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NORMA STUTLER

v.

Docket No. 54-86-333-3

WOOD COUNTY BOARD OF EDUCATION

DECISION

The grievant, Norma Stutler, is employed by the Wood County Board of Education as a substitute custodian. On October 6, 1986 she filed a level one grievance alleging the board violated W.Va. Code, 18A-4-10 when it refused to credit her for personal leave days she claims to have accumulated as the result of temporary substitute employment. Denied at levels one and two, the grievant would not agree to the board's request for a delay of several weeks to consider the level three appeal. Thereupon, the grievance was appealed to level four in late November, 1986 and the parties agreed to submit the matter for decision based upon the existing record and supplementary briefs and proposals, the last of which was filed in early March, 1987.

The parties are in agreement that grievant orally agreed to substitute for the absent regular custodian for an indefinite period of time, and as such, she would not receive calls each morning directing her to appear for work. She did work in that temporary, full-time capacity from May 29 through September 22, 1986 taking one day off during the entire period. Grievant was not paid for the day she took off, for July 4, nor for September 1, 1986.

It is grievant's contention that she is entitled to payment for one used personal leave day and credit for five more, for future use, that she should have accrued at the rate of 1½ days per month for her four months of employment. Grievant cites W.Va. Code, 18A-4-10 which provides personal leave for full-time employees of a board of education. She argues that W.Va. Code, 18-1-1(i) defines regular full-time employment and she met the legal definition since she committed herself to work for an indefinite period of time and did perform in the position for four months until the regular employee returned to work.

Respondent's counsel cites W.Va. Code, 18A-4-15 in support of its position that grievant was not entitled to accrue personal leave days. The provisions relied upon are thus:

The county board shall employ and the county superintendent,... shall assign substitute service personnel... to perform any of the following duties:

(1) To fill the temporary absence of another service employee;

(2) To fill the position of a regular service employee on leave of absence; Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position;

...

(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....

(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 county board of education becomes final.

Counsel posits that the rights, privileges and benefits of a service personnel substitute depend upon the cause of the vacancy which the substitute fills. Counsel maintains that grievant's employment fell under "Paragraph 1" of the statute since she was appointed to fill the temporary absence of an employee not on an approved leave of absence, severed from employment nor suspended from employment. He urges that there was no legislative intent to provide the rights, privileges and benefits of full-time employment upon substitutes employed to fill a temporary absence of the regular employee.

In support of his position that grievant is not entitled to the leave days, counsel also cites a case decided by this Board, Brenda Hager v. Boone County Board of Education, Docket No. 03-86-242-4. In Hager the grievant performed under contract as a substitute teacher for eight months and it was found that her contract had not been altered to provide her a definite employment term. Accordingly she was not a regular full-time employee as contemplated by W.Va. Code, 18A-1-1(i) or W.Va. Code, 18A-4-10 and thus was not entitled to benefits. Counsel urges that the instant case is analogous as grievant herein filled in for a position known to be of indefinite duration. Hager, however, is distinguished because the employment status of a substitute professional employee is defined by the contract executed between employer/board and employee/substitute teacher but the employment of substitute service personnel is defined and governed by W.Va. Code, 18A-4-15, supra. It is clear by the language of the statute that the intent was to provide full-time benefits to substitute personnel who remain at a specific job site and work in an ongoing capacity for an extended period of time. Kathy Miller v. Wood County Board of Education, Docket No. 54-86-298-3.

While grievant may have begun her assignment on a temporary basis of indefinite duration, when that employment extended beyond twenty continuous working days, the absent employee was, in fact, on a leave of absence. Moreover, while the board of education may not have formally approved the regular employee's leave of

absence, tacit approval was given since her absence did not prompt dismissal from her position and it was preserved for her until she returned.

In addition to the foregoing discussion the following specific findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant is employed by the Wood County Board of Education as a substitute custodian.

2. On May 29, 1986 the grievant agreed to replace an absent regular full-time employee for the indeterminate duration of the regular employee's absence. She continued in the position through September 22, 1986.

3. School administrators and the board of education refused to grant grievant's request for personal leave days and she filed a grievance on October 6, 1986.

4. After twenty days of ongoing full-time substitute employment grievant was entitled to accrual of one and one-half days per month of personal leave days as a matter of law.

CONCLUSIONS OF LAW

1. Pursuant to W.Va. Code, 18-1-1(i) a full-time employee is any person employed by a county board of education who has a regular position or job throughout his or her employment term, without regard to hours or method of pay.

2. Any fulltime 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. W.Va. Code, 18A-4-10.

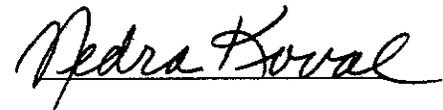
3. Pursuant to W.Va. Code, 18A-4-15, substitute service personnel are generally limited to twenty or thirty working days employment on each temporary assignment. Kathy Miller v. Wood County Board of Education, Docket No. 54-86-298-3.

4. Substitute service employees employed on a regular basis to fill the position of an absent regular service employee shall be given regular employee status, including accrual of personal leave days, for the duration of their assignment when the tenure of employment extends beyond twenty days. W.Va. Code, 18A-4-15(2); Kathy Miller v. Wood County Board of Education, supra.

Accordingly, the grievance is **GRANTED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 20, 1987



NEDRA KOVAL
Hearing Examiner