agreed to resign his position as Superintendent, his placement in the Director of Maintenance position was a lawful lateral transfer.

Initially it should be noted that Intervenor was not just an employee of MBOE; he was the Superintendent.

> As an officer of the county school district, the superintendent's election and tenure of office is governed primarily by W.Va Code, 18-4-1 et seq. To the extent that a particular matter is not clearly specified in W.Va. Code, 18-4-1 et seq., other W.Va. Code provisions have been considered in pari materia.
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> Although W.Va. Code, 18-1-1(c)(4) [1981] includes the superintendent within the meaning of school personnel, the provisions of W.Va. Code, 18A-1-1 et seq. apply only to a superintendent when W.Va. Code, 18-4-1 et seq., is silent and, even then, only if application to a superintendent was clearly intended.

Blackwell v. Wyoming County Bd. of Educ., 180 W. Va. 1, 375 S.E.2d 25 (1988). Intervenor had a contract for a set period of time, for a set salary, which did not end until June 30, 1998. W. Va. Code § 18-4-1 provides that at the expiration of a superintendent's contract term, he shall be given the status of teacher, and Grievant's contract stated he would be returned to a 261 day position.

What occurred here was not technically a statutory lateral transfer. It does not appear that the lateral transfer provision of W. Va. Code § 18A-4-7a applies to a superintendent, as that provision relates to a reduction in force. This was a settlement reached by the parties. Intervenor agreed to resign his employment as Superintendent prior to the expiration of his contract, and tocontinue to perform the duties of the Director of Maintenance, as well as assisting the new Superintendent and the Title I Director, at a reduced salary. Whether this position is a professional or service personnel position is of no moment. Intervenor was entitled by statute to be returned to a professional position with the school system, and he was entitled by contract to a 261 day position. However, Intervenor

agreed that the Director of Maintenance position was an acceptable alternative.

> "The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation; it is the policy of the law to uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy." McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (W. Va. 1994). If settlement agreements could be nullified by non-parties at some later date, employers would be discouraged from entering into such contracts or settlement agreements with its employees.

Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). At the time Intervenor was placed in the position of Director of Maintenance, it was mid-year. Assuming the transfer provisions even apply to a Superintendent, he could not have bumped a less senior employee at that time of the year, unless the other employee agreed. Grievants presented no evidence that some other position existed into which Intervenor should have properly been placed. MBOE decided it was in the best interests of the schools to accept Intervenor's resignation, and his agreement to serve in the role of Director of Maintenance, at a reduced salary, and find a new Superintendent to serve during this period, rather than face complying with the terms of Intervenor's contract, or finding a valid way to terminate the contract, which could still be challenged by Intervenor. One of the possible scenarios was that MBOE would remove Intervenor from his duties, but continue to pay him his full contract salary through June 30, 1998, for doing nothing. The undersigned finds no violation of law or public policy in this settlement. The undersigned concludes that as to Grievant Pope's assertion that the position had to be filled within 20 days of the posting, MBOE had the discretion to withdraw the posting and the vacancy, and to allow the Superintendent to take on those duties, upon its determination that the position should not be filled at that time. Bowen v. Mingo County Bd. of Educ., Docket No. 95-29- 488 (Mar. 29, 1996); Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995). See Spence v. Mingo County Bd. of Educ., Docket No. 97-29-245 (Apr. 6, 1998). As circumstances changed dramatically, it likewise had the discretion to decide that it was in the best interests of the schools to not include the Director of Maintenance duties in the duties of the new Superintendent, and assign those duties to Intervenor in his new position, along with assigning him other duties during the transition.

The following Conclusions of Law support the Decision reached.

## Conclusions of Law

1. The burden of proof is upon Grievants to prove the elements of their grievances by a

preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. County boards of education have the discretion to withdraw a posting and to allow one or more employees to take on the duties of the posted position, upon a determination that the position should not be filled at that time. Bowen v. Mingo County Bd. of Educ., Docket No. 95-29- 488 (Mar. 29, 1996); Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995). See Spence v. Mingo County Bd. of Educ., Docket No. 97-29-245 (Apr. 6, 1998).

3.

> "The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation; it is the policy of the law to uphold and enforce such contracts if they are fairly made and not in contravention of some law or public policy." McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (W. Va. 1994). If settlement agreements could be nullified by non-parties at some later date, employers would be discouraged from entering into such contracts or settlement agreements with its employees.

Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

4. Grievants failed to prove the settlement agreement entered into between the Mingo County Board of Education and former Superintendent Everett Conn, which placed Mr. Conn in the position of Director of Maintenance, in addition to other duties, at a reduced salary for one year, in return for his resignation as Superintendent upon the takeover of Mingo County Schools by the State Board of Education, was in violation of any law or public policy.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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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**BRENDA L. GOULD**

**Administrative Law Judge**

**Dated: July 29, 1998**

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*Footnote: 1*

*Grievant Massie filed his grievance on January 20, 1998, and his supervisor responded on January 21, 1998, that he was without authority to grant relief. The record does not reflect when the other grievances were filed, or what transpired at Level I. Level II hearings were held on the grievances on February 12 and 19, 1998, and the grievances were denied at Level II. Grievants waived Level III, with Grievants Pope and Spence appealing to Level IV on March 9, 1998, andGrievant Massie appealing to Level IV on March 12, 1998. A Level IV hearing was held before the undersigned Administrative Law Judge on April 28, 1998. Grievant Pope was represented by John Everett Roush, Esquire, Grievant Spence was represented by Gordan McClanahan, and Grievant Massie was represented by C. Michael Sparks, Esquire. Respondent was represented by W. C. Totten, and Intervenor was represented by Joan G. Hill, Esquire. This grievance became mature for decision on June 1, 1998, upon receipt of the last of the parties' written arguments.*