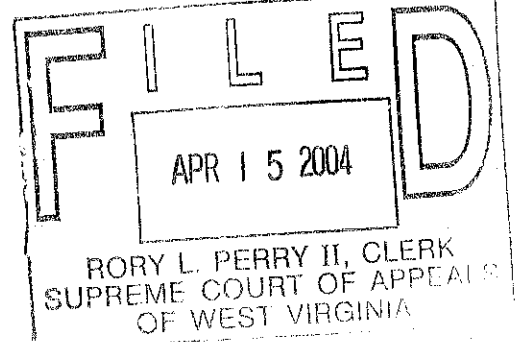


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**THE BOARD OF EDUCATION OF
THE COUNTY OF RANDOLPH,
Appellant,**



v.

Appeal No. 31691

**CHARLOTTE SCOTT and
JUDY CHEWNING,
Appellees,**

and,

**MELINDA WHITE,
Intervenor.**

BRIEF ON BEHALF OF APPELLEES

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I. Procedural History and Nature of the Case

Appellee Scott initiated an employment grievance pursuant to West Virginia Code §18-29-1, et seq., on or about December 20, 2000. Appellee Scott contended that Appellant had erred in posting an aide position with the requirement that the successful applicant would have to possess licensure as a practical nurse and that Appellee had violated West Virginia Code §18A-4-8b in failing to employ her. The grievance of Appellee Scott was consolidated with the grievance of Appellee Judy Chewning that involved the same subject matter. The grievance proceeded through the first three levels and was appealed to level IV on or about February 28, 2001. A level IV hearing was held on May 15, 2001. By decision dated July 27, 2001, the administrative law judge of the West Virginia Education and State Employees Grievance Board granted the grievance. Appellant appealed this decision to the Circuit Court of Kanawha County on or about August 30, 2001. By order entered June 9, 2003, the circuit court affirmed the decision of the administrative law judge. Appellant appealed to this court.

II. Statement of Facts

Charlotte Scott and Judy Chewning, Appellees, are employed by the Appellant in the aide classification. At the time this grievance arose they had preferred recall status. The Board of Education of the County of Randolph, Appellant, is a quasi-public corporation created by statute for the management and control of the public schools of Randolph County. Melinda White had no contractual status with the Appellant at the time this grievance arose.

On October 27, 2000 Appellant posted a position for an aide. The posting indicated that applicants must be licensed as a LPN (Licensed Practical Nurse). The individual in question would serve the needs of two diabetic children, one of who was provided insulin by a device known as an insulin pump. Appellees and Ms. White applied for the job.

Appellant hired Ms. White despite the fact that Appellees possessed preferred recall status, possessed regular and substitute seniority within the aide classification category, and had received favorable evaluations on their service with Appellee as aides.

Appellant contended that it needed an LPN in this position because of the necessity that the individual employed for the position would need to operate an insulin pump. Despite the assertions of School Nurse Margaret McFarland, R.N., however, Appellant has provided no authority supporting a legal requirement that the insulin pump be operated by an LPN.

Ms. White was not trained on the operation of an insulin pump during her training to be an LPN or at any other time prior to filling the position in question in this grievance. By contrast the student being served by the insulin pump could be trained to operate the insulin pump. The parents could also be trained to operate the insulin pump without the requirement that they possess an LPN license.

III. Issues Raised¹

- A. May a board of education require job qualifications for a school service personnel position inconsistent with the definitions of the classification title of said position in West Virginia Code §18A-4-8?
- B. May a board of education require that the successful applicant for an aide position be licensed as a licensed practical nurse?

IV. Citation of Authority

- A. West Virginia Code §18A-4-8

¹ Although accepting the issues raised by Appellant in a general fashion, Appellee has recast them to more accurately reflect their nature.

- B. West Virginia Code §18A-2-5
- C. West Virginia Code §18A-4-8b
- D. West Virginia Code §18A-4-8e
- E. West Virginia Code §18A-4-8a
- F. West Virginia Code §18-5-22
- G. West Virginia Code §18A-1-1(d)
- H. Ohio County Board of Education v. Hopkins, 457 S.E.2d 537 (W.Va. 1995)
- I. Hancock County Board of Education v. Hawken, 546 S.E.2d 258 (W.Va. 1999)
- J. Board of Education of the County of Mingo v. Ooten, Cir. Ct. of Mingo County, Civil Action No. 99-C-55, (May 24, 2000)

V. Argument

Before addressing the issues peculiar to this case, Appellees briefly note that they concur with the representation of Appellant regarding the standard of review to be applied in the current appeal.

A. A board of education may not require job qualifications for a school service personnel position inconsistent with the definitions of the classification title of said position in West Virginia Code §18A-4-8.

In its brief Appellant casts this issue in a false light. Appellant utilizes the classic device of erecting a straw man and then smashing it to pieces. Appellant pretends that the issue is whether or not a board of education can add job requirements to a particular position in addition to those specifically listed in definition of the appropriate classification title in West Virginia Code §18A-4-8.

The answer to this question is yes, a board of education may do so. The definitions of the various classification titles in West Virginia Code §18A-4-8 are for the most part general and brief. There is no attempt made in these definitions to list in exhaustive fashion every duty or

task that an employee in that class title could be called upon to perform. Clearly, a board of education may require an applicant for a service personnel position to possess an ability or the qualification to perform a duty or task that is consistent with the definition of the classification title in the code. This remains true even if that duty or task is not specifically listed in the definition in the code *if the duty or task is consistent with the definition of the classification in the code*. Appellee contends that this last phrase defines the crucial question in this case, i.e. whether or not a board of education can require a qualification for a position, *which is outside the scope of and inconsistent with the definition found in the code for the classification title*.

Appellees base their contention that a board of education may not add job qualifications that are outside the scope of the code definitions or are inconsistent with the code definitions on language contained in several different code provisions. First, West Virginia Code §18A-2-5 specifies the terms of all school service personnel contracts throughout the state. One of the terms specified in that statute for these contracts is as follows:

(3) The services to be performed by the Employee shall be such services as are prescribed for the job classification set out above in paragraph (1) and as defined in Section 8 [§ 18A-4-8], Article 4, Chapter 18A of the Code of West Virginia, as amended.

Second, West Virginia Code §18A-4-8, in addition to providing the definitions of various classification titles provides that if an employee is performing duties outside the classification title the employee holds, that an employee is entitled reclassification to a title that encompasses such duties. Specifically, this section of law provides:

(g) Upon the change in classification or upon meeting the requirements of an advanced classification of or by any employee, the employee's salary shall be made to comply with the requirements of this article, and to any county salary schedule in excess of the minimum requirements of this article, based upon the employee's advanced classification and allowable years of employment.

...

(l) The county boards shall review each service personnel employee job classification annually and shall reclassify all service employees as required by the job classifications. The state superintendent of schools may withhold state funds appropriated pursuant to this article for salaries for service personnel who are improperly classified by the county boards. Further, the state superintendent shall order county boards to correct immediately any improper classification matter and with the assistance of the attorney general shall take any legal action necessary against any county board to enforce the order.

If an employee who performs duties outside of his/her classification title, then this employee is entitled to reclassification. Clearly, the legislature intended that there be a close linkage between duties and classification title.

Third, West Virginia Code §18A-4-8b(b) provides the following in relation to the qualifications an applicant must possess in order to “be qualified” for a particular position:

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight [§ 18A-4-8] of this article, that relates to the promotion or vacancy.
(Emphasis added)

According to this language, an employee qualifies to fill a position by demonstrating that he/she is qualified to perform the duties in the code definition of the classification title of the position. Again, there is significant connection between the classification title of a position and the duties of the position.

Finally, West Virginia Code §18A-4-8e(c) provides the following language regarding the scope of the competency tests that are meant to determine if an employee is qualified for a particular classification:

The subject matter of each competency test shall be commensurate with the requirements of the definitions of the classification titles as provided in section eight [§ 18A-4-8] of this article. The subject matter of each competency test shall be designed in such a manner that achieving a passing grade will not require knowledge and skill in excess of the requirements of the definitions of the classification titles.

The same linkage between duties and classification title appears in the above language.

The subject matter covered by a competency test for a classification must be related to the definition found in the code.

Let us sum up. West Virginia Code §§18A-2-5 and 18A-4-8 make the connection between the code definitions and the actual duties to be performed by an employee. West Virginia Code §§18A-4-8b and 18A-4-8e make clear the link between the code definitions and meeting the qualifications necessary for entering a classification. In view of this plain language the link between the code definitions of a classification title and what can legally be required by a board of education of an applicant for a position within the designated classification title is beyond dispute.

Perhaps an example will help illustrate the point Appellees seek to make. West Virginia Code §18A-4-8(i)(32) provides the following definition for a Custodian III:

"Custodian III" means personnel employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs

Given the following definition, a board of education might reasonably require that an applicant for a Custodian III position be able or qualified to operate a vacuum cleaner.

"Operation of a vacuum cleaner" is not specified in the code definition, but it is consistent with definition and is doubtless one of the duties intended to be covered by the broad phrase "to keep buildings clean and free of refuse". On the other hand, a board of education could not require

that an applicant for a Custodian III position possess a master's electrician license. While it would certainly be handy to have custodian with such licensure available at the school, possession of such a licensure is well beyond the scope of the code definition of Custodian III.

The link between the duties of a position and the classification title of said position is a corner stone of the protections erected by the legislature for school employees. Further, it goes beyond the issue of who is entitled to fill a vacant position. For example, the classification title of an employee determines the employee's salary. In the scenario given above, a Custodian III is only entitled to pay grade "A" while an Electrician II is entitled to a pay grade "G", a difference of \$190.00 per month.² (By way of explanation, we should mention that Electrician II is the class title for which an applicant may be legally required by the statutory definition to possess a master's electrician license.) Thus, permitting a board of education to add requirements beyond the scope of the code definitions of the classification title not only permits them to bar qualified applicants for a job, it would permit them to underpay the successful applicants for said jobs. The whole legislative intent for provision of a minimum pay scale with varying levels would be defeated.

We have established the general proposition that a board of education may not make a job requirement that goes beyond the scope of the code definition of the classification title of the position or is inconsistent with the same. Next we turn to the specific question in this case, i.e. whether possession of licensure as practical nurse is consistent with the code definitions of the aide classification title. We will do so in the next section. Prior to turning to that issue, though, Appellees would like to comment on the various citations of cases presented by Appellant in the first section argument of its brief. Appellees contend that those cases are irrelevant to the current case.

² See West Virginia Code §18A-4-8a

First, nearly all involve the supervisor or director of a department or division of a board of education. In Ohio County Board of Education v. Hopkins, 457 S.E.2d 537 (W.Va. 1995), the position in question was the director of transportation. In Hancock County Board of Education v. Hawken, 546 S.E.2d 258 (W.Va. 1999), the position in question was the director of the maintenance department that is in question. It would not be surprising if a board of education were not given a little more latitude than normal in such situations. Second, the “additional” job requirements in those cases were well within the scope of the code definitions of the classification titles in question. The issue in said cases involved whether the grievants met said qualifications and the comparative level of qualification of the respective applicants. The same is true of Board of Education of the County of Mingo v. Ooten, Cir. Ct. of Mingo County, Civil Action No. 99-C-55, (May 24, 2000) in which the additional qualifications required by the board of education were related to proficiency in skills clearly related to the classification title in question, i.e. sign language interpreter.

In the present case, the children in question also have need of the legitimate services of a teacher’s aide. Let us suppose that the children did not need an aide. Would the board of education then “attach” the requirement of LPN licensure to the position of secretary, custodian, or cook? Alternatively, would they “attach” the requirement to the position of the classroom teacher serving the students?³ While we do not wish to push this argument to the point of absurdity, it should be abundantly clear that Appellant’s position has already taken us into this territory.

Finally, we should note that the ultimate result of a decision in favor of Appellant, whether that is their intention or not, would be to transport the state of school law back to the early seventies, prior to enactment of West Virginia Code §18A-4-8 and 18A-4-8b. If the

³ This thought may not have occurred to counsel for Intervenor. However, it is well worth his consideration.

relationship between the classification title of a job and the actual duties of the job is severed and if the connection between seniority/employment status and filling of a position is broken, boards of education may hire whom they please for positions, title the positions however they desire, and pay the employee whatever they wish. Chapter 18A will become largely a dead letter.

B. A board of education may not require that an applicant for an aide position hold licensure as a practical nurse.

West Virginia Code §18A-4-8(i) provides the following classification titles for the aide classification with accompanying definitions:

(8) "Aide I" means those personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aide;

(9) "Aide II" means those personnel referred to in the "Aide I" classification who have completed a training program approved by the state board, or who hold a high school diploma or have received a general educational development certificate. Only personnel classified in an Aide II class title may be employed as an aide in any special education program;

(10) "Aide III" means those personnel referred to in the "Aide I" classification who hold a high school diploma or a general educational development certificate and have completed six semester hours of college credit at an institution of higher education or are employed as an aide in a special education program and have one year's experience as an aide in special education;

(11) "Aide IV" means personnel referred to in the "Aide I" classification who hold a high school diploma or a general educational development certificate and who have completed eighteen hours of state board-approved college credit at a regionally accredited institution of higher education, or who have completed fifteen hours of state board-approved college credit at a regionally accredited institution of higher education and successfully completed an in-service training program determined by the state board to be the equivalent of three hours of college credit

Not even the most fertile of imaginations can read a requirement of licensure as a practical nurse into these code definitions. Clearly such a requirement may not be permitted to stand. Although West Virginia Code §18-5-22 contemplates aides performing specialized medical procedures, it clear that the law only refers to procedures for which a layman may be trained by a school nurse, i.e. an RN employed by the board of education, and not procedures which require special licensure, either as an RN or as LPN.

Appellees would like to address a few points which do not conveniently fit under either of the points of argument but which are of considerable relevance. First, Appellees are on the preferred recall list. They have obtained regular employment as aides, but had been laid off in a reduction in force of aides. West Virginia Code §18A-4-8b provides the following protection for individuals in their situation:

No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

Clearly employees on the preferred recall list are supposed to be given the right of recall to reemployment over individuals like Ms. White who had never worked for the board of education in any capacity.

Second, it is clear that Appellees are qualified to perform the duties of an aide. They have held that classification and successfully performed the "normal" duties required of an aides. Please note that West Virginia Code §§18A-4-8b and 18A-4-8e clearly provide that possession of a classification title conclusively demonstrates that an applicant is qualified to fill a position within said classification category.

Finally, Appellees assert that the real issue here does not involve the needs of the children. If these children could be adequately served by an aide, we have at least two aides, the Appellees, eager to serve them. On the other hand, if the needs of the children require an LPN, by all means let Ms. White serve them. However, do not permit her in doing so to move ahead of the Appellees and all other substitute aides and aides on the preferred recall list in securing regular service personnel status. Either, way the needs of the children will be met.


As with the illustration of the Custodian III and Electrician II, Appellant could have hired Ms. White legally by providing the proper title for the posting. Unlike our illustration, though, the proper title in this case would fall outside the ranks of service personnel. Appellant could hire an LPN by posting a position for an LPN under the rubric of "other professional employees." West Virginia Code §18A-1-1(d) authorizes the employment of "other professional employees" and defines this type of employee as:

... that person from another profession who is properly licensed and is employed to serve the public schools ...

However, by designating Ms. White as a service personnel rather than a professional employee, Appellant can receive state money from the service personnel part of the formula to pay her salary. Which leads us to the real issue that stands behind all others in this case, i.e. MONEY. Appellant is not in a situation where it must sacrifice either the rights of the Appellees or the needs of the children. The real needs of the children can be served without such an injustice being perpetrated on the Appellees. In this regard the decision of the administrative law judge is a model of equity and simplicity. If Appellant needs an employee to perform the tutorial duties of an aide, it must hire an "aide" as defined in West Virginia Code §18A-4-8. If such an employee may serve the physical needs of the children, the employee may do so. However, if

the needs of the children require, in addition to their educational needs, the services of a nurse, then Appellee must hire such an employee in addition to the aide and must properly post and compensate the employee who fills said position.

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CHARLOTTE SCOTT and JUDY CHEWNING, Appellees,
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