PAULA TAYLOR HURLEY, .

Grievant, .

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v. .

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MINGO COUNTY BOARD OF EDUCATION, . Docket Number: 95-29-211

Respondent, .

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and .

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PAMELA VARNEY, BETTY SAMMONS .

and TUANIA HALE, .

Intervenors. .

D E C I S I O N

Paula Taylor Hurley (hereinafter Grievant) filed this grievance pursuant to West Virginia Code §§18-29-1, et seq., in late April or early May 1995, alleging that the Mingo County Board of Education (hereinafter Board) violated W. Va. Code §18A-4-8b when it decided to lay her off at the end of the 1994-1995 school year. Grievant initiated her claim at level two of the grievance procedure and a hearing was held on May 3, 1995. Grievant received a decision from Superintendent Everett Conn denying her claim on May 17, 1995. She elected to waive level three pursuant to Code §18-29-4, and appeal to level four was made on May 24, 1995. An evidentiary hearing was held at the Grievance Board's office inCharleston, West Virginia, on July 20, 1995, and the case became mature for decision upon receipt of the briefs from the various parties.

Position of the Parties

Grievant asserts that she should not have been laid off by the Board as a result of its attempt to reduce its secretarial work force. She contends she has more regular employment seniority in the classification of secretary than either Ms. Varney or Ms. Sammons who were both retained for the 1995-1996 school year; therefore, she maintains that the Board violated Code §18A-4-8b when it voted to lay her off. The Board denies that Grievant has more secretarial seniority than either Ms. Varney or Ms. Sammons, and both intervenors contend likewise. Ms. Hale, who was also laid off by the Board, avers that she has more seniority than any of the other three employees; therefore, she argues that she should have been retained. Ms. Hale also seeks reinstatement to the position of secretary for the 1995-1996 school year.

Discussion

Before addressing Grievant's claim, it is necessary to rule on Ms. Hale's legal position and request for relief. Ms. Varney, Ms. Sammons and Ms. Hale each intervened in this case at level two pursuant to their right under W. Va. Code §18-29-3, which states as follows:

> Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties.

Ms. Hale's position that she is more senior than any of the other three employees, and therefore, she should be reinstated to regular employment, is not consistent with her status in this action. As an intervenor, Ms. Hale may only attempt to protect the rights she held at the time of the filing of the grievance. At that time, her only recognized rights would be related to her recall to employment pursuant to Code §18A-4-8b. An intervenor may only defend against an action brought by a grievant who is asserting rights in opposition to him or her. Intervention may be used as a "shield" to defend against a claim but not as a "sword" to achieve a remedy which could only result from the filing of a separate grievance. An intervenor may not raise new issues in a grievance or broaden the scope of the claim. An intervenor may not raise new issues or pursue issues not raised directly by the complainant. See, Brennen v. United Steelworkers of America, AFL-CIO-CLC, 501 F.Supp 912 (D.C. Pa.) , aff'd in part, rev'd in part on other grds., 666 F2d 845, cert denied, 103 S.Ct. 52, 459 U.S. 823,

74 L.Ed.2d 58. Ms. Hale's request for relief is not cognizable in the instant case.

In addressing the merits of Grievant's claim, W. Va. Code §18A-4-8b, states, in pertinent part,

> All decisions by county boards of education concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided.
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> The seniority of any such personnel shall be determined on the basis of the length in time the employee has been employed by the county board of education within a particular job classification.
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> . . .
>
> Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount ofseniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a vacancy . . . (Emphasis added).

Further, with regard to determining the seniority of service personnel, W. Va. Code §18A-4-8g states as follows:

> Seniority accumulation for regular school service employees shall begin on the date such employees enters upon regular employment duties pursuant to a contract as provided in section five [§ 18A-2-5], article two of this chapter and shall continue until the employee's employment as a regular employee is severed with the county board of education. . . . Seniority accumulation for substitute employees shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen [§ 18A-4-15], article four of this chapter, after executing with the board a contract of employment as provided in section five, article two of this chapter. The seniority of a substitute employee, once established, shall continue until such employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter or employment as a substitute with the county board is severed. Seniority of a regular or substitute employee shall continue to accumulate except during the time when an employee is willfully absent from employment duties because of a concerted work stoppage or strike or is suspended without pay.
>
> For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-a [§ 18A-4-8e] of this article: Provided, That when implementing a reduction in force, an employee with the least seniority within a particular classification category shall be properly released and placed on the preferred recall list. The particular classification title shall not be taken into consideration when implementing a reduction in force.

This Code section further recognizes that substitute employees may acquire regular employment seniority and status if they receive an assignment to a regular employment position pursuant to W. Va. Code§18A-4-15, subsections (2) and (5). (See footnote 1) Finally, 8g speaks to the seniority of those employees who are multi-classified, in the following manner:

> School service personnel who hold multi-classification titles shall accrue seniority in each classification category of employment which said employee holds and shall be considered an employee of each classification category contained within his multi-classification title. Multi-classified employees shall be subject to reduction in force in any category of employment contained within their multi-classification title based upon the seniority accumulated within said category of employment: . . .

Based upon Grievant having signed a probationary contract of employment in or around October of the 1994-1995 school year, it is determined that she was a regular employee holding the classification of secretary when she was laid off pursuant to the Board's reduction in force at the end of that school term. The record also establishes that Grievant worked for forty days as a "long-term substitute" during the 1993-1994 school year, after having received that assignment through the posting and bidding provisions of W. Va. Code §18A-4-8b. Also, during the 1991-1992 school year, Grievant has been credited with regular employment seniority for a period of time she spend substituting in a position vacated by a regular employee who had been injured on the job. (See footnote 2) Overall, Grievant has at least sixteen months of regular employment seniority in the classification of secretary.

Both Ms. Varney and Ms. Sammons currently work in the Board's central office. They were each given the classification title of secretary as a result of the Board's review of their job duties and its subsequent decision to reclassify them effective September 1, 1994. Ms. Sammons contends that she has one complete year's seniority. Ms. Varney contends that she has more than one year's worth (greater than 260 days) of seniority because she had previously worked in a regular secretarial position between November 16, 1986, and the end of the 1987 school year, prior to being removed from that position as a result of a grievance decision. In any event, both Intervenors contend that they have greater seniority than Grievant because her seniority came as a result of various months spent in separate positions during separate years. (See footnote 3)

Intervenors assert that Grievant's seniority is only nine months, which is representative of the time

she spent at Red Jacket Elementary School during the 1994-1995 school term. They maintain that the rest of her seniority may not be "recaptured" and added to this seniority as her employment in each of her various assignments was severed at the end of those assignments. They argue that the law relating to seniority for school service does not allow for the "recapturing" of seniority as opposed to the statutory framework for professional personnel. (See footnote 4) They rely upon the following language of 8g which was already reproduced above:

> Seniority accumulation for a regular school service employee shall begin on the date such employee enters upon regular employment duties pursuant to a contract as provided in section five [§ 18A-2-5], article two of this chapter and shall continue until the employee's employment as a regular employee is severed with the county board of education. . . . [Emphasis added].

The Board seems content in relying upon this argument as well.

This case revolves around an interpretation and application of Code §18A-4-8g. Our West Virginia Supreme Court has held that

> It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.

Pristavec v. Westfield Ins. Co., 400 S.E.2d 575 (W.Va. 1990), citing Syl. Pt. 2, Click v. Click, 98 W.Va. 419, 127 S.E.2d 194 (1925). Intervenors are attempting to characterize Grievant's employment history, in relationship to the provisions of 8g, in amanner deemed inconsistent with the perceived legislative intent behind the language.

The first sentence of 8g is simply interpreted to mean that a regular employee accumulates seniority while he or she remains employed by a board of education, and that the employee's seniority continues to accumulate until that person's employment is willfully discontinued by the employee of for cause by the Board. As a long-term substitute, Grievant has been in a position to receive regular employee status and seniority; it cannot be concluded that Grievant's employment during these times has been severed.

Further, nothing within 8g can be interpreted to stand for the proposition that Grievant's total, regular seniority may not be the product of an accumulation of her seniority for the relevant periods. Just the opposite should be the case as the words "accumulation" and "continue" are used

extensively in 8g. And, while it is clear that a substitute employee may not accumulate both substitute and regular employee seniority at the same time, there is no prohibition in 8g to combining one's seniority over a period of time to reflect his or her overall seniority. In fact, the last sentence of 8g states that both forms of seniority continue to accumulate until the employee takes part in a strike or is suspended with pay. It can be inferred from this provision that other reasons for one's discontinuance in a position, such as another assignment for a substitute employee, should not operate to cause an employee's accumulation of seniority in the appropriatestatus to cease. Any interpretation to the contrary would lead to an absurd and unjust result.

It is accepted that Grievant has, at the least, sixteen and one-half months of regular employment seniority within the classification of secretary. Therefore, this seniority must be contrasted to that held by Ms. Varney and Ms. Sammons. Grievant's seniority is greater than that of Ms. Sammons; therefore, she should not have been laid off while Ms. Sammons was retained. The question becomes whether Ms. Varney has more seniority than Ms. Sammons by virtue of the fact that she had worked in a regular position approximately seven months during the 1986-1987 school year, but was removed from that position based upon a grievance decision. The Board has not credited her with this regular seniority and contends that it has erred. If it has not erred, then both Ms. Varney and Ms. Sammons would have the same seniority and a random selection system would need to be utilized by the Board to determine which employee to retain.

As recognized, the seniority of a regular employee begins to accumulate from the date that employee enters into the duties of a regular position. Ms. Varney entered into the duties of a regular, secretarial position on or about November 18, 1986, and continued in this position until the end of the school year when, due to no fault of her own, she was removed. She should not be penalized by having her employment records not reflect that she gained experience and spent time within this position, regardless of the fact that she was removed pursuant to an order from this GrievanceBoard in another grievance. To an extent, seniority is simply a numerical reflection of time spent which represents the experience that an employee has gained through working in a position or classification. It would be inequitable not to grant Ms. Varney credit for this experience earned, and further, there is no statutory requirement that such must be the case. It is determined that Ms. Varney has approximately fifteen and one-half months of regular employment seniority in the secretary classification. Therefore, she should be retained and Ms. Sammons must be the individual placed

upon the preferred recall list pursuant to the reduction in force at the end of the 1994-1995 school year.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. At the time of the reduction in force in question, Grievant was a regular employee of the Mingo County Board of Education.

2. Grievant has gained regular employment seniority based upon being assigned to various regular, full-time positions as a long-term substitute, during the 1991-1992 and 1993-1994 school years. Grievant was also employed as a probationary, regular employee between the period from October 10, 1994 through the end of the 1995-1995 school year.

3. Intervenor Varney has earned regular employment seniority in the classification of secretary for the time periods of November16, 1986 to the end of the 1987-1987 school year, and for the period from September 1, 1994 to the present.

4. Intervenor Sammons has earned regular employment seniority in the classification of secretary for the period of September 1, 1994 to the present.

5. Grievant has greater regular employment seniority in the classification of secretary than Ms. Sammons.

6. Ms. Varney has greater regular employment seniority in the classification of secretary than Ms. Sammons.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant's regular employment seniority in the classification of secretary shall be based upon an accumulation of the days she has worked within that classification, beginning with the 1991-1992 school year. W. Va. Code §18A-4-8g.

2. Intervenor Varney's regular employment seniority for the classification of secretary shall be inclusive of the days she worked within that classification during the 1986-1987 school year. W. Va.

Code §18A-4-8g.

3. Grievant has established by a preponderance of the evidence that the Mingo County Board of Education has misinterpreted and misapplied W. Va. Code §18A-4-8g.

4. Grievant has established by a preponderance of the evidence that the Mingo County Board of Education violated W. Va. Code §18A-4-8a when it laid her off at the end of the 1994-1995school year because she was not the employee with the least amount of regular employment seniority within the classification of secretary.

Therefore, this grievance is hereby **GRANTED**. The Mingo County Board of Education is hereby **ORDERED** to remove Grievant from the status of preferred recall and to instate her into the secretarial position she should have been assigned at the end of the 1994-1995 school year had the Board properly credited her with the proper seniority she has earned pursuant to the discussion herein. The Board is then required to take whatever action is necessary to ensure that both Ms. Varney and Ms. Sammons are afforded their rights under W. Va. Code §18A-4-8b. Grievant is entitled to all back pay and benefits she would have received had she not been laid off, less any appropriate set-off or deductions.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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 nor 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 the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

September 28, 1995

Footnote: 1These two subsections provide that "long term substitutes" may, under certain circumstances, receive the "rights, privileges and benefits" of regular employment if the regular employee has been absent from the position for

greater than thirty days.

Footnote: 2In Davis v. Mingo Co. Bd. of Educ., Docket No. 94-19-1082 (Jun. 29, 1995), Grievant intervened in an attempt to retain the position she was awarded at Red Jacket Elementary in October 1994. Ms. Davis argued that she had greater and more appropriateseniority than Grievant for the position in question; therefore, Grievant's seniority was at issue. In Davis, it was found that Grievant had five months and twenty-five days of regular employment seniority for the 1991-1992 school year. The testimony in this case appears to contradict this ruling; however, based upon the conclusions in this case, it is not necessary to revisit this finding.

Footnote: 3Intervenors cite to an April 24, 1995 opinion of the State Superintendent of Schools in support of this position. Based upon a review of this opinion, it is determined that Mr. Marockie's answer to the question posed to him by the Assistant Superintendent of Schools of Raleigh County is not directly on point. Therefore, no discussion is needed as to whether this opinion is binding on the legal issue in this case or is clearly wrong.

Footnote: 4See, W. Va. Code §18A-4-7b.