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BRENDA CHIDESTER

v.

DOCKET NO. 49-87-103-2

UPSHUR COUNTY BOARD OF EDUCATION

DECISION

Grievant, Brenda Chidester, was employed by the Upshur County Board of Education as an elementary teacher in July, 1970 and continued in that position until June 20, 1980 when she resigned. She resumed her teaching position in Upshur County on November 10, 1980 and has continuously served in that capacity to the present time. By letter dated March 19, 1987 Assistant Superintendent Richard G. Hoover advised Ms. Chidester that in order to achieve the mandated pupil-teacher ratio and to maintain sound fiscal policy she would be dismissed at the conclusion of the 1986-87 school term as part of a reduction in the work force.

Ms. Chidester subsequently filed a grievance in which she alleged her dismissal to be in violation of W.Va. Code, 18A-4-8b as the years 1970 through 1980 were not included in the calculation

of her seniority. The grievance was waived at levels one and two; following an evidentiary hearing conducted at level three the grievance was denied.

The grievant argues that the clear and unambiguous language of both W.Va. Code, 18A-4-8b and Upshur County Board of Education Policy Section IX.10 requires the award of split seniority and cites Circuit Court and Education Employees Grievance Board decisions in support of her position.¹

The respondent asserts that its actions were proper and in reliance upon the advice of the State Superintendent of Schools who directed that the board must adhere to an opinion dated August 28, 1985 which determined that resignation by a teacher dissolves seniority already earned even if the teacher later becomes re-employed by the same county board of education. The respondent argues that the Circuit Court decisions cited by the grievant were limited to particular factual situations and

¹In the matter of Hark v. Kanawha County Board of Education and Gilkerson v. Wayne County Board of Education the Circuit Courts determined that seniority is to include employment prior to a resignation. In Hark the Circuit Court reversed the administrative decision rendered by the Education Employees Grievance Board which had upheld a State Superintendent's interpretation. The West Virginia Supreme Court of Appeals refused a petition of appeal filed by the Wayne County Board of Education in the matter of Gilkerson. The Circuit Court decisions have since been applied by the Education Employees Grievance Board in the analogous case of West v. Wetzel County Board of Education, Docket No. 52-86-279-3.

as the West Virginia Supreme Court of Appeals has not ruled on this issue, the remaining fifty-three counties are compelled to follow the the State Superintendent's interpretation until reversed by an Attorney General's opinion or by a court of competent jurisdiction.

In addition to the foregoing it is appropriate to make the specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant was employed as a teacher by the Upshur County Board of Education from 1970 until she resigned in 1980.

2. The grievant was again employed as a teacher by the Upshur County Board of Education on a regular, full-time basis in November, 1980 and has continuously held that position through the 1986-87 school term.

3. The respondent determined that due to a loss of student enrollment and fiscal considerations that a reduction in force would be implemented effective the 1987-88 school term. It was determined that one position at Rock Cave Elementary School could be eliminated.

4. In March, 1987 the grievant was advised that as the teacher with the least seniority at Rock Cave Elementary School, her employment would be terminated at the conclusion of the 1986-87 school year as part of a reduction in force.

5. In determining the grievant's seniority the respondent did not include the ten years she worked prior to her resignation in 1980.

6. The respondent's calculation of the grievant's seniority is in compliance with an interpretation issued by the State Superintendent of Schools on August 28, 1985 in which it was determined that a resignation dissolved seniority even if a teacher is later re-employed by the same county board of education.

7. If the ten years of employment prior to the resignation were calculated as earned seniority it is likely that another teacher and not the grievant would have been scheduled for termination.

Conclusions of Law

1. 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). The interpretation of the State Superintendent on computation of seniority is clearly erroneous.

2. W.Va. 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. Employment for less than

the full employment term of one year shall be prorated. Debra West, et al. v. Wetzel County Board of Education, Docket No. 52-86-279-3.

3. Where a statute is clear and unambiguous, it will be applied and not interpreted. Lavender v. McDowell County Board of Education, 327 S.E. 2d 691 (W.Va. 1984) and Cooper v. Greenbrier County Board of Education, Docket No. 13-86-192-4.

Accordingly, this grievance is GRANTED; W.Va. Code, 18A-4-8b shall be applied and the board of education is directed to compute the grievant's seniority according to the total length of time she has been professionally employed by the board.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Upshur County and such appeal must be filed within thirty (30) days of receipt of this decision. (W. Va. 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.

DATED August 12, 1987

Sue Keller

SUE KELLER
Hearing Examiner