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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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JERRY SEXTON

v.

Docket No. 03-88-149

BOONE COUNTY BOARD OF EDUCATION

DECISION

Grievant, Jerry Sexton, is employed by the Respondent Boone County Board of Education as a full-time permanent custodian. At the end of the 1987-88 school term, he was the subject of a reduction-in-force (RIF) action, but was reinstated some five or six days into school year 1988-89. He alleges Respondent improperly calculated his seniority and accordingly, he was inappropriately RIF'd; should have been given priority for re-employment over other RIF'd custodians brought back to work earlier than he was; and should be paid in line with his correct number of years of experience. Grievant initiated his complaint at Level I on June 13, 1988; it was denied there and at Level II and waived by Level III prior to being heard at Level IV on

October 24, 1988.¹ The parties having declined to make post-hearing submissions, this matter is mature for disposition.

Grievant began work for Respondent, as a substitute custodian, on May 2, 1986. Other substitute custodians were hired after that date, and some of those persons were given so-called "permanent substitute" custodian assignments as of April 15, 1987.² Grievant was made a regular³ custodian on August 26, 1987, and according to his unrefuted testimony at the Level II hearing, certain of the aforementioned individuals were also employed as regular custodians on or about that date. T. 10. Grievant and at least three of these

¹ At the lower levels, school year 1988-89 had not yet started and accordingly, Grievant had no reasonable basis to allege impropriety in the order of custodian re-hiring after the RIF. However, his claim of recall preference over these other custodians is intimately related to a key point of his original grievance, *i.e.*, that he should not have been RIF'd at all. No objection to the submission of the post-RIF recall order issue at this Level was raised by Respondent, and it therefore is appropriate for consideration. See W.Va. Code §§18-29-3(j), 18-29-3(k).

² Although Grievant complained, on his grievance form, that Respondent "did award 4 permanent Substitute custodian jobs on 4-5-87" and that Code §18A-4-15(6) "states that this job goes to the senior Substitute (I was senior)," at the Level IV hearing he expressly abandoned any claim of impropriety in the April, 1987 selection process.

There is no provision in West Virginia education law for a county board of education to hire "permanent substitute" employees; neither did Respondent present any official policy which purports to allow such action. It is presumed that the reference is to a substitute temporarily assigned to continuously fill a vacancy per Code §18A-4-15.

³ The term "regular employee" means a permanent employee, as distinguished from a substitute employee.

other regular custodians were RIF'd and placed on a preferred recall list at Respondent's March 31, 1988 meeting. Grievant was the last of these four RIF'd employees to be reinstated in a position with Respondent, and was the only one of the group to actually miss any work time or pay.

Grievant alleges that his seniority should have been calculated from May 2, 1986, when he first worked for Respondent.⁴ He seeks correction of his personnel record in that regard.⁵ Respondent counters that it is appropriate to consider Grievant's seniority as commencing August 26, 1987, his initial date of duty as a regular, full-time custodian.⁶ Respondent additionally argues that there is more than one definition of the term "seniority" within West Virginia education law, and that there is a distinction between

⁴ It is clear that Grievant's "seniority" as a substitute, referred to as "length of service time" in the West Virginia education law, see Code §18A-4-15, commences on this date.

⁵ At the Level IV hearing, Grievant expressly abandoned his claim for back pay for the days he was unemployed.

⁶ At the Level II hearing, Grievant stated that if Respondent's position as to his seniority date was upheld, then he and other RIF'd custodians would participate in a random selection process to determine priority for re-hiring. T. 11. There is no evidence that such random procedure was utilized prior to the recall; it appears that it perhaps should have been, if Grievant and other RIF'd personnel indeed had identical seniority as regular custodians. See Code §18A-4-8b(b).

"seniority" for RIF and preferred recall purposes, and "years of experience" for pay scale purposes.

W.Va. Code §18A-4-8b(b)⁷ provides, in pertinent part:

All decisions by county boards of education concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided.

The seniority of any such service personnel shall be determined on the basis of the length of time the employee has been employed by the county board of education within a particular job classification. For the purpose of establishing seniority for a preferred recall list...when an employee has been employed in one or more classifications, the seniority accrued in each classification shall be retained by the employee.

All employees whose seniority with the county board [of education] is insufficient to allow their retention. . .during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment. . .on the basis of seniority.

W.Va. Code §18A-4-15 provides, in pertinent part:

The salary of a substitute service employee shall be based upon his years of employment as defined in ...§18A-4-8...and shall be in accordance with the salary schedule of persons regularly employed in the same position in the county in which he is employed.

W.Va. Code §18A-4-8 provides, in pertinent part:

"Years of employment" means the number of years which an employee classified as service personnel has been employed by a board of education in any position... .

Grievant worked a total of seven days as a substitute custodian during school term 1985-86, and

⁷ A custodian is a service employee. Code §18A-4-8.

eighty-seven days in that classification in school year 1986-87. There is no evidence that Grievant has ever been employed by Respondent in any capacity other than those referenced heretofore. At the time Grievant was employed as a regular custodian, he was categorized as having zero years of experience for purposes of the pay scale.

In addition, it is appropriate to make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Grievant, Jerry Sexton, is employed by Respondent Boone County Board of Education as a full-time, permanent custodian.
2. Grievant was first employed by Respondent as a substitute custodian commencing May 2, 1986. In this capacity, he worked seven days in school year 1986-87 and eighty-seven days during school term 1986-87.
3. Grievant was employed as a regular full-time custodian as of August 26, 1987, and categorized as having zero years of experience for purposes of pay.
4. Grievant and three other custodians also first regularly employed by Respondent on or about of August 26, 1987 were the subject of a reduction-in-force (RIF) approved at

Respondent's March 31, 1988 meeting. The "three other" individuals had been originally employed by Respondent as substitute custodians after Grievant's initial employment, and were granted so-called "permanent substitute" custodian assignments in April, 1987.

5. The three other RIF'd custodians were reinstated with Respondent prior to the commencement of the 1988-89 school year; Grievant was re-employed after five or six work days of that school term had already elapsed.

6. Respondent computes Grievant's seniority as of the date he entered onto regular, full-time employment, i.e., August 26, 1987.

7. Respondent computes Grievant's years of experience for pay purposes as commencing August 26, 1987.

8. Grievant has never been employed by Respondent except as recounted in these Findings.

CONCLUSIONS OF LAW

1. Seniority, for purposes of reduction-in-force (RIF) and preferred recall, is determined from the date an individual is regularly employed within a given classification by a county board of education. W.Va. Code §18A-4-8b(b); see Toth v. McDowell Co. Bd. of Educ., Docket No. 33-87-309-4 (April 21, 1988); also see Satterfield v. Marion Co. Bd. of Educ., Docket No. 24-87-253-2 (February 26, 1988).

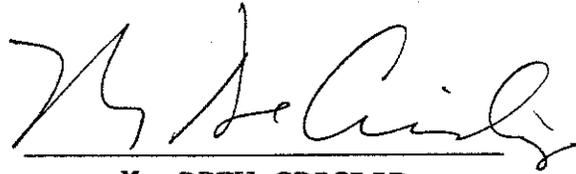
Grievant's relevant seniority as a custodian commenced August 26, 1987.

2. In order for an employee of a county board of education in West Virginia to gain a "year of experience" for pay increment purposes, he or she must work at least 133 days in a given school year. See Harkins v. Ohio Co. Bd. of Educ., 369 S.E.2d 224 (W.Va. 1988). Grievant's years of experience with Respondent commenced August 26, 1987.

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha or Boone County, but only within thirty (30) days of its receipt. See W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this

office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.



**M. DREW CRISLIP
HEARING EXAMINER**

Dated: November 23, 1988