RAYMOND WILLS,

Grievant,

v. DOCKET NO. 94-45-567

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On September 19, 1994, Grievant Raymond Wills, a custodian employed by the Summers County Board of Education (hereinafter SCBE), appealed to Level Four of the grievance procedure for education employees contending the SCBE violated W. Va. Code § 18A-2-6, when it did not issue him a continuing contract for the 1994-1995 school year. (See footnote 1) There is no dispute about the material facts in this case. The legal question presented involves whether a county board of education is required to consider a service employee's work as a substitute in determining whether the employee is entitled to a continuing contract of employment.

The parties stipulated to the following facts at the Level Two hearing. On October 6, 1986, Grievant signed a probationary employment contract for a half-time position as a custodian and worked during that school year as a regular employee for one hundred seventy-one (171) days. Grievant did not work for the SCBE during the next several years. Grievant signed a second probationary contract on January 28, 1993, and worked as a custodian for ninety-three (93) days as a regular employee. During that same 1992-1993 school year, Grievant also worked as a substitute custodian for sixty-four (64) days. Grievant signed a third probationary contract on August 12, 1993, and worked as a custodian for two hundred ten (210) days as a regular employee during the 1993-1994 school year. The parties further stipulated that Grievant requested a continuing contract for the 1994-1995 school year, but when this request was denied he subsequently signed a probationary employment contract for that school year.

Grievant asserts that he has completed three years of acceptable employment within the meaning

of W. Va. Code § 18A-2-6, and is, therefore, entitled to a continuing contract. Section 6 provides, in pertinent part, that "[a]fter three years of acceptable employment, each service personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status... ."

If Grievant is correct in his contention that he is entitled to a continuing contract of employment, he will have acquired avaluable right. (See footnote 2) The Supreme Court of Appeals over a decade ago ruled in Syllabus Point 5 of Bonnell v. Carr, 294 S.E.2d 910 (W. Va. 1982) that "[t]he Legislature by enacting W.Va. Code, 18A-2-6 (1973), which gives ... service personnel continuing contract status after three years of acceptable employment and providing that their employment could be terminated upon cause intended to extend a tenure status to such employees."

Grievant also seeks continuing contract status under the pronouncement of the Supreme Court of Appeals in Harkins v. Ohio County Bd. of Educ., 369 S.E.2d 224 (W. Va. 1988). In that per curiam decision, the Court determined that under the provisions of W. Va. Code, § 18A-2-2 [1984], a full-time substitute teacher, who had taught for more than 133 days in each of three school years, was entitled to tenure when she was hired for the fourth year. Grievant recognizes that the Harkins rule has never been applied to service personnel under W. Va. Code § 18A-2-6. Nonetheless, Grievant argues for an extension of the Harkins rule to service personnel on the grounds that school personnel laws "are to be strictly construed in favor of the employee" under Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). He also argues that no reason exists why the Harkins rule should not apply sinceW. Va. Code § 18A-2-6 is applicable to both teachers and school service personnel. (See footnote 3)

The SCBE conceded that Grievant has completed two years of acceptable employment because he did work at least 133 days during both the 1986-87 and 1993-94 school years. The SCBE disputes that Grievant is entitled to a year of service credit for the 1992-93 school year because he worked only 93 days as a regular employee that year. In other words, the SCBE contends that the statutory prerequisite of "three years of acceptable employment" can be met only by days of regular employment.

The SCBE correctly observes that the Harkins rule applicable to teachers was nullified by the enactment of W. Va. Code § 18A-4-7a, which provides, in pertinent part, "[u]pon completion of one hundred thirty-three days of employment in any one school year, substitute teachers shall accrue

seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee." The SCBE also argues that W. Va. Code § 18A-2-6 does not contain language similar to that contained in the statutory provision applicable to teachers. (See footnote 4) Furthermore, the SCBE asserts that substitute employees are not subject to the same evaluation procedures applicable to probationary or permanentemployees, that a determination of what is acceptable employment cannot be accomplished outside the evaluation process, and that Grievant has not shown any basis upon which to determine that his employment as a substitute was "acceptable."

To the extent Grievant is requesting the Grievance Board to extend Harkins to cover school service personnel positions, that invitation is hereby rejected. Harkins is a per curiam decision. The Supreme Court has noted that per curiam opinions "are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta [meaning an incidental, non-binding opinion]. Lieving v. Hadley, 188 W. Va. 197, 423 S.E.2d 600 (1992), n. 4, in part, quoted with approval, Graf v. West Virginia Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992). The sole syllabus point in Harkins is that school personnel laws and regulations are to be strictly construed in favor of the employee. Consequently, Harkins does not provide any basis for a ruling either for or against Grievant. (See footnote 5)

The legal question presented here must be resolved by examination of the applicable statutes. The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature. Snider v. West Virginia Dept. of Commerce, 441S.E.2d 363 (W. Va. 1994). Clear and unambiguous language ordinarily must be applied not construed. Miller v. Board of Educ. of County of Boone, 190 W. Va. 153, 437 S.E.2d 591 (1993). An ambiguity may be found to exist where: (1) the language can be understood in more than one way or refers to two or more things simultaneously; or (2) the statutory language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness. Brown v. Lukhard, 229 Va. 316, 330 S.E.2d 84 (1985). Two other cardinal rules of statutory construction are applicable here. Each section of a statute must be considered in the context of the entire statutory scheme of which it is a part, and statutes relating to the same subject matter should be read and applied together so that the legislature's intention can be gathered from the whole of the enactments. W. Va. Dept. of Health and Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Boley v. Miller, 187 W. Va. 242, 418 S.E.2d 352 (1992).

At the outset it should be noted that there is nothing in the language of Section 6 confining its reach to regular employees working under probationary contracts. Although the Court remarked in Bonnell that W. Va. Code § 18A-2-6 (1973), was clear and unambiguous, the Court was not confronted with any issue about whether the employees had worked the requisite number of years or whether their employment had been acceptable. In any event the phrase "three years of acceptable employment" is hardly a model of specificity. Neither the term "years" nor "acceptable employment" are defined.

In any event this case cannot be properly decided by simply applying Section 6 to the facts of this case. Rather the statutory provision that prescribes the rights of substitute service employees must be read together with Section 6 to ascertain the intent of the Legislature. The last two paragraphs in W. Va. Code § 18A-4-15, are significant here;

> Before any substitute service employee enters upon his duties, he shall execute with the county board of education a written contract as provided in section five [§ 18A-2-5], article two of this chapter. (See footnote 6)

> Substitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel in sections six, seven, eight and eight-a [§§ 18A-2-6, 18A-2-7, 18A-2-8, 18A-2-8a], article two of this chapter. [Emphasis added.]

In this case Grievant worked more than thirty days as a substitute service employee during the 1992-93 school year. He thus acquired, under the express language of W. Va. Code § 18A-4-15, the same rights to contract renewal as a regular service employee, which would include a probationary service employee who has not yet acquired continuing contract status or tenure. It is therefore concluded that Section 15 imposes a duty on county boards of education to consider the work of a substitute service employee in determining whether the employee is entitled to a continuing contract under W. Va. Code § 18A-2-6, where the substitute employee has worked thirty days or more during a particular school year. Otherwise, substitute service personnel would not have the same rights in regard to contract renewal as regular service personnel, as mandated by Section 15. Furthermore, the express reference to W. Va. Code 18A-2-6 in Section 15 must be given some meaning.

In this case the SCBE should have considered the grievant's regular and substitute employment

during the 1992-93 school year. This is not to say, however, that substitute employment for thirty days during a particular school year necessarily entitles the employee to a year of acceptable employment for purposes of obtaining a continuing contract under W. Va. Code § 18A-2-6. In other words, a county board of education is not required by law to give a service personnel employee a year of credit for purposes of tenure under Section 6, simply because the employee worked thirty days as a substitute during a particular school year. (See footnote 7)

Hence, the SCBE was under a duty to consider Grievant's substitute employment during the 1992-93 school year in determining whether he had three years of acceptable employment and wastherefore entitled to a continuing contract for the 1994-95 school year. The SCBE policy arguments cannot override the language of W. Va. Code § 18A-2-6 and the command of Section 15. (See footnote 8)

The SCBE does not argue that Grievant's actual job performance was not acceptable nor does it appear to dispute that if Grievant's substitute and regular employment were combined during the 1992-93 school year he would have worked a sufficient number of days (157) to obtain a year of acceptable employment. It is not appropriate in this case to attempt to delineate the number of days an employee must work during a school year to qualify as a year of employment for purposes of obtaining a continuing contract under W. Va. Code § 18A-2-6.

In view of all the facts and circumstances, the undersigned administrative law judge reaches the following conclusions of law.

Conclusions of Law

1. If a substitute service employee works thirty days or more during a particular school year, W. Va. Code § 18A-4-15 imposes a duty on county boards of education to consider the service employee's substitute work for purposes of determining whether the employee is entitled to credit for a year of"acceptable employment" toward satisfying the requirements for obtaining a continuing contract under W. Va. Code § 18A-2-6.

2. The SCBE violated W. Va. Code § 18A-4-15 by not considering Grievant's substitute service personnel work during the 1992-93 school year, along with his regular employment that school term, for purposes of determining whether he was entitled to a continuing contract for the 1994-95 school year under W. Va. Code § 18A-2-6.

3. Given the facts and circumstances of this case, it is concluded that the SCBE violated W. Va. Code § 18A-2-6, by failing to give the grievant a continuing contract of employment for the 1994-95 school year.

Accordingly, this Grievance is hereby **GRANTED**, and the SCBE is **ORDERED** to provide Grievant with a continuing employment contract beginning with the 1994-95 school year, to modify his seniority appropriately, and to afford him any other employee benefit he is entitled to by law.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Summers 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 not 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 theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

RONALD WRIGHT

Administrative Law Judge

Dated: April 3, 1995

Footnote: 1 The grievance was denied at Level Two by decision dated September 8, 1994, and Grievant apparently bypassed Level Three by appealing directly to Level Four as permitted by W. Va. Code § 18-29-4(c). This case would have become mature for decision on January 6, 1995, upon receipt of proposed findings of fact and conclusions of law filed by counsel for both parties, but the undersigned was not provided a copy of the Level Two transcript and exhibits until March 23, 1995.

Footnote: 2 W. Va. Code § 18A-2-6 further provides that the continuing contract shall remain in effect and cannot be unilaterally terminated, unless a majority of the full membership of the board votes to terminate the continuing contract and gives written notice of the proposed termination by April 1 of the then current school year. The notice must state the cause or causes for terminating the continuing contract and the affected employee must be afforded the opportunity for a hearing before the final action is taken to terminate the contract.

Footnote: 3 Contrary to Grievant's argument, W. Va. Code, § 18A-2-6, clearly and unambiguously applies only to service personnel employees.

Footnote: 4 The SCBE does not elaborate on this assertion. W. Va. Code § 18A-2-2, which governs the issuance of

continuing contracts for teachers, provides that if after three years of employment the county board and the employee enter into a new employment contract, it shall be a continuing contract.

Footnote: 5 The undersigned will not, however, ignore the reasoning of the decision to the extent that it may be relevant. In Harkins, the Court was influenced by a State Superintendent of Schools' decision stating that teaching for more than 133 days in a school year had often been used to determine whether a teacher had earned tenure. The Court also stressed that the substitute teacher had worked on a substantially full time basis in three prior school years: 147 days, 177 days and 200 days.

Footnote: 6 This statutory form contract must also executed by all regular service personnel, whether they be probationary or have a continuing contract of employment, before they enter upon their duties. W. Va. Code § 18A-2-5 ¶ 3.

Footnote: 7 The conclusion that the grievant's substitute employment of thirty days or more cannot be ignored for continuing contract purposes is not inconsistent with Miller v. Wood County Bd. of Educ., Docket No. 54-86-298-3 (May 13, 1987), in which the grievance was granted. There, it was determined that the grievant, an aide, was entitled to a continuing contract for regular service personnel at the beginning of the 1986-87 school term based, in part, upon her working full-time during one prior year in a substitute assignment for which she was entitled to regular employee status under W. Va. Code § 18A-4-15(2). In this case the complete circumstances surrounding the grievant's substitute employment during the 1992-93 school year are not revealed by the record. The record only reveals that the grievant worked for sixty-four days in the place of a Mr. John Phelps at Hinton High School as a custodian, and immediately thereafter secured regular employment as a custodian at the same high school. Tr. at Level Two, p. 5.

Footnote: 8 The holding in this case does not violate the prohibition in W. Va Code § 18A-4-8g ¶10 [1993], against combining for any purpose seniority acquired as a substitute with seniority acquired as a regular service employee. Here, seniority is not being combined. Rather, all days worked, during a particular school year, are counted (if the substitute service employee worked at least thirty days) to determine whether the employee is entitled to credit for a year of acceptable employment under Section 6.