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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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THOMAS HARK

v.

Docket No. 20-86-225-1

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Thomas Hark, is employed by the Kanawha County Board of Education as a teacher at East Bank Junior High School. He alleges that he was initially employed by Kanawha County Schools in 1965 and remained employed until the end of the 1970 school year, at which time he resigned. He was reemployed on August 24, 1971 until September 13, 1971, when he again resigned; he was reemployed on August 27, 1973, until the present. On June 2, 1986 he requested a calculation of his seniority and was advised that he had twelve years seniority and seventeen years seniority for pay purposes.¹ This calculation was

¹ This was calculated on the latest date of employment, i.e., August 27, 1973, which was added to the five previous years from 1965 to 1970 for pay purposes only.

Kanawha County Schools makes decisions as to filling of vacancies, transfer, reduction in force and recall on seniority calculated from the most recent date of employment.

predicated upon Kanawha County Board of Education Administration Regulations Nos. IV-H-5 and IV-H-13.

On June 20, 1986 grievant filed a grievance requesting that the records be corrected to reflect the seventeen years of seniority on the basis of Code, 18A-4-8b and Kanawha County Schools refused to process the grievance.² On July 14, 1986 grievant requested a level four hearing and on August 21, 1986 a hearing was conducted on the motion of the board of education to dismiss the grievance; the motion to dismiss was denied on August 27, 1983.³

Code, 18A-4-8b defines seniority for professional personnel as follows:

"The seniority of professional personnel shall be determined on the basis of the length of time the employee has been professionally employed by the county board of education..." (Emphasis added).

² By letter dated July 11, 1986 grievant was advised that he had not been affected by any application of the "most recent date of hire" practice and was therefore seeking an advisory opinion, which was not an appropriate use of the grievance procedure.

³ Findings of fact and conclusions of law were submitted by the parties on October 17 and October 20. The facts are not in dispute and the question appears to be solely one of law, i.e., Code, 18A-4-8b.

The position of the board of education is that the above underscored portion of Code, 18A-4-8b relates to the then current term of employment and that terminations for cause and resignations operate to extinguish any accrued seniority; that this position is consistent with the interpretations of the State Superintendent of Schools under the authority of Code, 18-3-6 and that these interpretations are entitled to great weight.⁴

Grievant contends that Code, 18A-4-8b is clear and unambiguous and requires the board of education to calculate seniority based upon the date of initial employment as a professional employee; that the interpretation utilized by Kanawha County via the policies is a misinterpretation of Code, 18A-4-8b cognizable under Code, 18-29-2. Grievant contends further that Code, 18A-4-8b is to be strictly construed in favor of the grievant and cites a decision of the Circuit Court of Wayne County in the case of Gilkerson et al. v. Wayne County Board of Education,

⁴ In several interpretations the State Superintendent has opined that resignation and disciplinary dismissal extinguishes the seniority previously earned but that regulatory dismissal (i.e., RIF per Code, 18A-2-2 or 18A-2-8a) does not dissolve seniority. The rationale is that "resign" is defined as a relinquishment of one's office or position and that once an employee's resignation is accepted the employee is not eligible for reinstatement but must submit a new application for employment.

in support of his position.⁵ Accordingly, grievant requests that his records be corrected so as to reflect eighteen years of seniority credit for the full period of his professional employment with Kanawha County Schools, effective the close of the 1985-86 school year.

In addition to the foregoing factual recitation the following specific findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant is employed by the Kanawha County Board of Education as a teacher at East Bank Junior High School.

2. Grievant was initially employed by Kanawha County Schools in 1965 and remained so employed until the close of the 1970 school year, when he resigned.

⁵ In the Gilkerson case, which is analogous, the Circuit Court held that Code, 18A-4-8b was clear and unambiguous and required that seniority be computed from initial employment prior to resignation as well as years worked after reemployment; that the policy of the Wayne County Board of Education denying seniority credit for the full period of employment violated Code, 18A-4-8b. There two teachers had been removed from their assignments at Ceredo Elementary School and placed on an unassigned transfer list as the two employees with least seniority.

The Wayne County Board of Education petitioned the Supreme Court of Appeals for an appeal on February 20, 1986 and the petition was denied on April 1, 1986 by a 3-2 vote, Justices Neely and Brotherton voting to grant the appeal.

3. Grievant was reemployed by Kanawha County Schools on August 24, 1971 and resigned on September 13, 1971; he was reemployed on August 27, 1973 and has remained employed to the present.

4. Code, 18A-4-8b provides, in part, that the seniority of professional personnel is to be determined on the basis of the length of time the employee has been professionally employed by the county board of education. The State Superintendent of Schools has rendered several interpretative rulings that seniority relates to the current term of employment and that terminations for cause and resignations operate to extinguish accrued seniority.

5. Kanawha County Schools has adopted regulations incorporating the State Superintendent's interpretation of seniority as follows:

a. For transfer purposes a teacher's seniority is to be computed from the employee's most recent date of hire as a professional employee in the county. Seniority will not be broken by leaves of absence and absences due to layoff (RIF) but such time will not be counted toward computing seniority. Seniority will be broken upon dismissal for cause or resignation. (Regulation IV-H-5).

b. For the purposes of reducing the number of professional employees the seniority of a professional employee shall begin on the date of the employee's most recent employment as a professional employee in the county. Seniority will not be terminated by leaves of absence or by absences due to layoffs because of a reduction in force but the period of such absences shall not be included in the total length of time the employee has been employed for the purpose of determining seniority.

Dismissal for cause and resignation will terminate an employee's seniority and, if the employee is rehired, seniority will be determined on the basis of the date of such rehiring. (Regulation IV-H-13).

6. Grievant contends the policies of Kanawha County Schools denying seniority for all purposes for employment prior to his resignation is a violation, misapplication and misinterpretation of Code, 18A-4-8b.

CONCLUSIONS OF LAW

1. The pertinent provisions of Code, 18A-4-8b are not sufficiently clear to reveal whether previous terms of employment are to be considered in calculating seniority thereby authorizing an interpretation thereof by the State Superintendent of Schools (Code, 18-3-6).

2. The administrative interpretation placed upon Code, 18A-4-8b by the State Superintendent of Schools is considered as persuasive authority unless such interpretation is clearly erroneous. Smith v. Logan County Board of Education, 341 S.E. 2d 685 (W.Va. 1985).

3. Grievant has failed to demonstrate that the interpretation of the State Superintendent is clearly erroneous.

For the foregoing reasons the grievance is denied.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty days of receipt of this decision. (Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

A handwritten signature in cursive script, reading "Leo Catsonis", is written over a horizontal line.

LEO CATSONIS

Chief Hearing Examiner

Dated: _____

October 30, 1986