WILLIAM CHAPMAN, et al.,

Grievant,

v.

DOCKET NO. 03-33-067

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants filed this grievance against their employer, the McDowell County Board of Education ("Board") on September 6, 2002: (See footnote 1)

> Grievants claim violation of WV State Code § 18A-2-2, McDowell County Levy Call and past practice of the McDowell County BOE when the McDowell County BOE failed to hold Vocational Summer School.
>
> Relief sought: Grievants seek lost wages and benefits or the return of the appropriated levy funds to the tax payers of McDowell County.

The grievance was denied at level one by Ron Estep, Grievants' immediate supervisor, and a level two hearing was held on February 6, 2003. The level two Grievance Evaluator, Basil R. Legg, Jr., denied the grievance by decision dated March 6, 2003, on the basis of untimeliness. (See footnote 2) Grievants bypassed level three, and appealed to level four on March 11, 2003. A level four hearing was held in the Grievance Board's Beckley,West Virginia, office on July 24, 2003, and this matter became mature for decision on August 24, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievants were represented by Jeffrey G. Blaydes, Esq., Donnelly & Carbone, PLLC, and Sidney Fragale, American Federation of Teachers, and the Board was represented by Kathryn R. Bayless, Esq., Bayless Law Firm, PLLC.

SUMMARY OF EVIDENCE

LII Joint Exhibit

Ex. 1 -

Notice of Special Election for Renewal of Additional School Levy to the Voters of McDowell County, West Virginia.

LII Grievants' Exhibits

Ex. 1 -

School Vision and Statement.

Ex. 2 -

McDowell County Schools 2002 Summer School Bus Schedules.

Ex. 3 -

March 5, 2002 memorandum to teachers regarding McDowell County Career and Technology Center School-to-Work.

LIV Grievants' Exhibits

Ex. 1 -

Affidavits of Linda Douglas, Michael Mitchem, Harold McBride, Roy J. Allen, and Dortha Fowler.

Testimony

Grievants presented the testimony of David Robbins, Steven Bailey, William Chapman, William Fedele, Carmello Miano, and Roy J. Allen. The Board presented the testimony of Ron Estep and Mark A. Manchin.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievants are employed by the Board as teachers, and are assigned to teach vocational classes during the regular school year at the McDowell County Vocational Technical Center ("Center") located in Welch, West Virginia.

2. At least for the past 25 years, the Board has offered summer vocational classes at the Center.

3. At least for the past 25 years, a special levy has been approved by the voters of McDowell County to provide certain funding to ensure the operation of county schools. (See footnote 3)

4. The school levy was most recently promulgated by the Board in 1998. It was approved by the voters of McDowell County in 1999. In that year, as in previous years, the levy included the following language:

> 1. That the purpose for which funds are needed in order to maintain and improve the instructional programs and the operation of school services in the McDowell County School System is as follows:
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> ******
>
> E. To provide for the summer operation of the McDowell County Vocational Technical Center in the approximate amount of Forty-Five Thousand Dollars ($45,000.00) per year, or an approximate total for five years of Two Hundred Twenty-Five Thousand Dollars ($225,000.00).

LII Jt. Ex. 1.

5. Up until the Summer of 2002, the Board provided summer vocational programs with the money from the special levy, and students were able to take vocational courses at no cost. Prior to the Summer of 2002, the only summer courses offered at the Center were vocational ones. 6. By contrast, McDowell students were permitted to take academic courses by engaging teachers individually. Academic courses were held at various McDowell County schools, but not at the Center.

7. In late Spring 2002, Superintendent Mark Manchin decided to reassess summer programs

to determine student interest in the various programs. (See footnote 4) Parents were provided with interest forms in which students were to indicate their interest in particular courses, and designate their top three choices. The survey was conducted several months prior to the scheduled start of summer school on or about July 1, 2002. In order for a summer program to be offered, at least 15 students would have to show an initial interest, and at least 10 students would have to be present for the first day of classes.

8. While at least two vocational courses showed an interest level of about 10 students, the majority of students indicated an interest in pursuing academic courses during the summer.

9. Dr. Manchin decided that no vocational courses would be offered in Summer 2002, but rather, and for the first time, academic courses would be offered as part of the summer school program.

10.

Only academic courses were offered at the Center in the Summer of 2002.

11. Grievants, vocational instructors, did not teach in the Summer of 2002.

ISSUES AND ARGUMENTS

Grievants contend the Board violated the terms of the school levy, and state law, in its failure to provide vocational programs at the Center, resulting in their being unable to teach during the Summer of 2002. The Board contends the language of the school levy merely provides for the summer operation of the Center, not specifically for vocational classes, and that its decision to hold academic courses at the Center was based upon the needs of the students.

In support of their position, Grievants rely on a number of factors. First, the plain language of the school levy refers specifically to “summer operation of the McDowell County Vocational Technical Center.” Certainly the language does not mention summer academic programs; nor does it specifically state that the funds at issue are to be used for any purpose. Grievants assert that the specific use of the term “operation” and the location of the “Vocational Technical Center”, as opposed to other available venues in McDowell County, dictate that summer vocational courses must be offered. Grievants conclude that the levy language does not vest authority in the Superintendent to unilaterally determine how those funds are spent.

Second, Grievants contend the historical use of those funds has been for vocational programs only over the previous years. Grievants assert that the uncontroverted testimony is that the vocational summer program has routinely received the funding, while academic programs have been funded by private sources.

Third, Grievants assert the Board drafted and approved the levy language with the intention of funding vocational summer programs. Grievants contend the Board presented no evidence to contradict that argument. Finally, Grievants maintain that when the voters of McDowell County consented to be taxed more heavily, they believed their funds were earmarked for vocational summer operation.

The Board asserts that Grievants' claim, that the Board violated the special levy by not offering vocational classes at the Center in the Summer of 2002, does not amount to a statement of an employee “grievance” within the meaning of W. Va. Code § 18-29-2(a), and the Grievance Board lacks jurisdiction over any claim related to an alleged violation of the levy call.

The Board further maintains that nothing in the levy specifies that vocational courses must be taught in the summers, only that funds will be spent to maintain the operation of the Center during the summer. There is no dispute that the levy funds were spent on the Center during the Summer of 2002, and the Board argues the Superintendent had the discretion to determine how those levy funds were spent.

Finally, the Board maintains Grievants have failed to demonstrate any entitlement to continued summer employment, or that the Board has in any way violated their employment contracts.

DISCUSSION

In a non-disciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). *See* W. Va. Code § 18-29-6.

1.

Jurisdiction.

Grievants assert levy funds were expended for purposes other than which they were approved.

W. Va. Code §§ 11-8-25 and 26 require that levy funds only be expended for the "purposes for which they were raised." Grievants maintain that, had the levy funds been expended for the appropriate purpose, *i.e.*, for vocational summer courses, they would have been employed in the Summer of 2002.

W. Va. Code § 18-29-2 defines a "grievance" as:

> [A]ny claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; . . .

Clearly, to the extent Grievants can prove they would have been employed in the Summer of 2002 but for the Superintendent's decision to offer academic as opposed to vocational courses, Grievants have a claim for back pay, which is within this Grievance Board's jurisdiction. However, any claim of relief by Grievants that the levy funds should be returned to the taxpayers is outside this Grievance Board's jurisdiction. W. Va. Code §§ 11-8-1, *et seq.*, provide the mechanism for taxpayers to lodge complaints and get redress for any unauthorized expenditure of levy funds.

2. The Levy.

Grievants contend the levy language was intended to ensure promotion of vocational programs at the Center during the Summer. The Board contends the language merely specifies that levy funds will be used for the summer operation of the Center withoutreference to the types of programs offered at the Center. The resolution of this grievance depends upon the interpretation to be given to the special levy language.

The issue of the interpretation of special levy language has been addressed by the West Virginia Supreme Court of Appeals in the "Thomas trilogy." *See* Thomas v. Board of Education, County of McDowell, 164 W. Va. 84, 261 S.E.2d 66 (1979)(Thomas I); Thomas v. Board of Education, County of McDowell, 167 W. Va. 911, 280 S.E.2d 816 (1981)(Thomas II); and Thomas v. Board of Education, County of McDowell, 181 W. Va. 514, 383 S.E.2d 318 (1989)(Thomas III). In Thomas I, the Court addressed whether the County could discontinue paying school service employees a salary supplement that was mandated by special levy. In interpreting the language of a special levy and finding that the County improperly failed to pay the salary supplement, the Court held at Syllabus

Point 1:

> The true interpretation of the language of a special levy is the meaning given to it by the voters of the county, who, by their approval of the special levy, consent to be taxed more heavily to provide the necessary funds. [citations omitted]

The Court then noted:

> We must be guided by the purpose the voters of McDowell County sought to effect in approving the special levy rather than by the intention of those who interpreted the proposal.

Thomas I at 88-9.

All public agencies are responsible for the proper application of publicly mandated funds. When a levy election is held to raise money for a specific public purpose, the money must be applied towards that purpose. W. Va. Code § 11-8-25; Thomas I, *supra;* Thomas II, *supra*. Where funds were expended for a purpose other than that intended bythe voters, the Court found such expenditures to be an "unlawful diversion of funds." The Court emphasized that the county school board lacked "discretion" to change how the funds were spent.

The Court noted its policy considerations underlying its holding in Thomas I when it stated:

> The Legislature has clearly indicated that special levy funds must be expended for the purpose approved by the voters. W. Va. Code §§ 11-8-25, 11-8-26. We think that the overall intent of the Legislature in this regard is to preserve the integrity of special or excess levy funds. This intent may not be defeated by a contrary construction of one provision of a statute without regard to the general purpose of the Legislature with regard to special levies.

Id. At 92.

The Court next considered the interpretation of school levy language in Bane v. Board of Education of Monongalia County 178 W. Va. 749, 364 S.E.2d 540 (1987), which involved the issue of whether a local board of education had discretion to allocate special levy funds approved for salary supplements. The Court permitted the discretionary allocation of salary supplements because

> [u]nlike the special levy in Thomas, the language of the special levies in the present case did not require the county board of education to pay a specific salary supplement

> in a fixed amount to each of the service personnel employed by the board. Instead, the special levies here required the special levy funds in the aggregate to be used as salary supplements and to extend services. The language of the special levies here delegated to the Board the discretion as to the manner in which it which in would allocate the salary supplements and extended services among the service personnel. All of the special levy funds in the present case were expended for the purposes for which they were authorized by the voters.

178 W. Va. at 753-54, 364 S.E.2d at 544-45.

Finally, in Byrd v. Board of Education of Mercer County, 196 W. Va. 1, 467 S.E.2d 142 (1995), the Court affirmed its holding in Thomas I. Moreover, the Court recognizedthat a county board of education may exercise discretion in the allocation of levy funds only where the language of the levy permits - typically through a catch-all phrase - such flexibility. (See footnote 5)

This Grievance Board has also addressed the issue of interpretation of levy language in Ignatius, et al. v. Lincoln County Board of Education, Docket No. 90-22-230 (Sept. 12, 1990), aff'd Cir. Ct. of Kanawha Cty., CC 90-AA-166 (1994), relying on the holdings in Thomas I and Bane for guidance. In Ignatius, the grievants, vocational instructors, argued that language in the special levy required levy funds to be spent on wage supplements for vocational instructors. The Administrative Law Judge agreed with the county board of education that the language merely referred to vocational instructors as *examples* of the types of personnel that might receive salary supplements from the levy funds, but in no way mandated they receive such funds, and noted that the grievants presented no convincing information that the voters interpreted the levy language to mandate payment of funds to the vocational instructors.

In the instant case, the school levy promulgated by the Board in 1998, as well as those from previous years, contained the following language:

> 1. That the purpose for which funds are needed in order to maintain and improve the instructional programs and the operation of school services in the McDowell County School System is as follows:

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> E. To provide for the summer operation of the McDowell County Vocational Technical Center in the approximate amount of Forty-Five Thousand Dollars ($45,000.00) per year, or an approximate total for five years of Two Hundred Twenty-Five Thousand

Dollars ($225,000.00).

LIV Jt. Ex. 1 (emphasis added).

Grievants presented the testimony of Roy J. Allen, a McDowell County Board member, as well as Affidavits from his fellow board members, in support of their argument that the levy funds were intended solely for the operation of vocational courses at the Center. Mr. Allen recalled that vocational education was very important in McDowell County, and that when he voted to approve the levy - in his capacity as a school board member - he voted to continue the tradition of providing summer vocational programs to the citizens of the County. Mr. Allen testified that the same levy language had been approved for years in McDowell County, and that the provision of summer vocational programs was a “traditional thing”; and that the citizens of the county routinely approved it. Similarly, Mr. Allen's fellow Board members recalled, via Affidavit, that they intended the funds from the levy to be used “solely for the operation of vocational programs at the McDowell County Vocational Technical Center.” LIV G. Ex. 1.

The Board maintains that the special levy does not specify the types of courses to be taught in the summer at the vocational school. Superintendent Manchin testified that the amount of dollars from the special levy was indeed spent for the summer operation of the vocational technical center. Both Superintendent Manchin and Principal Estep testifiedthat they viewed limited enrollment as a justification for eliminating the summer vocational programs, and based upon the interest survey, Superintendent Manchin did just that.

However, under Thomas I, the determination is what the voters sought at the time they voted, not what an administrator nearly three years after the fact deemed prudent. Based upon the language of the levy providing for the operation of a Vocational Technical Center, coupled with the historical practice of offering summer vocational programs at the Center, it is more likely than not that the voters of McDowell County anticipated that summer vocational programs would continue to be offered at the Center. Add in the Board members' beliefs that, in drafting the levy language, they were providing for summer vocational programs to be offered, it becomes obvious that the purpose of the special levy was to provide funds for the operation of summer vocational programs at the Center. If, in the future, the Board agrees with Superintendent Manchin that a summer program offering academic programs would best serve the needs of the students in McDowell County, it can establish

a summer program under W. Va. Code § 18-5-39, or change the language of the special levy when it next comes up for renewal. (See footnote 6)

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). *See* W. Va. Code § 18-29-6.

2. W. Va. Code § 18-29-2 defines a "grievance" as:

> [A]ny claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; . . .

3. Grievants' claims that the levy language was misinterpreted falls within the definition of a grievance under W. Va. Code § 18-29-2, and the Grievance Board has jurisdiction to hear their claims to the extent they are seeking back pay for the Summer of 2002.

4. The Grievance Board does not have jurisdiction to order the special levy funds returned to the taxpayers, as W. Va. Code §§ 11-8-1, *et seq.* provide the statutory mechanism for challenging the levy.

5. All public agencies are responsible for the proper application of publicly mandated funds. When a levy election is held to raise money for a specific public purpose, the money must be applied towards that purpose. W. Va. Code § 11-8-2; Byrd v. Board of Education of Mercer County, 196 W. Va. 1, 467 S.E.2d 142 (1995); Bane v. Board of Education of Monongalia County 178 W. Va. 749, 364 S.E.2d 540 (1987); Thomas v. Board of Education, County of McDowell, 164 W. Va. 84, 261 S.E.2d 66 (1979)(Thomas I); Thomas v. Board of Education, County of McDowell, 167 W. Va. 911, 280 S.E.2d 816(1981)(Thomas II); Ignatius, et al. v. Lincoln County Board of Education, Docket No. 90-22- 230 (Sept. 12, 1990), aff'd Cir. Ct. of Kanawha Cty., CC 90-AA-166 (1994).

6. The true interpretation of the language of a special levy is the meaning given to it by the

voters of the county, who, by their approval of the special levy, consent to be taxed more heavily to provide the necessary funds. Thomas I, *supra*.

7. The language of the special levy, the historical practice of offering summer vocational programs at the Center, and the Board members' testimony that they intended vocational summer programs to be funded by the special levy, all combine to demonstrate, by a preponderance of the evidence, that the voters of McDowell County intended to fund summer vocational programs at the Center when they voted in favor of the special levy.

8. A county board of education may exercise discretion in the allocation of levy funds only where the language of the levy permits - typically through a catch-all phrase - such flexibility. Byrd, *supra.*

9. Where funds are expended for a purpose other than that intended by the voters, such expenditures are an “unlawful diversion of funds.” Thomas I, *supra*; Thomas II, *supra*.

10. The special levy does not include any language giving the Board or the Superintendent discretion to use the special levy funds for a purposes other than offering summer vocational programs at the Center. Therefore, the Superintendent's decision to eliminate vocational offerings at the Center in Summer of 2002 was unlawful under the terms of the special levy. 11. Grievants have proven by a preponderance of the evidence that the elimination of summer vocational programs in the Summer of 2002 was unlawful and contrary to the language of the special levy, and but for the Superintendent's unilateral action in eliminating those programs, Grievants would have been employed as vocational instructors in the Summer of 2002.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to compensate Grievants in the amount of back pay, benefits, and interest, to which they are entitled had they been permitted to teach vocational programs at the Center in Summer of 2002.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 6, 2003

Footnote: 1

Grievants are William Chapman, David Robbins, Carmello Miano, William A. Fedele, Steve Bailey, Theresa Chittum, Victoria Belcher, Dennis Andrews, James R. David, and Grant Thompson.

Footnote: 2

The Board waived its timeliness argument at level four.

Footnote: 3

The special levy has been renewed over the years for five years at a time.

Footnote: 4

In December 2001, the West Virginia State Board of Education intervened in the operation of the McDowell County School system, and Dr. Manchin was appointed Superintendent.

Footnote: 5

The applicability of Byrd rests primarily in its affirmance of Thomas I. In that case, the Court dealt with the issue of whether the levy language was violative of state statute because the levy provided specific purposes for the levy money without providing specific amounts to be spent on each project. In addressing the issue, the Court found that where a general purpose is stated, a general amount would suffice. Where, however, specific projects were articulated, a specific amount must also be included. Because the levy in Byrd included specific projects without specific amounts, the Court found that the Board had failed to comply with certain statutory requirements for levy language. Moreover, the Court addressed the issue of the discretionary use of levy funds and determined that discretion could not be obtained by including specific projects with general amounts. Instead, the Court noted that catch-all phrases may be used for this purpose.

Footnote: 6

W. Va. Code § 18-5-39 provides in part:

> *(b) The board of any county has the authority to establish a summer school program utilizing the public school facilities and to charge tuition for students who attend the summer school. . . . The county board may determine the term and curriculum of the summer schools based upon the particular needs of the*

individual county. The curriculum may include, but is not limited to, remedial instruction, accelerated instruction and the teaching of manual arts.