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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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**DARLENE DAVIS**

**v.**

**Docket No. 25-88-096**

**MARSHALL COUNTY BOARD OF EDUCATION**

**D E C I S I O N**

Grievant, Darlene Davis, is regularly employed by the Marshall County Board of Education as an elementary teacher. On June 6, 1988 she filed a level four grievance appeal alleging the board had miscalculated her seniority for the purposes of implementing a reduction in force (RIF) action. The parties submitted the matter for decision upon the record developed at the lower administrative levels. Reference to the level two proceedings conducted April 27, 1988 shall be cited, T.\_\_\_\_.

Grievant is certified to teach elementary education, 1-6, and language arts/social studies, 1-9. She was hired by the board as a substitute teacher and worked 133 days during the 1983-84 school year. Prior to the 1984-85 school year she applied for posted vacancies but was not interviewed nor hired for the vacancies but worked on a substitute basis for 133 days. For 1985-86 she again applied for full-time positions as they were posted but instead was assigned to a permanent, full-time substitute position at McNinch School; she was reappointed to that position for the 1986-87 school year. She was regularly employed for the 1987-88 school term and assigned to Limestone School. (T.8-10). During a RIF action in the spring of 1988, grievant was terminated based on the board's determination she had only one year's seniority.

Grievant contends that her substitute employment met the 133 day rule by which the State Superintendent has determined that a professional employee accrues seniority for yearly salary increments and meeting a year's requirement for tenure. Therefore, she argues, the respondent has miscalculated her seniority and improperly released her from employment as there are teachers remaining with less employment time and seniority than she. She further relies on Harkins v. Ohio County Board of Education, \_\_\_ S.E.2d \_\_\_ (W.Va. 1988).

The board asserts grievant accrued seniority after her initial employment for the purposes of earning a tenured substitute contract. It argues the the Harkins decision is not crystal clear with respect to the type of a continuing contract a teacher earns while meeting the 133 day rule and the State Supreme Court of Appeals has been petitioned to reconsider Harkins. It urges grievant's seniority was correctly calculated.

The Grievance Board has determined that the reference to a continuing contract in Harkins could only refer to a regular contract of employment as school law does not presently define the contractual requirements for hiring substitute teachers and the Court ordered back pay and benefits from the time the petitioner should have received her continuing contract. See, Talerico v. Harrison County Board of Education, Docket No. 17-88-021-3. Talerico also contains a full discussion of the "133 rule" as it relates to substitute employment. The statutes do not create a class of professional employee designated "tenured" substitute employees and school personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979) as cited in Harkins, supra.

In addition to the foregoing narration, the following findings of fact and conclusions of law are appropriate,

### FINDINGS OF FACT

1. Grievant was professionally employed by the board as a substitute teacher for the 1983-84 school term.

2. During both the 1983-84 and 1984-85 school terms she was employed as a substitute for 133 days.

3. Grievant was employed as a permanent substitute teacher at McNinch School for the entire 1985-86 and 1986-87 school years.

4. At the onset of the 1987-88 school year grievant was regularly employed as a teacher at Limestone School.

5. In the spring of 1988 the board initiated reduction in force (RIF) proceedings. It determined that grievant had one year of seniority and she was placed on a RIF list and terminated.

6. On the basis of her yearly work record grievant had acquired five years of full-time employment upon the completion of her 1987-88 school term and was entitled to be credited with five years seniority.

## CONCLUSIONS OF LAW

1. The State Superintendent of Schools has determined that substitute teachers working on a substantially full-time basis shall attain regular employment benefits during said employment. See, Harkins v. Ohio County Board of Education, \_\_\_ S.E.2d \_\_\_ (W.Va. 1988).

2. 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); Thompson v. Kanawha, Docket No. 20-86-366-1; B. Smith v. Wyoming County Board of Education, Docket No. 55-87-209.

3. School personnel regulations and laws are to be strictly construed in favor of the employees. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (W.Va. 1979); Harkins v. Ohio County Board of Education, supra.

Accordingly, this grievance is GRANTED and the board is Ordered to consider grievant's five years seniority for purposes of RIF and other personnel actions.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall 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:

July 11, 1988

Nedra Koval

NEDRA KOVAL  
Hearing Examiner