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BRUCE MILLER

v.

DOCKET NO. 10-86-284-4

FAYETTE COUNTY BOARD OF EDUCATION

DECISION

This grievance comes before the West Virginia Education Employees Grievance Board on appeal from a waiver at level three by the Fayette County Board of Education. A level four hearing was held before John M. Richardson, Hearing Examiner, at Beckley, West Virginia.

The grievant, Bruce Miller, is a teacher who has been employed by the respondent board for twenty-three years. Beginning in 1967, the grievant was employed during the summer as a painter, except for the summers of 1982 and 1983 when he did not work due to his wife's illness. The grievant complains that even though he has taught for twenty-three years and painted for seventeen years, he was not employed as a painter for the summer of 1986. He alleges that individuals with less seniority were hired in violation of WV Code §18A-4-8b(b). For relief, the grievant seeks back pay for the 1986 summer's work and determination of

his seniority status.

The respondent contends that due to the failure of the grievant to work during the summers of 1982 and 1983, there was a break in service amounting to a resignation causing the grievant to lose his summer seniority. Therefore, WV Code §18A-4-8b(b) was not violated because all of the professional employees who were hired during the summer of 1986 and worked more continuous summers than had the grievant.

In response, the grievant complains that he was not informed of respondent's practice of giving preference to applicants who had worked the most "continuous" summers and that, in any case, the practice is a violation of WV Code §18A-4-8b(b).

The record reveals that the grievant applied for a summer painter's position for the summer of 1986. The respondent did not hire the grievant because other regularly employed professional employees with greater continuous summer seniority were hired instead. The grievant had been employed as a summer painter each summer beginning in 1967 up and until the summer of 1982. Prior to the summer employment term of 1982, the grievant called Wayne Wriston, Director of Services, and informed him that due to his wife's illness he would be unable to work that summer. The same sequence of events occurred the next year and the grievant did not work the summer of 1983. However, the grievant applied for a painter's position and worked the summers of 1984 and 1985.

It is evident from the record that while the issue of a written policy relating to these circumstances was raised at the level two hearing, the only policies made a part of the record then or at the level four hearing related to Personal Leave (B-34) and Annual Recommendation of School Personnel by Principals, etc., (B-24). Neither of these policies provide any substantive guidance to the matters here.

Since there was no written contract it is necessary to look to the provisions of WV Code §18A-4-8b(b). There is no issue regarding the order of hiring but only an issue as to which professional employee was entitled to be hired first.<sup>1</sup>

In pertinent part, WV Code §18A-4-8b(b) provides:

(b) A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§18-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service. . . . Applicants shall be considered in the following order:

- (1) Regularly employed service personnel;
- (2) Service personnel whose employment has been discontinued in accordance with this section;
- (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions . . .

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<sup>1</sup>It was uncontested that the respondent first hired (1) regularly employed service personnel followed by, (2) service personnel whose  
(footnote cont.)

For purposes of determining seniority under this section, an employee's seniority begins on the date that he enters into his assigned duties. . . .

WV Code §18A-2-5, in pertinent part, provides:

The board is authorized to employ such service personnel, including substitutes, as is deemed necessary for meeting the needs of the county school system. Before entering upon their duties such personnel shall execute with the board a written contract which shall be in the following form: . . .

Since professional personnel were seeking to fill service personnel positions, it follows that this must be done on the basis of seniority, qualifications and evaluation of past service. It was in applying this provision of WV Code §18A-4-8b(b), that the respondent determined that continuous summer employment would be used to determine the amount of seniority. While there might appear to be no prohibition to such a determination, it is clear that to enforce such a practice would require a written policy.

West Virginia Board of Education Policy 5300(7) states:

- (7) All official and enforceable personnel policies must be written and made available to every employee of each county board of education.

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(footnote cont.)

employment had been discontinued, etc., and then (3) professional employees who held temporary service personnel positions prior to 1982, etc.

Even though WV Code §18A-4-8b(b), supra, makes reference to temporary service personnel positions previously held by professional employees, this board has determined that a service personnel position which is in excess of twenty working days in duration, is not a temporary position and must be filled in accordance with WV Code §18A-4-8b(b) and WV Code §18A-2-5. Haddox v. Kanawha County Board of Education, Docket No. 20-86-223-1 and Mullins v. Kanawha County Board of Education, Docket No. 20-86-222-1.

Under the circumstances, it appears that the respondent developed an unwritten policy sometime after November 1983. This occurred after the grievant had missed two summers (1982 and 1983) breaking his continuity of summer employment.<sup>2</sup>

The respondent argues that this break in continuity amounted to a resignation; however, that argument has little merit when it is uncontroverted that there was no contract of employment in effect when grievant informed the respondent he would be unable to work those two summers, e.g., from what job did the grievant resign?

It is amply clear that the respondent had no valid policy which would provide a basis for not employing the grievant and to enforce the respondent's practice would be contrary to the clear meaning of West Virginia Board of Education Policy 5300(7).

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

#### FINDINGS OF FACT

1. The grievant, Bruce Miller, is a classroom teacher, regularly employed by the respondent, the Fayette County Board of Education.

2. Beginning in 1967 the grievant has been employed each summer as a painter except for the summers of 1982 and 1983.

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<sup>2</sup>The grievant testified that he did not know of the practice until he filed his grievance and Mr. Wriston did not tell the grievant. Further, Mr. Wriston admitted he really wasn't aware of the effect of the break in continuity until November 1983.

3. Prior to the summer employment terms of 1982 and 1983, the grievant informed the respondent that he would be unable to work due to his wife's illness.

4. The grievant was employed as a painter during the summer of 1984 and 1985.

5. The grievant applied for a painter's position for the summer of 1986 and was not hired.

6. The grievant was informed that he was not hired for the summer of 1986 because he had lost his continuous summer seniority by not working the summers of 1982 and 1983.

7. The respondent's unwritten policy/practice of counting continuous summers as the basis for determining seniority did not begin prior to November 1983.

8. The respondent does not regularly enter into written contracts with its summer employees and did not enter into a written contract with the grievant for any of his seventeen summers of employment.

9. The respondent has no written policy regarding summer seniority.

10. The grievant did not resign from his summer employment.

11. The regular summer employment term for which the respondent employs personnel exceeds twenty working days.

12. The respondent hired professional employees during the summer of 1986 who had worked fewer summers than had the grievant.

### CONCLUSIONS OF LAW

1. West Virginia Board of Education Policy 5300(7) requires that all official and enforceable personnel policies be written and available to every employee. State ex rel. Hawkins v. The Tyler County Board of Education, 275 S.E.2d 908, p. 915 (W.Va. 1980).

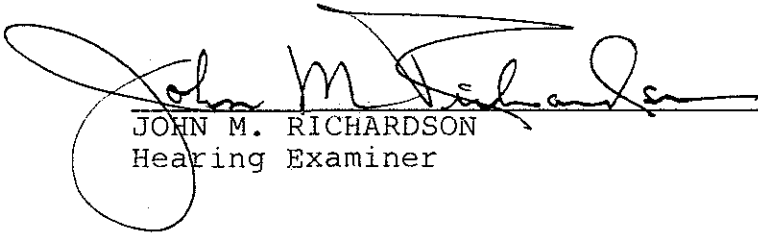
2. This board has determined that a service personnel position which is in excess of twenty working days in duration, is not a temporary position and must be filled in accordance with WV Code §18A-4-8b(b) and WV Code §18A-2-5. Haddox v. Kanawha County Board of Education, Docket No. 20-86-223-1 and Mullins v. Kanawha County Board of Education, Docket No. 20-86-222-1.

3. The grievant has proven by a preponderance of the evidence that the respondent had no valid basis for not employing him as a summer painter in 1986.

For all the foregoing reasons, the grievance is GRANTED.

It is, therefore, ORDERED that the grievant be paid for his loss of wages and granted such benefits, including credit towards his seniority, that he would have regularly earned during the summer of 1986. The payment of such lost wages shall be offset by any other income derived during that period.

Either party may appeal this decision to the Circuit Court of Fayette 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 inform 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