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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
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**DONALD MINNEY**

**v.**

**Docket No. 34-88-112**

**NICHOLAS COUNTY BOARD OF EDUCATION**

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

Grievant, Donald Minney, was employed by the Nicholas County Board of Education as a teacher until the end of the 1987-88 school term when his position was eliminated in a reduction of force. He filed a grievance following a Board hearing on the termination held May 26, 1988 alleging violations of W.Va. Code, 18A-4-8b(a) and W.Va. Code, 18A-2-2.<sup>1</sup> The parties waived Levels I and II and the Board voted to stand on its previous decision to eliminate the grievant's position. A Level IV hearing was held July 11, 1988.

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<sup>1</sup>No evidence was presented or legal argument advanced relating to the allegation of a violation of W.Va. Code, 18A-2-2 and accordingly this part of the grievance is not further addressed herein.

Grievant holds a professional teaching certificate in the area of social studies, grades 7 through 12. At the beginning of the 1985-86 school term, he was offered a sixth grade teaching position at Nettie Grade School, provided he would apply for a permit for substitute teaching. He received the permit on August 28, 1985, signed a regular teachers contract with the Board, and was assigned to Nettie as a "permanent substitute" for the duration of the 1985-86 school term. Mr. Minney signed another regular teacher's contract at the beginning of the 1986-87 school term and was assigned to Richwood Junior High School where he served as a "full-time" substitute filling in for teachers who were absent at the school. At the beginning of the 1987-88 school term, grievant again signed a regular teacher's contract and was assigned to teach a fourth grade class at Kessler's Cross Lanes Elementary School. By letter dated April 26, 1988 grievant was informed by Mr. Robert Bailey, Superintendent of Schools, that a recommendation would be made to the Board that his position be terminated for lack of need. Mr. Minney was afforded a hearing and the Board subsequently accepted Mr. Bailey's recommendation.

Grievant contends his employment with the Board has been that of a probationary teacher and despite his assignments to subject areas outside his certification in social studies, grades 7 through 12, he has accrued three years' seniority within that

certification and should have been allowed to displace or "bump" less senior social studies teachers in accordance with the provisions of W.Va. Code, 18A-4-8b(a). Grievant asserts Mr. David Hypes was the least senior teacher in social studies at the time the reduction in force was initiated and it was his position that should have been eliminated.

The Board contends it properly identified grievant as the teacher with the least seniority as a permanent substitute in the county and complied with the requirements of W.Va. Code, 18A-2-2 and W.Va. Code, 18A-4-8b(a) in the elimination of his position. The Board further argues that even if grievant did accrue seniority as a teacher of social studies, he was still the least senior teacher in that field as Mr. Hypes has certification in physical education and teaches one class in that subject area as part of his duties at Summersville Junior High School.

The Board's argument that grievant's "permanent substitute" status prevented him from accruing seniority as a regularly employed teacher in his area of certification is without any legal basis. W.Va. Code, 18A-4-b(a) provides the method for calculating seniority for teachers:

The seniority of professional personnel shall be determined on the basis of the length of time the employee has been professionally employed by the county board of education. For purposes of establishing seniority as hereinafter provided, when an employee holds valid certification or licensure in one or more areas, the seniority shall accrue in each area.

(Emphasis added)

It is clear from this language that a teacher must only be professionally employed in order to attain seniority in his or her area(s) of certification and a characterization of that employment as "permanent substitute" cannot prevent the accrual of that seniority. Moreover, there are no provisions contained in the West Virginia Code for "permanent substitutes" or a different method of determining seniority for such positions. The West Virginia Supreme Court of Appeals recently held that substitutes who only teach one hundred and thirty-three (133) days in a given school term are entitled to one year of seniority for the purposes of obtaining tenure and a continuing contract of employment. Harkins v. Ohio County Board of Education, 369 S.E.2d 224, (W.Va. 1988). A holding that such teachers only accrue "substitute seniority" would be inconsistent with that decision and it must be concluded that the grievant attained three years' seniority in the certification, social studies, grades 7 through 12.

The question of whether or not grievant's seniority entitled him to displace Mr. David Hypes rests on an analysis of the position which Mr. Hypes holds at Summersville Junior High School. His schedule there consists of two eighth grade social studies classes, one seventh grade geography class, two American studies classes and one physical education class. The course outline for this last class defines it as one "designed" to familiarize

seventh grade students with procedures associated with a Secondary Level Physical Education/Health Class". The course is conducted over a nine-week period and consists of outside physical education activities and health-related classwork (Board's Exhibit No. 4). It appears the position is primarily that of a social studies instructor, as the grievant contends, but the additional physical education class does make it one requiring a certification in that area.<sup>2</sup> Grievant does not hold certification in that area and the Board was correct in its decision not to allow him to displace Mr. Hypes.

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

#### FINDINGS OF FACT

1. Grievant, Donald Minney, was employed by the Nicholas County Board of Education from the beginning of the 1985-86 school term until the end of the 1987-88 school term, when his position was eliminated in a reduction of force.

2. Grievant holds a valid teaching certificate for social studies, grades 7 through 12.

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<sup>2</sup>It should be noted that the grievant produced no job posting of the position which may have indicated how it was categorized by the Board prior to Mr. Hypes' assignment.

3. During the term of his employment with the Board, grievant signed a 200 day regular teaching contract each year and worked full-time at various schools in the county.

4. Mr. David Hypes holds certification in physical education, grades 7 through 12 and social studies, grades 7 through 9, and is employed by the Board assigned to Summersville Junior High School, where he teaches social studies and physical education classes.

#### CONCLUSIONS OF LAW

1. A teacher who substitutes one hundred and thirty-three (133) days or more in a given school term is entitled to one year seniority for the purposes of obtaining tenure and a continuing contract of employment. Harkins v. Ohio County Board of Education, supra.

2. Teachers who substitute one hundred and thirty-three (133) days or more in a given school term accrue one year of seniority in his or her area(s) of certification.

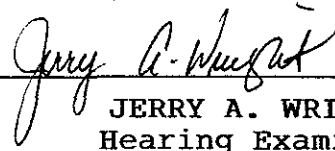
3. Grievant's service as a full-time substitute for three consecutive 200-day school terms entitles him to three (3) years seniority in his area of certification, social studies, grades 7 through 12.

4. Pursuant to W.Va. Code, 18A-4-8b(a), a professional employee whose position is eliminated in a reduction in force may displace or "bump" less senior employees within his or her area(s) of certification. State ex rel. the Board of Education of Kanawha v. Casey, 349 S.E.2d 436 (W.Va. 1986); James v. Gilmer County Board of Education, Docket No. 11-87-181-3; Christian v. Harrison County Board of Education, Docket No. 17-87-146-2.

5. Grievant did not possess certification to teach physical education and the Board's decision not to allow him to displace Mr. David Hypes when the reduction in force was initiated was therefore in accordance with the provisions of W.Va. Code, 18A-4-8b(a).

Accordingly, the grievance is **DENIED**; however, the Nicholas County Board of Education is hereby **ORDERED** to make amendments in any and all personnel records concerning the grievant, Donald Minney, to reflect his seniority as three (3) years in the certification, social studies, grades 7 through 12, and place his name on the preferred recall list for said certification.

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



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JERRY A. WRIGHT  
Hearing Examiner

Dated: October 31, 1988