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EMPLOYEES GRIEVANCE BOARD**
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CHASSIE CLINE

v.

DOCKET NO. 29-86-287-4

MINGO COUNTY BOARD OF EDUCATION

DECISION

This grievance comes before the West Virginia Education Employees Grievance Board on appeal from a level two decision.¹ A level four hearing was held before John M. Richardson, Hearing Examiner, at 101 Harper Park Drive, Suite D, Beckley, West Virginia.

The evidence revealed that the grievant, Chassie Cline, was a substitute custodian who was hired to fill the vacancy created by the termination of Delbert Simpson, a regular full time custodian, assigned to Gilbert Junior High School. The grievant was hired on September 30, 1985 and continued to be regularly employed until he was injured in an automobile accident on March 14, 1986.

¹The record reveals that the Superintendent of Mingo County Schools denied the grievance on a finding that grievant was never classified as a regular employee. No level two hearing was held. The grievant then appealed to level three and no timely action was taken. Pursuant to WV Code §18-29-2(a), the grievant then appealed to level four. Upon the representation by counsel for both parties that no useful purpose would be served by remanding the grievance to level three or two for hearing and would unnecessarily delay the

(footnote cont.)

The grievant was released to return to work on March 31, 1986 but was not allowed to do so by the respondent due to the fact another person had been hired as a substitute to fill the grievant's job. The grievant's representative sought and received a favorable interpretation from the State Superintendent of Schools.² Subsequently, on April 15, 1986 the grievant was permitted to return to his job. Immediately thereafter, the job was posted by the respondent and awarded to yet another employee on April 21, 1986.

Grievant seeks sick leave pay that he had earned while he was recuperating from the auto accident (March 14 to March 31) and back pay for the time he was not allowed to return to work (April 1 to April 15), together with reinstatement to the job which was awarded to another employee.

In response, the respondent argued that the grievant was hired as a "day-to-day" substitute following the suspension of Delbert Simpson. The respondent further alleges the job was not posted because they were waiting to be certain that Mr. Simpson would not pursue a grievance and only when Mr. Simpson filed for his retirement

(footnote cont.)

resolution of the matter, this hearing examiner reluctantly agreed to proceed. However, it is specifically noted that this is not the preferred procedure and such deviation from WV Code §18-29-1, et seq., is not likely to be permitted again.

²In essence, the State Superintendent determined that WV Code §18A-4-15(5) permitted the grievant to return to his job which had been filled by another substitute and that grievant was entitled to sick leave benefits he had earned prior to his March 14, 1986 auto accident, citing WV Code §18A-4-10.

did the respondent post the vacancy pursuant to WV Code §18A-4-8b(b).³

The respondent denies that grievant was eligible for sick leave benefits because he was not a regular part time or full time employee as required by WV Code §18A-4-15.

In pertinent part, WV Code §18A-4-15 provides:

The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties: . . .

- (4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability or death of the regular service employee who had been assigned to fill such position: Provided, that within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section eight-b [§18A-4-8b] of this article and section five [§18A-2-5], article two of this chapter and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position;
- (5) To fill the vacancy created by a regular employee's suspension: Provided, that if the suspension is for more than thirty working days the substitute service employee shall be assigned to fill the vacancy on a regular basis and shall have and be accorded all rights, privileges and benefits pertaining to such position until such termination by the

³ The record is not clear what date Mr. Simpson filed for retirement with the respondent board. John Fullen, Personnel Manager of the Mingo County Board of Education, testified that it was on or about the same time as the job posting (April 15, 1986).

county board of education becomes final.
If the suspended employee is not returned to his job, the board shall fill the vacancy under the procedures set forth in section eight-b [§18A-4-8b] of this article and section five [§18A-2-5], article two of this chapter; . . .

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. (Emphasis added)

By examination of WV Code §18A-4-15(4), and (5), supra, it can be seen why the respondent desires to rely upon WV Code §18A-4-15 (4), because that portion of the statute permits the respondent to "temporarily" fill the position. Hence, respondent's designation of the grievant as a "day-to-day" substitute. However, as previously noted, the State Superintendent of Schools did not agree and neither does this examiner with the respondent's position.

It is uncontested that the grievant was hired on September 30, 1985 and that the job was not filled in accordance with WV Code §18A-4-8b(b) until April 21, 1986. It is also uncontested that Mr. Simpson was terminated for insubordination, etc., on October 10, 1985.⁴ To be able to maintain its position, the respondent would have had to follow the procedures in WV Code §18A-4-8b within twenty days following the creation of the vacancy which occurred on or before

⁴Grievant's Exhibit #2 was a letter dated October 10, 1985 to Delbert Simpson from James Melmige, Mingo County Superintendent of Schools, stating that Mr. Simpson was discharged for insubordination, etc., by the Mingo County Board of Education at its regular meeting held on October 10, 1985.

September 30, 1985.⁵

Inasmuch as WV Code §18A-4-15(5) provides that the substitute employee assigned to fill the vacancy created is to be accorded all rights, privileges and benefits pertaining to the position, it is not subject to interpretation and therefore the benefits provided in WV Code §18A-4-10 inure to the grievant.

WV Code §18A-4-10, in pertinent part, provides:

At the beginning of his employment term, any full-time employee of a county board of education shall be entitled annually to at least one and one-half days personal leave for each employment month or major fraction thereof in the employee's employment term.

This leaves only the remaining question of the grievant's right to keep and fill the position, in relation to that employee who was hired pursuant to WV Code §18A-4-8b to fill the position on or about April 21, 1986.

The grievant claims that he became a regular full time employee after having filled the vacancy for over thirty working days according to WV Code §18A-4-15(5), supra. Therefore, in accordance with WV Code §18A-4-8b(b), he was in the first group to be considered, while the person hired was a substitute employee.⁶

⁵It is noted that the respondent also would have entered into a written contract pursuant to WV Code §18A-2-5 and required in both WV Code §18A-4-15(4) and (5). No such contract was entered into by the parties.

⁶It was uncontested that the substitute employee who ultimately filled the vacancy was qualified and had more seniority as a substitute than did the grievant. However, substitute employees are in the fourth group and considered after regular employees.

Such an interpretation of WV Code §18A-4-15(5), supra, would render the language in the second sentence as meaningless. That is, there would be no need to have the vacancy filled in accordance with WV Code §18A-4-8b since a regularly employed person (ostensibly the grievant) was already filling the position. This is not what WV Code §19A-4-15(5) means or was intended to accomplish.

The clear meaning of WV Code §18A-4-15(5) grants all the rights, etc., of a regular employee's status until the termination of the former employee becomes final and until the job is filled by the procedures provided in WV Code §18A-4-8b and WV Code §18A-2-5 are accomplished.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

FINDINGS OF FACT

1. The grievant, Chassie Cline, was a substitute custodian hired to fill the vacancy of Delbert Simpson, a regularly employed custodian, assigned to Gilbert Junior High School.

2. Delbert Simpson was removed from his job on or before September 30, 1985 and grievant was hired to fill the vacant position.

3. Delbert Simpson was finally terminated by the respondent board on October 10, 1985.

4. The grievant remained regularly employed until he was injured in an automobile accident on March 14, 1986.

5. The grievant was released by his doctor and returned to Gilbert Junior High School on March 31, 1986. The respondent refused to allow the grievant to work because another person had been hired to fill the position.

6. The grievant was permitted to return to work on April 15, 1986 where he worked until April 21, 1986.

7. On or about April 15, 1986, the respondent, pursuant to WV Code §18A-4-8b(b), posted the job.

8. The employee hired by respondent on April 21, 1986 was qualified to fill the position and had greater seniority than the grievant.

9. The grievant was employed on a regular basis beginning September 30, 1985 through April 21, 1986.

CONCLUSIONS OF LAW

1. Pursuant to WV Code §18A-4-15(5), the grievant is entitled to all benefits pertaining to the custodial position he was hired to fill on September 30, 1985.

2. Pursuant to WV Code §18A-4-10, the grievant earned one and one-half days sick leave for each employment month or major fraction thereof beginning on September 30, 1985 and ending April 21, 1986.

3. The grievant has proven by a preponderance of the evidence that he is entitled to sick leave benefits for his absence due to injury occurring on March 14, 1986.

4. Pursuant to WV Code §18A-4-15(5), the grievant was entitled to return to his employment on March 31, 1986 and remain there until the job was filled pursuant to WV Code §18A-4-8b(b) on April 21, 1986.


5. The interpretations of the State Superintendent of Schools are entitled to great weight unless clearly erroneous. Smith v. Board of Education of the County of Logan, 341 S.E.2d 685 (W.Va. 1985) and McGinnis v. Logan County Board of Education, Docket No. 23-86-077.

6. The respondent filled the vacancy on April 21, 1986 in accordance with WV Code §18A-4-8b(b) and therefore grievant is not entitled to reinstatement to the position.

Accordingly, the grievance is GRANTED in part and DENIED in part.

It is, therefore, ORDERED that the grievant be paid sick leave benefits to the extent earned and applicable for the period from March 14, 1986 to March 31, 1986. It is further ORDERED that the grievant be paid for those working days he was not allowed to work beginning March 31, 1986 to April 15, 1986.

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


JOHN M. RICHARDSON
Hearing Examiner

DATED:

March 23, 1987