**DAWN LEMASTER,**

**Grievant,**

**v.** **DOCKET NO. 05-40-169**

**PUTNAM COUNTY BOARD**

**OF EDUCATION,**

**Respondent.**

## DECISION

Grievant filed two separate grievances on May 20, 2005, and on June 28, 2005, challenging a suspension for insubordination and neglect of duty, followed by Respondent's later termination of Grievant's employment. At level four, the grievances were consolidated and the parties agreed to submit the matter on the record developed below, with stipulations.

Grievant was represented by counsel, Jason A. Poling of Tyson & Tyson, and Respondent was represented by counsel, Gregory W. Bailey of Bowles Rice McDavid Graff & Love, LLP. The matter matured for decision on October 21, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

## Issues and Arguments

The parties have agreed that the above-styled grievance may be submitted upon a stipulation of issues and fact. The stipulations reached by the parties are as follows:

> In lieu of a Level IV evidentiary hearing, the parties have agreed to submit the above-styled consolidated grievance upon the stipulation of issues and related facts. The parties agree and stipulate that the merits of this case turn upon the question of whether the Grievant is able to assert and establish that she held continuing contract status at the time of the Respondent's determination that her contract not be renewed or whether the Grievant was a probationary employee at the time her contract was not renewed. The parties further agree and stipulate that the resolution of this issue and any related issues will determine the outcome of the grievance. The Grievant agrees and stipulates that if she is unable to assert and establish continuing contract status, the Respondent made a sufficient showing in support of thenon-renewal of her contract and that she has no claim to continuing employment with Respondent. Respondent agrees and stipulates that if the Grievant is able to assert and establish continuing contract status, it improperly observed the procedures relating to the non-renewal of probationary employee contracts and that the Grievant be permitted to return to her position with back pay, benefits and seniority restored.

In addition to the stipulation of issues cited above, the parties further agree and stipulate that this decision should be based on the following facts, listed verbatim from the stipulation:

## Findings of Fact

1. Grievant was employed by the Respondent as a substitute bus operator on August 20, 1985.

2. Grievant was re-employed as a substitute bus operator for the 1986-87 school year.

3. Grievant was re-employed as a substitute bus operator for the 1987-88 school year.

4. Grievant was employed as a .5 bus operator effective August 26, 1987.

5. Grievant was re-employed under a probationary contract for the 1988-89 school year.

6. The Grievant resigned her employment with Respondent, effective March 7, 1989.

7. Grievant was employed as a substitute bus operator from September 1, 1998, through August 20, 2002.

8. Grievant was employed as a .5 bus operator under a probationary contract, effective August 21, 2002. 9. Grievant was re-employed as a .5 bus operator under a probationary contract for the 2003-2004 school year.

10. Grievant was re-employed as a .5 bus operator under a probationary contract for the 2004-2005 school year. The Grievant executed a service personnel probationary employment contract dated May 4, 2004 [previously submitted].

11. During a meeting conducted on May 2, 2005, Respondent approved a rehire list of probationary employees that did not include the Grievant. The Grievant was notified of the non-renewal of her contract by letter dated May 5, 2005. Grievant requested a statement of reasons for the non-renewals of her contract in a letter that was submitted on her behalf that was dated May 11, 2005.

12. Reasons for non-renewals were provided by letters dated May 13, 2005, May 24, 2005, and May 25, 2005.

13. A hearing upon the non-renewal of Grievant's employment contract and upon the Grievant's suspension without pay was conducted by the Respondent on June 21, 2005. Following the hearing, the Putnam County Board of Education voted to approve the suspension without pay of

the Grievant and voted that her contract not be renewed.

**Discussion**

The parties stipulate that the question of whether the Grievant held continuing contract status at the time of the termination (or non-renewal) is the determinant factor in the outcome of the case. The assertion by Grievant that she was not a probationary employee is an affirmative defense to the non-renewal action taken by Respondent, on which she bears the burden of proof. An affirmative defense is one that, "assuming the complaint to be true, constitutes a defense to it." (See footnote 2) "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." (See footnote 3)

However, part of the parties' stipulation is that Grievant must be able to "assert and establish that she held continuing contract status." Respondent argues that Grievant is now unable to so assert because she is not timely in doing so. This assertion is itself an affirmative defense to Grievant's claim, and the Grievance Board has determined that "[t]imeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. (See footnote 4) The issue might be dispositive of the entire grievance, because "[i]f proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed." (See footnote 5) This issue will therefore be addressed first. Respondent avers that the prior Grievance Board case of *Lilly v. Summers County Board of Education* (See footnote 6) is controlling and dispositive. In that case, the grievant did not protest the issuance of a second "3rd Probationary Contract of Employment" through the grievance procedure until more than fifteen days after it was issued, and only did so when she was much later notified the contract would not be renewed. Those facts parallel the facts in this matter as an almost complete analog, and Respondent contends the present grievance is similarly time-barred.

This argument, however, ignores the later Grievance Board decision in *Byrd v. Kanawha County Board of Education*, (See footnote 7) wherein it was determined that, in a service employee's fourth year of acceptable employment, a continuing contract is created as a matter of law regardless of the explicit title of the contract entered into by the parties.

> The West Virginia Supreme Court of Appeals has found, however, that the work performed by an employee for a county board of education can be the basis for an implied contract. In *Bonnell v. Carr*, 170 W. Va. 493, 294 S.E.2d 910 (1982), the court stated, "Under W. Va. Code, 18A-2-6 (1973),a continuing contract of employment shall

> be granted to auxiliary and service personnel 'after three years of acceptable employment.' While W. Va. Code, 18A-2-4 (1969), authorizes the employment of auxiliary personnel by 'a written contract which may be in letter form,' we do not believe that a written contract is essential in all instances once an employee completes three years of acceptable service and is reemployed by the board." In other words, if the employer fails to grant continuing contract status to an employee, the law operates to create a continuing contract once the employer has employed a worker in a given position for three years, and accepts that employee again for the fourth year. (See footnote 8)

The effect of this determination is to eliminate the need for a grievant to file a grievance challenging a contract that should not have been probationary in order to have a continuing contract. If Grievant in this case completed three years of acceptable employment, then in her fourth and subsequent years she was working under a continuing contract regardless of whether Respondent offered her a probationary contract and regardless of whether she timely challenged that contract. This makes the timeliness argument moot.

Respondent also contends Grievant never accumulated that requisite three years of acceptable employment, so she was not entitled to a continuing contract. This presents a novel issue to the Grievance Board. According to Respondent's argument, Grievant's voluntary resignation in 1989 broke the chain of service credit accumulation, and a new three-year probationary period began when she was re-employed in 1998. The 2004-2005 school year would then have been the third year of Grievant's employment, and Grievant was not entitled to continuing contract status that year despite any prior service between her initial hiring in 1985 and her resignation in 1989.

The entitlement to a continuing contract is created by West Virginia Code § 18A-2-6, which provides in part, "After 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[.]" Respondent argues that "service credit" for purposes of this section is equivalent to "seniority." A service employee's seniority rights relevant to a particular classification begin when the employee enters into his or her assigned duties. "The seniority of any such service personnel shall be determined on the basis of the lengthof time the employee has been employed by the county board of education within a particular job classification." W. Va. Code § 18A-4-8b. In comparing those seniority rights with those of professional personnel, the Supreme Court of Appeals of West Virginia determined that service personnel have no right to seniority credit for time worked prior to a voluntary break in employment. *Hazelwood v. Mercer Co. Bd. of Educ.,* 200 W. Va. 205, 488 S.E.2d. 480

(1997), citing *Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 425 S.E.2d 111 (1992). *See also Chapman v. Webster County Bd. of Educ.*, Docket No. 92-51-349 (1993).

The conundrum of whether the legislature intended service credit to survive an intervening, voluntary separation from employment must be resolved in light of the directive that "'[s]chool personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." Syl. Pt. 1, *Cruciotti v. McNeel,* 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.,* 197 W. Va. 176; 475 S.E.2d 176 (1996). Respondent's argument recognizes that there is no explicit treatment of service credit as being the same as seniority rights, but attempts to resolve the matter in favor of the employer. West Virginia Code section 18A-2-6 makes no mention of the term "seniority," instead referring to "acceptable employment." In W. Va. Code § 18A-4-8b, "Seniority Rights," there is no mention of continuing contract status being related to or dependent on seniority. In both cases, it is a conspicuous absence. Although neither statute by itself is particularly unclear, the difference or relationship between them is open to interpretation. "'In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusioalterius*, the express mention of one thing implies the exclusion of another, applies.' Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984)." *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 27, 488 S.E.2d 20, 27 (1997). Therefore, it must be assumed that if the legislature had intended continuing contract status to be dependent on seniority, it would have said so directly, rather than using the phrase "years of acceptable employment."

Nevertheless, the reasoning the court uses to find a waiver of prior employment rights upon an employee's voluntary resignation, also applies to the rights conferred by W. Va. Code § 18A-2-6. In *Triggs, supra*, the Court found that for professional personnel, "the termination of a teacher's employment ends the continuing contract and upon reemployment the teacher must again serve a successful probationary period before being granted a continuing contract." In *Hall v. Bd. of Educ. of the County of Mingo* the Court reached the same conclusion with respect to seniority rights of service personnel: "Pursuant to W. Va. Code § 18A-4-8g(a) (2000) (Supp. 2000), seniority for a regular school service employee continues until the employee's regular employment with the county board is severed." (See footnote 9) In that case, the Court was not asked to determine whether school service personnel who resign, but are subsequently rehired by a county board of education, retain prior

seniority. However, the decision does note the *Triggs* and *Hazelwood* decisions, and finds them persuasive.

These determinations were made based largely on the absence of any legislative inclusion to the contrary. In attempting to divine the legislative intent, the Court reasonedthat the legislature would not have added in a provision (for professional employees) allowing them to retain certain tenure-based rights upon reemployment, if it did not assume those rights would be lost otherwise. The decision in *Hazelwood* was applied to prohibit the resurrection of credit for summer service in *McClung v. Board of Education of the County of Nicholas*, 213 W. Va. 606, 584 S.E.2d 240 (2003). In *McClung*, a fully tenured employee with many years of prior service voluntarily resigned from his position as a bus operator, was reemployed as a substitute bus operator, and sought to resurrect his tenure as summer employee for purposes of retaining a summer assignment that continued to exist. The Court determined that the voluntary resignation of the employee extinguished any claim he had rights to that had been acquired as a regular employee. He was, therefore, not entitled to his right to priority in filling summer positions.

If a fully tenured employee loses all “seniority credit” or rights associated with longevity, as considered by the Court in *McClung,* upon voluntary resignation, it would be incongruous to conclude that a probationary employee who voluntarily resigns has a greater right to resurrect prior service credit upon re-employment. By resigning her employment with Respondent, effective March 7, 1989, the rights Grievant had that were based upon the longevity in her previous employment were lost. When she again obtained employment with the Respondent, she did so without retaining any rights she may have acquired by virtue of her previous employment. Therefore, the 2004-2005 school year was properly regarded by the Respondent as the third year of Grievant's probationary contract.

According to the stipulation of the parties, “The Grievant agrees and stipulates that if she is unable to assert and establish continuing contract status, the Respondent made a sufficient showing in support of the non-renewal of her contract and that she has no claimto continuing employment with Respondent.” As discussed above, Grievant did not have continuing contract status at the time Respondent decided not to renew her contract, and she therefore waives any claim to continued employment.

The following conclusions of law support this discussion:

**Conclusions of Law**

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). When a probationary employee is terminated on grounds of unsatisfactory performance, rather than misconduct, the termination is not disciplinary, and the burden of proof is upon the employee to establish that his services were satisfactory. *Bonnell v. W. Va. Dep't of Corrections*, Docket No. 89-CORR-163 (Mar. 8, 1990).

2. An affirmative defense is one that, "assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary 55 (5th ed. 1979). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." 156 C.S.R. 1 § 4.21.

3. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ.*, Docket No. 97- 42-140 (Feb. 28, 1998. If proven, an untimely filing will defeat a grievance, in which casethe merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

4. In a service employee's fourth year of acceptable employment, a continuing contract is created as a matter of law regardless of the explicit title of the contract entered into by the parties. *Byrd v. Kanawha County Board of Education* Docket No. 02-20-376 (Jan. 28, 2003).

4. The timeliness issue in this matter is moot, given that a grievant need not assert continuing contract status in a grievance in order for it to apply to the grievant's employment.

5. Service personnel have no right to seniority credit for time worked prior to a voluntary break in employment. *Hazelwood v. Mercer County Bd. of Educ.,* 200 W. Va. 205, 488 S.E.2d. 480 (1997), citing *Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 425 S.E.2d 111 (1992). *See also Chapman v. Webster County Bd. of Educ.*, Docket No. 92-51-349 (1993).

6. "'School personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." Syl. Pt. 1, *Cruciotti v. McNeel,* 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.,* 197 W. Va. 176; 475 S.E.2d 176, (1996).

7. "'In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.' Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984)." *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 27, 488 S.E.2d 20, 27 (1997). 8. "Pursuant to W. Va. Code § 18A-4-8g(a) (2000) (Supp. 2000), seniority for a regular school service employee continues until the employee's regular employment with the county board is severed." *Hall v. Bd. of Educ. of the County of Mingo,* 208 W. Va. 534; 541 S.E.2d 624 (2000).

9. Prior summer service credit is extinguished upon voluntary resignation. *See McClung v. Bd. of Educ. of the County of Nicholas*, 213 W. Va. 606, 584 S.E.2d 240 (2003).

10. When service personnel resign, and employment time previously applicable to eligibility for continuing contract status is lost, the employee must complete a new probationary period upon reemployment.

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 Putnam County. Any such appeal must be filed within thirty 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 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**November 4, 2005**

_____

**M. Paul Marteney**

**Administrative Law Judge**

---

Footnote: 1

*No proposals were received from Grievant's counsel.*

---

Footnote: 2

*Black's Law Dictionary 55 (5th ed. 1979).*

---

Footnote: 3

*156 C.S.R. 1 § 4.21.*

---

Footnote: 4

*Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 28, 1998).*

---

Footnote: 5

*Lynch v. W. Va. Dep't of Transp., Docket No. 97-DOH-060 (July 16, 1997).*

---

Footnote: 6

*Docket No. 93-45-399 (June 16, 1994).*

---

Footnote: 7

*Docket No. 02-20-376 (Jan. 28, 2003).*

---

Footnote: 8

*Id.*

---

Footnote: 9

*208 W. Va. 534; 541 S.E.2d 624(2000).*