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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**  
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LEWIS TALERICO, III

v.

Docket No. 17-88-021-3

HARRISON COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Lewis Talerico, is employed by the Harrison County Board of Education as a professional employee holding a substitute teacher contract. On December 18, 1987 he filed a level one grievance alleging violation by the board of numerous statutes with respect to his employment status resulting in the denial of certain employment benefits. The grievance was denied at level one and appealed to level two on December 18, 1987; a level two hearing was conducted January 20, 1988 and the decision was adverse to grievant. After the board waived consideration of the matter on February 3, 1988, the grievance was appealed to level four. The parties requested that the matter be decided on the record below and the submission of proposed findings of fact and conclusions of law. Grievant filed proposals May 17, 1988, the board submitted a brief on June 2, 1988 and grievant filed his reply June 13, 1988 as per the parties' written agreement for submission of these materials.

Grievant initially contracted with the board as a day-to-day substitute teacher on August 3, 1984 and the contract was renewed each year thereafter. In February 1987 grievant was assigned an on-going permanent substitute position to teach physical education and health courses at Presley Ridge School. (T.6,11). Grievant received notice from the board in the spring of 1987 that he was now a "tenured" substitute teacher and no further contracts would need to be signed. The directive asked whether he wished to remain on the substitute list for 1987-88 to which grievant responded affirmatively. (Joint Exhibit 5, 1/20/88).

At some point either prior to or after the beginning of the 1987-88 school term, grievant responded to a job vacancy posted for a physical education and health teacher at the Presley Ridge School and the Alternative Learning Center. (T.19,20). The job posting was not made part of the record but grievant acknowledged that he had been informed the position would definitely last for one semester and possibly two. (T.6,7). While serving in the position grievant received personal and sick leave days but was not provided with Public Employees Insurance Board (PEIB) hospitalization coverage. (T.10).

Grievant contends that the position he presently holds was vacated by a teacher who transferred from that position. He contends that he is not a day-to-day substitute but rather he acts in the capacity of a regular full-time employee as defined

by W.Va. Code, 18-1-1(i) as he has a regular position or job at a designated site throughout his employment term and W.Va. Code, 18A-2-3 does not authorize the employment and assignment of substitute teachers to positions made vacant by the transfer of teachers.<sup>1</sup> Thus, he argues, he should be granted a regular teaching contract of employment or some modification of his day-to-day substitute teaching contract which would reflect his regular employment and would provide him not only the paid leave days and other benefits of a regular teacher he presently has been granted, but also the benefit of PEIB hospitalization coverage. He argues that W.Va. Code, 18A-4-8b(a) defines seniority as the length of time the employee has been professionally employed by the county board of education and he should be accruing such seniority. He submitted school law interpretations of the State Superintendent of Schools favorable to his factual situation and urges a strict construction of regulations and laws pertaining to school personnel as outlined in Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

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<sup>1</sup> The applicable portion of W.Va. Code, 18A-2-3 provides that substitutes be hired, "(a) to fill the temporary absence of any teacher or an unexpired school term made vacant by resignation, death, suspension or dismissal; (b) to fill a teaching position of a regular teacher on leave of absence, and (c) to perform the instructional services of any teacher who is authorized by law to be absent from class without loss of pay, providing such absence is approved by the board of education in accordance with the law. Such substitute shall be a duly certified teacher."

In his brief submitted to level four, counsel for the board of education claims that grievant's allegation that the board offered a similarly situated individual a regular teacher's contract is without basis in fact because the position was posted and filled according to W.Va. Code, 18A-4-8b and grievant, not being certified in behavior disordered, did not apply for the vacancy and was not qualified for the position. Counsel then stated that, conversely, grievant's position was never posted and bid upon. However, this assertion by counsel was a direct contradiction of grievant's unrefuted testimony. (See, T.19,20). Counsel then outlined a rationale for the temporary nature of grievant's position and the board's determination that a substitute be employed for the vacancy but offered no documentation to support his statements. Moreover, the board did not explain at level two why the vacant position was not permanently filled but instead was filled with a teacher retained on a day-to-day substitute teacher's contract. These assertions have little bearing on the grievance issues herein and not properly adduced evidence, will not be considered for the purposes of this grievance decision.

Counsel characterizes grievant's present contract with the board as that of a tenured substitute teacher. He contends that grievant agreed to the terms of his (day-to-day) substitute teaching contract when he accepted the assignment at Presley Ridge the last semester of 1986-87 and his present assignment at Presley Ridge and the Learning Center for as long as his services were needed during the 1987-88 school year. Counsel

argues that the only way the board could hire grievant to a regular teaching contract would be upon fulfilling the posting and bidding requirements of W.Va. Code, 18A-4-8b, and he urges that there is no legal authority for it or the Grievance Board to grant grievant a full-time teaching contract and that such relief would be in violation of the statute. Counsel contends that the board cannot grant grievant PEIB benefits as his substitute employment status would preclude those benefits according to PEIB regulations. He asserts that the board of education has not denied seniority to grievant and, therefore, that question is not at issue or ripe for decision in this grievance.

Present school law makes no mention of the contractual requirements for the employment of substitute teachers, however, W.Va. Code, 18A-2-3 states that a substitute teacher can be employed for a position being held for an absent teacher but does not authorize the employment by the board of a substitute teacher for a vacancy created by the transfer of a regular teacher such as was done in the case of the grievant herein. Moreover, the West Virginia Code contains no provisions for "tenured" substitute teachers nor did the board offer any interpretative data from the State Superintendent of Schools or other legal authority addressing that alleged class of professional employees.

However, guidance can be found regarding the employment status of substitute professionals employed under certain circumstances. In a July 1974 advisory, the State Superintendent of Schools

has declared that a regular full-time substitute teacher should be employed by contract, be granted pay allowances for holidays and leave time, be covered by insurance benefits and that after three years of such employment, the teacher would be due a continuing contract. As there appears to be no statutory provision for a class of professional employees designated "tenured" substitute teachers, the "continuing" contract gained by substitute teachers would pertain to regular full-time employment. Such an entitlement would not be in contravention of the statutory posting and hiring requirements as a teacher who attained a continuing contract by such means could still be "unassigned" and would therefore have to bid upon a job vacancy. With respect to insurance benefits, the Grievance Board may not rule on matters pertaining to PEIB coverage. W.Va. Code, 18-29-2(a). However, if the board has correctly interpreted that grievant is ineligible for PEIB benefits, W.Va. Code, 18-5-13(a) does empower a board, "[t]o provide solely from county funds for all regular full-time employees of the board all or any part of the cost of a group plan or plans of insurance coverage not provided or available under the West Virginia public employees insurance act[.]" (Emphasis added).

In another advisory the State Superintendent has declared that a teacher working 133 days per school year earns seniority for pay increment purposes and the 133-day rule can be applied to satisfying tenure requirements for continuing contract status.

This position was accepted by the State Supreme Court in Harkins v. Ohio County Board of Education, \_\_\_ S.E.2d \_\_\_ (W.Va. 1988) when it reasoned that a substitute teacher employed on a substantially full-time basis for three years, whether successive years or not, was entitled to a continuing contract of employment as per W.Va. Code, 18A-2-2. Thus, grievant herein was entitled to all of the benefits of regular employment including accrual of a semester's seniority to attain regular employment for each semester he worked on an ongoing regular basis at one continuing assignment and/or a year's seniority credit for pay purposes and to attain tenure for regular employment if he met the 133-day rule for each school year he taught.

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

#### FINDINGS OF FACT

1. Grievant is certified to teach in the areas of physical education, health and safety and driver's education but holds no certification for teaching behavioral disordered students.

2. Grievant commenced his employment with the board as a day to day substitute teacher and entered into a contract for the 1984-85 school year; he signed a similar contract for the 1985-86 school year and the 1986-87 school year.

3. The second semester of the 1986-87 school year, grievant was assigned on a regular, full-time basis to teach physical education and health to the female students at Presley Ridge School. (T.6). On May 4, 1987 he was sent a letter from the school board stating that he was now considered a tenured substitute teacher and that signing a contract was no longer necessary. He was asked whether he wished to remain a substitute teacher for the 1987-88 school year to which he replied affirmatively. (Joint Exhibit 5, 1/20/88).

4. At the beginning of the 1987-88 school year grievant applied for a posted position (T.19,20) vacated by a teacher who had transferred (T.12). The position was to teach physical education and health at both Presley Ridge School, for behaviorally disordered students, and the Alternative Learning Center, a facility designed for potential dropouts. At the time of grievant's assignment to the position he was informed that the position would continue until at least the end of the first semester and possibly to the end of the 1987-88 school year but the school board provided no reasons for the temporary nature of the assignment. (T.6,7).

5. Grievant apparently filed this grievance in mid-December 1987 when he learned that another teacher who had transferred from a substitute position at Presley had been employed in a regular full-time position elsewhere. Grievant stated he was not certified in behavioral disordered and was not eligible for



the position for which the other teacher had been hired and did not apply for it.

6. The State Superintendent of Schools has determined that a substitute teacher employed on a substantially full-time basis to a specific semester or an entire school year (133 days minimum, "133 day rule") is entitled to a contract reflecting said regular substitute employment and all benefits of regular employment including personal and sick leave days, insurance benefits and accrual of seniority for salary determinations and tenure for regular employment status.

7. Grievant presented no evidence pertaining to how many work days he had completed for school years 1984-85, 1985-86, 1986-87 and the first semester of the 1987-88 school year, thus he has not shown entitlement to a regular, continuing contract of employment on the basis of the completion of three years employment under the 133-day rule the State Superintendent of Schools has determined as controlling.

8. Grievant has established that, as of the time he filed his grievance, he had worked a full semester the second semester of 1986-87 and the first semester of 1987-88 in a full-time substitute capacity at one ongoing teaching assignment and he was entitled to a contract reflecting the full-time employment and all the benefits of regular employment, including insurance

coverage for those semesters and accrual of two semesters (total one year) seniority credit toward tenure for a regular, continuing contract of employment.

#### 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).

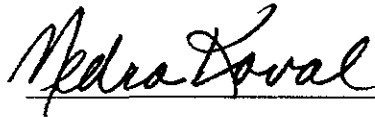
2. Interpretations of the State Superintendent of Schools are entitled to great weight unless clearly erroneous. Smith v. Board of Education of the County of Logan, 341 S.E.2d 685 (W.Va. 1985); Thompson v. Kanawha, Docket No. 20-86-366-1; B. Smith v. Wyoming County Board of Education, Docket No. 55-87-209.

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** to the extent that grievant has accrued at least two semesters of seniority for regular continuing contract tenure and he is entitled to insurance coverage and all benefits of regular employment for future full-time substitute employment.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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: June 23, 1988

A handwritten signature in cursive script, reading "Nedra Koval", written over a horizontal line.

NEDRA KOVAL  
Hearing Examiner