



11/25

REPLY TO:
101 Harper Park Drive
Suite D
Beckley, WV 25801
Telephone: 255-6155

Members
James Paul Geary
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

VIRGINIA K. TOTH

v.

Docket No. 33-87-309-4

MCDOWELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Virginia Toth, first signed a contract of employment for substitute service personnel as an aide with the McDowell County Board of Education on December 13, 1984. She filed a grievance in October 1987 alleging several improper actions on the part of the Board including a miscalculation of her substitute seniority. A Level II hearing was held on November 2, 1987 and a decision at that level was adverse to the grievant. Level IV hearings were scheduled but in February 1988 the parties agreed to submit the matter for decision on the record and exhibits developed at Level II.

After signing her contract in December 1984, grievant was first assigned duties at Berwind Elementary School on January 3, 1985. In May 1985 she again performed substitute duties at War Elementary

and on October 21, 1985 she began working at Berwind Elementary again and remained there through the end of the 1985-86 school term. At the beginning of the 1986-87 school term she signed another substitute service personnel contract and was again assigned to Berwind Elementary working with the same teacher, Mr. Carl Owens. She remained at Berwind through the end of the 1986-87 school term but in May 1987, she was notified her "temporary aide position there would be dissolved" due to a lack of need and she would accordingly be returned to a rotating substitute list.

During the summer of 1987 Ms. Toth was turned down for several positions for which she bid and in September 1987 the position of aide at Berwind, which she previously occupied, was posted and after she applied it was awarded to someone whom she believed to have less seniority. Assuming the Board's calculations of her seniority were incorrect, Ms. Toth then filed her grievance and through informal discovery with the Board found her seniority date as a substitute aide listed as May 13, 1985 when she first performed duties at War Elementary and another seniority date as a substitute secretary listed as January 3, 1985 when she first worked at Berwind. Grievant also learned that another substitute aide, Ms. Jennifer Phillips, had been granted regular employee status while filling in for an aide on leave of absence and by virtue of this status was awarded the aide position at Berwind. With this information Ms. Toth raised three basic issues

at Level II and upon appeal at Level IV:

1. The Board incorrectly listed her substitute aide seniority date as May 13, 1985 causing her to lost certain positions for which she bid and by improperly granting Ms. Phillips the right to bid on positions as a regular employee, she (grievant) lost the Berwind position in particular.

2. By virtue of the Board's action in granting her certain insurance benefits, a right to prorate her salary over the calendar year and other privileges of regular employment during the 1985-86 and 1986-87 school terms, she had in fact achieved regular employee status and should have been afforded the right to bid as such upon vacancies.

3. Since she served as an Aide II during the second half of the 1984-85 school term she accrued seniority as such and should have received a promotion to Aide III and a corresponding raise in salary for the 1986-87 school term.

As relief grievant requests back pay in the amount of difference in the salaries of Aide II and Aide III for the 1986-87 and 1987-88 school terms, costs of private insurance payments and reinstatement to the aide position at Berwind or any other position to which a correct calculation of seniority would have entitled her. Grievant further seeks reimbursement for attorney fees and costs of this action.¹

¹Absent any express authority to do so the West Virginia Education Employees Grievance Board will not award attorney fees and costs. See, Barnhart v. Kanawha County Board of Education, Docket No. 20-87-201-1.

The Board takes the position that the grievant's substitute aide seniority date of May 13, 1985 is correct in that she was working as a substitute secretary on January 3, 1985 and moreover this fact was communicated to her in December 1985 and grievant is therefore barred from pursuing the matter because of the timeliness provisions of W.Va. Code, 18-29-4. As to the assertion that grievant gained regular employee status by serving in the same position for nearly two school terms, the Board points to the provisions of W.Va. Code, 18A-2-7 which grant only the superintendent and board of education the authority to fill positions with regular employees. It is the Board's position that regardless of Ms. Toth's length of service in the position at Berwind the requirement of timeliness also bars this part of the grievance in that grievant was clearly put on notice by the letter dated May 28, 1987, that she was still considered a substitute and the grievance was not filed until October 1987.² The Board made no response to grievant's third argument relating to her right to a classification of Aide III at the beginning of the 1986-87 school term.

² While the Board's letter indicated grievant's "temporary Aide position at Berwind was dissolved", she was still on a substitute list and this letter was in effect just a notice that grievant would not be performing substitute aide duties at Berwind at the beginning of the 1987-88 school term.

Grievant's contentions that she had gained regular employee status while serving in the position at Berwind is barred by the timeliness provisions of W.Va. Code, 18-29-4, as the Board asserts. Although the Board had granted her certain rights and privileges incident to regular employment status, she was clearly placed on notice as early as March 28, 1987 that she would be returned to a rotating substitute list nearly six (6) months before the grievance was filed. Grievant's argument that she should have been reclassified as an Aide III at the beginning of the 1986-87 school term is similarly precluded on the issue of timeliness.³

Ms. Toth's remaining assertion concerning her seniority date as a substitute aide, however, was timely filed despite the Board's contention she was informed in 1985 that she had a seniority date of January 3, 1985 as a substitute secretary. Although the testimony of Ms. Jerry Roncella indicated there was a discussion of this matter in December 1985 at the Board office, the testimony of the grievant revealed this seniority listing was not clearly communicated to her at that time. (T.23, 24) The Level II transcript indicates that

³This issue was not adequately developed at Level II or in legal argument submitted at Level IV and as such would have been considered abandoned notwithstanding the fact that over a year had passed since the beginning of the 1986-87 school term and the date the grievance was filed. See, Farmer v. Logan County Board of Education, Docket No. 23-87-052-4.

on September 23, 1987 grievant became aware of the Board's May 13, 1985 seniority date listing and even though the Board claims she was performing secretarial duties on January 3, 1985, the record indicates otherwise. Her contract of employment noted her title as aide and the notification of official action by the Board on that contract contained the same notation. Ms. Toth was even given a training course on the duties of aide prior to beginning those duties. It is not clear from the record why the Board elected to use an employee hired for such a job to fill in for a secretary on January 3, 1985, but it could not change grievant's classification and seniority date as a substitute aide by doing so. Ms. Toth testified she could not type, take shorthand or dictation and her duties that day were mainly those of an office assistant. (T.7,8)

It appears grievant is also correct in her assertion that the Board improperly granted Ms. Jennifer Phillips the right to bid upon jobs as a regular employee when she was actually a substitute aide filling in for an employee on leave of absence at Elkhorn Junior High School. Director of Personnel, Mike Cortellesi, testified that it was known in advance that Ms. Phillips would be in that position for more than twenty (20) days so she was granted regular employee status. Mr. Cortellesi interpreted W.Va. Code, 18A-4-15 to mean this status entitled Ms. Phillips to bid on positions as a regular employee and thus gain preference over other substitutes. (T.87,88,89) This is not the meaning and intent of this section of the West Virginia

Code and the West Virginia Education Employees Grievance Board has previously held that substitutes in these particular circumstances do gain certain rights and privileges but they do not become regular employees for the purposes of seniority or preferential hiring. See, Day v. Wyoming County Board of Education, Docket No. 55-87-289-4; Cline v. Mingo County Board of Education, Docket No. 29-86-287-4. Ms. Phillips was, at the time of the posting of the aide position at Berwind, only a substitute and should have been given no preference over grievant or other substitute applicants. While grievant has established a miscalculation of her seniority date and an improper preference in hiring for Ms. Phillips, she has not shown which of the positions she would have received in 1987. Grievant began applying for a number of jobs with the McDowell County Board of Education in June 1987 and the Board must make a determination as to which of these she would have been awarded if her seniority date had correctly been listed as January 3, 1985.

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

FINDINGS OF FACT

1. Grievant, Virginia Toth, is a substitute aide employed by the McDowell County Board of Education.

2. Ms. Toth was given training in the duties and responsibilities of an aide and signed her first substitute service personnel

contract with the McDowell County Board of Education on December 1987 to perform the services of aide.

3. The grievant first entered into her duties as an aide on January 3, 1985 at Berwind Elementary School, although the person for whom she was substituting had the title of secretary.

4. On October 1985 grievant began substitute duties at Berwind Elementary School in the special education classroom of Mr. Carl Owens and continued in this position until the end of the 1986-87 school term when she was notified this position was "dissolved" by action of the McDowell County Board of Education.

5. From the end of the 1986-87 school term to September 23, 1987 grievant made application for a number of posted jobs for which she was qualified but was not hired for any of these positions including the aide position at Berwind Elementary which was awarded to Ms. Jennifer Phillips.

6. At the time of the posting of the aide position at Berwind Elementary, Ms. Phillips was a substitute aide who had been granted regular employee status pursuant to the provisions of W.Va. Code, 18A-4-15.

7. Grievant discovered on September 23, 1987 the McDowell

County Board of Education had been listing her substitute aide seniority date as May 13, 1985 and initiated grievance procedures on October 5, 1987.

CONCLUSIONS OF LAW

1. W.Va. Code, 18-29-4 requires an employee to file a grievance within fifteen (15) days following the occurrence of the event upon which the grievance is based, or within fifteen (15) days of the date on which the event became known to the grievant and the grievant, Virginia Toth, failed to make the allegations concerning her right to classification as Aide III and her right to regular employee status within the time limitations imposed by this section of the West Virginia Code.

2. W.Va. Code, 18A-4-8b(b) provides that a school service employee's seniority begins on the date he or she enters into his or his assigned duties.

3. Although the McDowell County Board of Education called upon grievant to fill in for a secretary on leave at Berwind Elementary School on January 3, 1985, she had no skills or training in such a job and as such her duties on that date more closely resembled those of a substitute aide, the Board should have calculated her substitute aide seniority from that date.

4. Pursuant to W.Va. Code, 18A-4-15 a county board of education is required to grant regular employee status to a substitute who fills in for a regular service employee on leave of absence for more than twenty days but said substitute does not become a regular employee for the purposes of seniority accrual or preferential hiring. Day v. Wyoming County Board of Education, supra; Cline v. Mingo County Board of Education, supra.

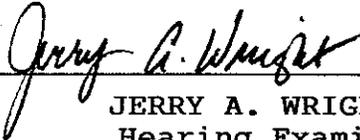
5. The McDowell County Board of Education improperly applied the provisions of W.Va. Code, 18A-4-15 by giving Ms. Jennifer Phillips the right to bid upon positions as a regular employee including the position of Aide at Berwind Elementary School.

6. Because of the Board's miscalculation of her substitute aide seniority and its improper action in granting Ms. Phillips regular employee status, grievant was improperly denied positions for which she applied between the end of the 1986-87 school term and September 23, 1987.

Accordingly, the grievance is **GRANTED** and the McDowell County Board of Education is hereby **ORDERED** to make amendments in any and all personnel records concerning the grievant, Virginia Toth, to reflect a substitute aide seniority date of January 3, 1985 and to further make a determination as to the first job posted between the end of the 1986-87 school term and September 23, 1987 for which grievant

bid upon and would have received had the Board correctly computed her seniority and after such determination, the McDowell County Board of Education is further ORDERED to instate grievant to said position with backpay and benefits less any appropriate set-off.

Either party may appeal this decision to the Circuit Court of McDowell 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.



JERRY A. WRIGHT
Hearing Examiner

DATED:

April 21, 1988