DAVID JARVIS, et al.,

Grievants,

v. **DOCKET NO. 03-26-103**

MASON COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

In a grievance filed January 28, 2003, Grievants (See footnote 1) stated: "Code 18A-4-8b-g--There were no vacant jobs in building and jobs should not have been posted. Code 18A-2-6-- Continuing contracts shall remain in full force and effect except as modified by mutual consent of school board and the employee." Grievants' stated relief requested is: "Reassigned to former positions in building and Mr. Jarvis['] days be reinstated."

After being denied at the lower levels, a level four hearing was scheduled, but the parties then agreed to submit the matter to level four based on the record developed below. Grievants were represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and Respondent was represented by its counsel, Gregory W. Bailey, Esq., of Bowles Rice McDavid Graff & Love, PLLC. The parties agreed to submit their proposed findings of fact and conclusions of law by June 2, 2003, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant David Jarvis is employed by Respondent Mason County Board of Education as a Custodian III, with a 230-day contract assigned to the day shift at North Point Elementary School.

2. Grievant Dorothy Cook is employed by Respondent as a Cook III with a 200- day employment term at North Point Elementary School.

3. Grievant Sandra Buttrick is a Cook III at North Point Elementary School.

4. Grievant Janet Sue Reynolds is an Aide at North Point Elementary School. 5. Grievant Carolyn Jane Miller is a Special Education Aide and a Bus Aide at North Point Elementary School.

6. At the end of the 2002-2003 school year, North Point Elementary, Ordinance Elementary and Central Elementary Schools will be closed. Beginning with the 2003-2004 school year, Point Pleasant Intermediate School (PPIS) will replace the three closed schools.

7. Students in grades three through six from the three closed schools will attend the new PPIS. Students in grades kindergarten through two will attend Point Pleasant Primary School (PPPS). In addition, the geographic area from which students come will be expanded to include some students who now attend other schools.

8. PPIS will be housed in a new building being built near Ordinance Elementary School. The building now housing Ordinance Elementary School will be demolished. The Central Elementary School Building will be used for some Head Start classrooms and possibly some central offices. PPPS will be housed in the building that is now North Point Elementary School. That building is undergoing comprehensive renovations and extensivenew construction to remove architectural barriers, modernize and expand facilities and infrastructure, and to add three new 1,000 square-foot kindergarten classrooms.

9. All service personnel at the three closed schools were placed on transfer as of the end of the 2002-2003 school year. Respondent posted all service personnel positions at both PPIS and PPPS, to give all employees at the three closed schools, as well as other county service personnel, an equal opportunity to bid on the jobs.

10. Respondent posted custodial positions at PPPS, for which Grievant Jarvis applied. Because he had less seniority than another applicant, he was awarded an evening shift position with a 210-day employment term rather than a day-shift position with a 220-day contract. (See footnote 2)

11. In 1994, Respondent switched its middle school and high schools from one building to the other. Grievant Jarvis, who had been working at the middle school on day shift, stayed at the same building he had worked at in 1993, but it became a high school in 1994. Mr. Jarvis and other personnel were not transferred from the middle school to the high school, but simply stayed in the same building.

12. Grievant Cook was a successful applicant for one of the Cook III positions posted for

PPPS. Grievant Reynolds was a successful applicant for one of the Aide positions posted for PPPS.

13. Grievant Buttrick applied for one of the Cook III positions at PPPS, but was not successful because she had less seniority than other applicants. Grievant Miller applied for one of the Aide positions at PPPS, but was not successful because she had less seniority than other applicants . Both are currently unassigned for the 2003-2004 schoolyear. The successful applicants for those positions are currently employed at Central and Ordinance Elementary Schools.

DISCUSSION

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. Grievants argue that the positions posted for PPPS are neither newly-created nor vacant, and so Respondent improperly posted those jobs in violation of W. Va. Code § 18A-4-8b(g). Grievants also argue that Respondent's past practice is to use the same personnel as currently assigned to a "reconfigured" school in the new configuration. Respondent's position is that PPPS is a new school even though it is housed in the same, although highly-renovated, physical location as an existing school, and that the positions are all newly-created. Respondent contends Grievants are asking to be treated differently than the employees at the other two closed schools, which would be impermissible discrimination or favoritism.

Respondent's 1994 school swap is not a situation so similar to the present one that it can be used for comparison purposes. Unlike the current consolidation action, that change involved no school closings, no student population change and no changes to the existing facilities. Further, Grievants provided very little evidence on the actual circumstances of that change, restricting evidence on it to the limited recollection of Mr. Jarvis, which is not enough information by which to make a meaningful comparison or even a determination as to whether the 1994 personnel transactions were proper themselves.

A school board may close any school which is unnecessary and assign the pupils of the school to other schools, and may consolidate schools. *See* W. Va. Code § 18-5-13. In order to do so, it must (1) prepare and reduce to writing its reasons and supporting dataregarding the school closing or consolidation; (2) provide notice for and conduct a public hearing; and (3) receive findings and

recommendations from any local school improvement council representing an affected school relating to the proposed closure or consolidation prior to or at the public hearing. W. Va. Code § 18-5-13a. Looking at the actions giving rise to this grievance, it is enough to state that a building is not a school. The bricks and mortar that make up Grievants' present work location do not create an entitlement to any type of employment. It is the actions of the Board that designate a place as a school or no longer a school. In this case, Respondent closed North Point Elementary School in compliance with W. Va. Code § 18-5-13a, and it ceased to exist along with all personnel positions assigned to that school. Then, Respondent created a new school, pursuant to its authority to do so, creating new personnel positions.

Grievants cite the prior Grievance Board decision, Burgess, et al. v. Raleigh County Bd. of Educ., Docket No. 95-41-268 (Sep. 28, 1995), as support for their contention to the contrary. That decision, which contains no specific findings of fact nor conclusions of law, concerned a school consolidation action in which Raleigh County closed two elementary schools and a middle school, and created a new elementary school in the old middle school building, without altering the building in any way. However, in that case it was the grievants who argued that the positions at the newly-created school were new positions that must be posted, and the School Board that contended they were not new positions. That grievance was denied, with the finding that,

> [T]he record reveals that the reconfiguration of schools merely changed the name of the Marsh Fork Middle employees' worksite and made slight alterations in the age and grade of students they would serve. To say that their posts were "transformed" into new positions by these actions would be to distort the applicable statutory provision.

That case has been interpreted to mean that "when the grade levels are changed at a building, but the size of the custodial staff and their duties at the building remain the same, those custodial positions are not newly created positions, and the board of education is not required by statute (W. Va. Code § 18A-4-8b) to post the positions." Baisden v, Mingo County Bd. of Educ., Docket No. 97-29-298 (Nov. 19, 1997) (emphasis in original).

As a general rule, this Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides

for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20- 085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

Burgess is unreliable and its conclusion clearly in error. It contains no explicit findings to support its conclusion, and contains no compelling logic. It relies in part on an unpublished State Superintendent of Schools opinion (See footnote 3) that is now unavailable, but doesnote the opinion does not cite any statute. It cites no facts which support the conclusion the Board's actions were not a closing or consolidation under W. Va. Code §§ 18-5-13 and 18-5-13a, but were instead a mere renaming. Further, there appears to be a strong public policy in favor of posting available positions and filling them fairly and equitably.

Even if Burgess were followed, it would be inapposite. In that case, the school building itself was not altered in any way, and there was only a slight change to the student population. In the present case, the changes are much more drastic, and the building itself is to be transformed into essentially a new building. Had Respondent chosen to close all three schools and build two new buildings, instead of building one and remodeling another, the effect on positions would be more obvious, but no different. (See footnote 4) Grievants cite the holding in Burgess that "unless there is to be a substantial change in the duties of the school service employees who will be 'retained' at their worksites, there are no new positions created." However, Grievants' worksite ceased to exist, therefore there are no longer any positions to be "retained" in.

To the extent that Burgess and its progeny stand for the proposition that personnel positions in a new school formed by the consolidation of one or more closed schools, even when it utilizes the physical plant of one of the closed schools, are not newly-created positions, it is hereby overruled.

Grievant Jarvis' claim that he was improperly relegated to a different and less favorable employment term is also without merit. Grievant applied for an accepted a newposition with a lower term, knowing the term of the position when he did so. He cannot now claim Respondent changed his employment terms without his consent. Grievant could not apply for and accept a job as a Custodian I, and then claim Respondent demoted him, and that situation is analogous to what happened here.

The following conclusions of law support this discussion.

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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. "West Virginia Code § 18A-4-8b(g) requires county boards to post 'all job vacancies of established existing or newly created positions.' These jobs must be filled based on seniority, qualifications and evaluation of past service. W. Va. Code § 18A-4- 8b(a). The Board is allowed no room to use its own discretion as to how to fill vacancies of existing positions, but must follow the Code requirements of posting and competitively filling the opening." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

3. A school board may close any school which is unnecessary and to assign the pupils of the school to other schools, and may consolidate schools. *See* W. Va. Code § 18- 5-13. In order to do so, it must (1) prepare and reduce to writing its reasons and supporting data regarding the school closing or consolidation; (2) provide notice for andconduct a public hearing; and (3) receive findings and recommendations from any local school improvement council representing an affected school relating to the proposed closure or consolidation prior to or at the public hearing. W. Va. Code § 18-5-13a.

4. As a general rule, this Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Shaffer v. Kanawha County Bd. of

Educ., Docket No. 00-20- 085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

5. A building is not a school. To the extent that Burgess, et al. v. Raleigh County Bd. of Educ., Docket No. 95-41-268 (Sep. 28, 1995) and its progeny stand for the proposition that personnel positions in a new school formed by the consolidation of one or more closed schools, even when it utilizes the physical plant of one of the closed schools, are not newly-created positions, it is in error and is hereby overruled.

6. Grievants have failed to meet their burden of proving entitlement to the positions they seek.

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 Mason County. Any such appeal must be filed within thirty (30) days ofreceipt 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: June 6, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

David Jarvis, Sandra Buttrick, Dorothy Cook, Carolyn Miller and Janet Sue Reynolds.

Footnote: 2

A 230-day position was not posted at PPPS, and no newly-created or vacated 230-day positions were posted elsewhere in the county.

Footnote: 3

The opinion is cited as follows: "The November 17, 1993 opinion is a direct response to an October 25, 1993 request of [Raleigh County] Superintendent Dials. This opinion incorporates the March 25, 1992 opinion by reference. As discussed herein, both address fact patterns similar to that in the present case." Neither opinion was cited by either party

to this case, and neither is available on the State Board of Education Website.

Footnote: 4

Cf. Roberts & Workman v. Raleigh County Bd. of Educ., Docket No. 02-41-163 (July 18, 2002), where moving students from a close school into a new school with added new facilities was a merger, not a consolidation, because new school was not closed and reconstituted, merely renamed.