JENNIFER ROLLYSON

and BARBARA WARD,

Grievants,

v. Docket No. 04-29-140

MINGO COUNTY BOARD

OF EDUCATION,

Respondent,

and

DEBRA DEAN,

Intervenor.

DECISION

This grievance raises the issue of whether the position of secretary at Gilbert Pre-K through Six should have been posted. This question was first raised by grievant Jennifer Rollyson ("Rollyson") when she filed a Level I grievance on January 22, 2004. Grievant Barbara Ward ("Ward") filed a Level I grievance on the same grounds on February 2, 2004. Both grievances were denied at Level I and, thereafter, appealed to Level II. The grievances were consolidated for hearing at Level II because they arose out of the same events and the respective grievants sought the same relief. At Level II, Debra Dean ("Intervenor Dean") was allowed to intervene because the resolution of the consolidated grievance had the potential to displace her from the secretarial position at issue. The consolidated Level II hearing was held on February 24, 2004. A decision denying the LevelII grievance was issued and disseminated on March 13, 2004. BOE waived Level III proceedings with respect to each of the grievances.

Rollyson and Ward (sometimes collectively "Grievants") each filed an appeal to Level IV, where their appeals were consolidated for hearing and decision. Grievants assert, in almost identical language, that the Gilbert Pre-K through Six School was being created by consolidation rather than

merger and, therefore, the secretarial position at the new school should have been posted and awarded to the applicant with the most seniority. Rollyson and Ward each have more seniority than Intervenor Dean, who is scheduled to fill the position of secretary at Gilbert Pre-K through Six. Grievants ask that the position be posted. They acknowledge that, even if posted, it is possible that neither Rollyson nor Ward would be awarded the position of secretary at Gilbert Pre-K though Six.

The Level IV hearing was conducted on June 4, 2004. Grievants were represented by Steven New, Esquire. The respondent, the Mingo County Board of Education ("BOE"), was represented by Kelly J. Kimble, Esquire. Intervenor Dean appeared on her own behalf. Upon submission of proposed findings of fact and conclusions of law by Grievants and BOE, this grievance became mature for decision on July 7, 2004.

Upon review of the entire record, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. At the outset of this grievance, Rollyson was employed by BOE as a secretary assigned to Gilbert Grade School.

2 2. Gilbert Grade School closed at the conclusion of the 2003-2004 school year.

3 3. At the outset of this grievance, Ward was employed by BOE as a secretary assigned to Cline Grade School.

4 4. Cline Grade School also closed at the conclusion of the 2003-2004 school year.

5 5. At the outset of this grievance, Gilbert Middle School served students in grades five through eight.

6 6. BOE is implementing a plan whereby students who would have attended Gilbert Grade School or Cline Grade School will join the fifth and sixth grade students from Gilbert Middle School in attending Gilbert Pre-K through Six ("Gilbert PK-6") in the 2004- 2005 school year. The seventh and eighth grade students who would have attended Gilbert Middle School will go to the high school.

7 7. After undergoing renovations, the former Gilbert Middle School building will house the newly-created Gilbert PK-6.

8 8. It is anticipated that, of the students who attended Gilbert Middle School, only the 63 or 67 students who were in fifth grade during the 2003-2004 school year will attend Gilbert PK-6, where

they will be coming in as sixth graders. The former sixth grade students will be moving on to the high school as members of the seventh grade.

9 9. Renovations to the former Gilbert Middle School include, among other things, the addition of four kindergarten classrooms, a new kitchen, and a new, larger cafeteria. Administrative offices are to be enlarged and the former cafeteria converted to classrooms.

10 10. BOE posted certain positions that will be need to be added to the service personnel staff at the former Gilbert Middle School to deal with the increase in the size ofthe physical plant and the influx of students who will be attending Gilbert PK-6. These new positions include kindergarten aides, an additional cook, and an additional custodian.

11 11. Pre-existing positions, such as the secretary slot at Gilbert Middle School, were left in place with the intention that they would remain once the building was transformed into Gilbert PK-6. Thus, the secretary position for Gilbert PK-6 was not posted.

12 12. In deciding whether the service personnel positions for the proposed Gilbert PK-6 should be posted, BOE relied, in part, upon its past practices regarding reconfigured schools, consulted with legal counsel, and conferred with school service personnel associations.

13 13. At the outset of this grievance, Intervenor Dean was employed by BOE as a secretary assigned to Gilbert Middle School.

14 14. Intervenor Dean is slated to fill the secretarial position at Gilbert PK-6.

15 15. As to seniority among secretaries employed by BOE, Rollyson is ninth, Ward is twenty-third and Intervenor Dean is twenty-seventh.

16 16. There was a faculty senate vote, pursuant to West Virginia Code section 18A- 4-8f, for purposes of determining priority among the professional staff displaced by the changes and school closures described above.

Discussion

Grievants assert that the secretarial position at Gilbert PK-6 should have been posted. They reason that Gilbert PK-6 is a new school and, as such, the secretarial position at that school would be a new position subject to the requirements of West VirginiaCode section 18A-4-8b. Grievants cite *Jarvis v. Mason County Board of Education*, Docket No. 03-26-103 (December 1, 2003), in support of this argument.

The starting point for the analysis of the merits of Grievants' argument is the statutory requirement

that BOE post “all job vacancies of established existing or newly created positions.” W. Va. Code § 18A-4-8b(g). BOE determined that the secretary position at issue herein was not a newly created position. BOE notes that the position antedated all of the proposed changes to Gilbert Middle School. It considers that Gilbert PK-6 is merely a reconfiguration of Gilbert Middle School, which will take place around the existing service personnel positions. Under BOE's reasoning, there was one secretarial position at Gilbert Middle School and there will be one secretarial position at Gilbert PK-6. Without the addition of another secretary, BOE maintains that there is no new position to post.

This view comports with BOE's prior practices. It appears that BOE has consistently applied the rule that the service personnel in an existing physical plant would remain in place even if the student population or grade levels being serviced at that location changed. BOE maintains that, where a school is reconfigured, it is only required to post new service personnel positions that need to be added in order to cope with the influx of greater numbers of students. As noted above, the changes that are being made to Gilbert Middle School will require the addition of several service personnel positions. Consistent with its prior practice, BOE has already posted the additional service personnel positions that will be needed at Gilbert PK-6.

Much time, attention and ink has been devoted to arguing whether Gilbert PK-6 will be a new school. However, the pivotal question is not whether Gilbert PK-6 is a newschool. The real question is whether the secretarial assignment at issue is a newly created position. If Gilbert PK-6 were an entirely new institution, built from scratch, there would be no doubt that the secretarial position therein would be newly created and, thus, subject to the posting requirement found in West Virginia Code section 18A-4-8b(g). Grievants' arguments rely on the somewhat different premise that, if the transformation of Gilbert Middle School is extensive enough, it has the effect of creating a new school, in which case, any position therein must be considered newly created. The surface appeal of this premise does not withstand scrutiny.

There was a secretary at Gilbert Middle School. After remodeling and the addition and subtraction of various grade levels, there will still be a secretary in the same location performing the same duties, albeit for an expanded student body. While the extent of the remodeling and grade level changes might be significant to the semantic argument of whether the old school was extinguished and a new, different school has emerged, these factors really do not have an impact on the question of whether there was a pre-existing secretarial slot.

In support of its position that Gilbert Middle School is merely being “reconfigured” into Gilbert PK-6, BOE notes that the Gilbert Middle School building is being utilized, albeit with some level of renovation. BOE also notes that two of the grade levels that comprised Gilbert Middle School will remain in that building to attend Gilbert PK-6. Around this central core of two grade levels and a building, BOE perceives Gilbert PK-6 as a modified version of Gilbert Middle School, rather than a new entity.

Given the wide change in grade levels being served, the scope of the additions to the existing building, and the change in the name of the school, it would have beenunderstandable if BOE had decided that Gilbert PK-6 was a new school. That does not mean, however, that BOE's decision on this point is in error or should be second-guessed on review. BOE's determination on this point is reasonable and factually supportable.

As noted, the focus on whether Gilbert PK-6 is a new school is misplaced. It leads, inevitably, to divergent opinions in an area where the pertinent statutes provide little, if any, guidance as to the factors to be considered in deciding if changes to an existing school are so extensive as to, in effect, create a new school. Venturing into this analytical minefield is simply not necessary. Grievants have failed to demonstrate that BOE's decision that there was not a newly created position for a secretary violates any statute, regulation or policy. To the extent that BOE made a factual determination that there was a pre-existing secretarial position that could serve Gilbert PK-6, Grievants have failed to demonstrate that such determination was arbitrary or capricious. To the extent that BOE came to the legal conclusion that the position in question did not need to be posted, Grievants have failed to prove that such conclusion was clearly wrong.

For the reasons discussed above, Grievants' reliance upon *Jarvis* does not assist them. *Jarvis* arose out of Mason County where three elementary schools, including North Point Elementary School, were being closed and replaced, in part, by an intermediate school. The intermediate school, which was to serve grades three through six, was to be housed in a newly constructed building. A primary school serving kindergarten through second grade students was to be housed in the old North Point Elementary School building. However, the building was to undergo extensive renovations before the primary school took up residence there. The Mason County Board of Education addressed the foregoing changes by placing the service personnel at the three elementary schools on transfer. Service personnel positions for the new primary and new intermediate schools were

posted as new positions. *Jarvis* was, in some respects, the reverse of this grievance. The *Jarvis* grievants were all service personnel who had worked at North Point Elementary School. They maintained that the service personnel positions for the new primary school were neither vacant nor newly created and, as such, should not have been posted.

The decision in *Jarvis* hinged upon the recognition that it is within the power and purview of a board of education to determine whether a specific place constitutes a school at any given time. In *Jarvis* the Mason County Board of Education took the position that the original North Point Elementary School "ceased to exist along with all personnel positions assigned to that school. Then, Respondent [Mason County Board of Education] created a new school, pursuant to its authority to do so, creating new personnel positions."

The following conclusion of law, which is set forth in the *Jarvis* decision, appears to have generated confusion for Grievants:

> 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. [sic] 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.

At first blush the foregoing appears to support Grievants' arguments. However, this conclusion must be read against the factual backdrop of *Jarvis*. The closing of North Point Elementary School was a distinct event that resulted in the elimination of the existing service personnel positions. The Mason County Board of Education then planned tocreate a new primary school using the physical plant from North Point Elementary School as the skeleton upon which to flesh out a new structure to house kindergarten through second grade students. Creation of this new school was another distinct event that concomitantly created new service personnel positions.

Thus, the terms "new school" and "closed schools," as used in the above-quoted conclusion of law, have the specific meanings given them in *Jarvis*. They are precise terms in the context of that case and Grievants have no basis for attempting to expand them. The lesson to be learned from *Jarvis* is that a board of education's actions and intentions must combine to extinguish pre-existing service personnel positions. Such convergence of actions and intentions did not occur with respect to the Gilbert Middle School.

BOE did not intend to extinguish the service personnel positions at Gilbert Middle School. The

intention was to change the character of the school through reconfiguration rather than obliteration. Gilbert PK-6 was not conceived as a “new school” within the meaning of *Jarvis*. It was intended to be an evolved form of its predecessor, Gilbert Middle School.

Grievants introduced, as Grievants' Exhibit 5 at Level II, a cover sheet for the “Gilbert Area Schools Closure Book”. That cover sheet is the only place in the record where BOE makes reference to closing Gilbert Middle School. Grievants also introduced Grievants' Exhibit 4 at Level II, which is a legal advertisement for the “Consolidation of Cline Grade and Gilbert Area Pre K-6.” Said legal advertisement announced that a public hearing would be conducted with respect to “the proposed closing of Cline Grade School and consolidation into Gilbert Pre K-6 School.” The record does not contain anyannouncement regarding the proposed closure of Gilbert Middle School. Except for the cover sheet for the closure book, BOE never indicated an intention to close Gilbert Middle School. As a matter of fact, even the cover sheet also refers to the consolidation of Cline Grade School, Gilbert Grade School and Gilbert Middle School 5th and 6th Grade[s] to Gilbert Pre K-6." As to the remaining grades from Gilbert Middle School, the cover sheet describes the “merger of Gilbert Middle 7th and 8th with Gilbert High School.” There is nothing in this exhibit that clearly indicates that BOE intended to, or took actions to, extinguish Gilbert Middle School. If, as indicated by *Jarvis*, BOE's intentions are controlling, the pre-existing service positions at Gilbert Middle School were not extinguished.

In discussing Grievants' reliance upon *Jarvis*, counsel for BOE asserts that the “more general holding and the one applicable to the instant case is that 'when grade levels are changed at a building, but the size of the [service] staff and their duties at the building remain the same, those . . . 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 provided in original).” *Proposed Findings of Fact and Conclusions of Law Submitted on Behalf of Respondent* at 7-8 (brackets in original). There are several problems with this purported authority that cannot go unremarked. The language quoted from *Baisden* was not part of the decision. It was, instead, merely a characterization of one party's argument based on *Burgess v. Raleigh County Bd. of Educ.*, Docket No. 95-41-268 (Sept. 28,1995). (See footnote 1) This argument, as quoted above, was expressly rejected as inapplicable to the facts in *Baisden*.

Furthermore, there is no acknowledgment on the part of counsel for BOE that the *Jarvis* decision overruled *Burgess* and its progeny. *Jarvis* at Conclusion of Law 5. An acknowledgment of this

troublesome bit of legal authority and a discussion of what this means in the context of this grievance would have been appropriate.

As it is, the matter of *Jarvis*, as it applies to this grievance, has been discussed above. The focus on the intention and actions of BOE will be deemed to harmonize *Jarvis* with the resolution of Grievants' claims. If such harmony cannot be attained, then this decision stands for the proposition that *Jarvis* may have, unnecessarily, gone a bit too far in stating that *Burgess* was overruled. The reality is that the *Burgess* decision suffers from the absence of a clear statement of what steps, if any, the Raleigh County Board of Education took with respect to closing the predecessor school involved in *Burgess*. Accordingly, *Burgess* neither assists nor harms the analysis of whether the respective boards in *Jarvis* and this grievance have acted improperly with respect to posting service positions.

Grievants also argue that, as a matter of fairness, if the professional positions were posted, the service personnel positions should have been posted. However, as Grievants acknowledged, the treatment of professional staff was addressed by faculty senate votes. Those votes were taken pursuant to a specific statute that controls the fate of professional staff in the event of school mergers or consolidations, as those terms are defined solelyfor purposes of that particular statute. W. Va. Code § 18A-4-8f. Said statute does not apply to service personnel.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievants bear the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievants must prove their allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "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 Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. “It is axiomatic that a school board has authority to close and/or consolidate schools.” *McComas v. Bd. of Educ. of Fayette County*, 197 W. Va. 188, 457 S.E.2d 280 (1996)(citing W. Va.

Code § 18-5-13 and *Haynes v. Bd. of Educ.*, 181 W. Va. 435, 383 S.E.2d 67(1989)).

4 4. "'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, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Boardof Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. pt. 2, *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 260, 546 S.E.2d 258, 259 (1999)(*per curiam*).

5 5. The Supreme Court of Appeals of West Virginia has stated that "[i]t is by now commonplace that when faced with a problem of statutory construction, the circuit court and this Court should give some deference to the interpretation of the officer who is charged with statutory implementation. As we noted in Syllabus Point 7, in part, of *Lincoln County Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992): 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.'" *Martin v. Randolph County Bd. of Educ.,* 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995)(citations and internal quotation marks omitted).

6 6. BOE is required to post all "job vacancies of established existing or newly created positions." W. Va. Code § 18A-4-8b(g).

7 7. The determination by BOE that the position of secretary for the planned Gilbert PK-6 School is not a newly created position for purposes of West Virginia Code section 18A-4-8b(g) is not clearly erroneous and is, thus, entitled to deference.

8 8. West Virginia Code section 18A-4-8f controls the treatment of professional staff displaced during school mergers and consolidations, as those terms are defined within said statute.

9 9. West Virginia Code section 18A-4-8f does not apply to Grievants or other service personnel.

10 10. Grievants have failed to meet their burden of proving by a preponderance of the evidence that there was any violation of statute, regulation or policy on the part of BOEin connection with the decision that the secretary position at Gilbert PK-6 did not need to be posted.

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. 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 West Virginia Code section 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.

Date: August 30, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The docket number for Burgess was incorrectly cited in the Baisden decision. The correct docket number has been used herein.