



WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD

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NEDRA ABBOTT

v.

Docket No. 89-03-288

BOONE COUNTY BOARD OF EDUCATION

DECISION

File Cabinet

Nedra Abbott, formerly on staff with
County Board of Education, filed the fol
Level I on May 12, 1989:

Grievant's position as an aide was terminated by a
reduction in force [(RIF)] in that classification.
Grievant has two years of seniority as a regularly
employed aide. The Board [of Education] has not
reduced in force the position of Brenda Lovejoy.
Ms. Lovejoy has one year of seniority as a regu-
larly employed aide and has worked in excess of
133 days as a substitute aide during the academic
years 1986-87 and 1987-88. Grievant requests
reinstatement to a position as an aide in the
Boone County School System.

After denials there¹ and at Level II² and W.Va. Code
§18-29-4(c) waiver at Level III, Grievant advanced her claim

¹ The disposition at Level I has not been made part of
the record at Level IV. It appears that there was no
authority at Level I to grant the relief sought, and it will
be presumed that Level I processing was appropriately
conducted per W.Va. Code §§18-29-3, 18-29-4(a). See
Bumgardner v. Ritchie Co. Bd. of Educ., Docket No.
(Footnote Continued)

to Level IV on June 26, 1989. The parties later concurred that the matter was appropriate for disposition on the record,³ and with the submission of fact-law proposals from the parties by September 8,⁴ the case is mature.

It is stipulated the statement of grievance is factually precise. This case thus squarely raises the following issue:

Do substitute service employees attain seniority just as regular service personnel do, without any distinction?

Code §18A-4-8b(b) relates to seniority rights of school service personnel and provides as follows:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel. . .on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of

(Footnote Continued)
89-43-222, etc. (June 12, 1989).

² The Level II hearing transcript is part of the record herein.

³ At this point, the scheduled August 4 Level IV hearing was cancelled.

⁴ Respondent presented the findings and conclusions of the Level II decision as its submission at Level IV. Grievant's Code §18-29-3(k) motion, appearing in the summary paragraph of her fact-law proposals, that her remedy request be amended to include back wages and benefits, is noted.

employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title. . .that relates to the promotion or vacancy. If the employee so requests, the the board [of education] must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:

- (1) Regularly employed service personnel;
- (2) Service personnel whose employment has been discontinued in accordance with this section;
- (3) Professional personnel who held temporary service personnel jobs or positions prior to. . .[June 9, 1982], and who apply only for such temporary jobs or positions;
- (4) Substitute service personnel; and
- (5) New service personnel.

The county board of education may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section and thereafter.

. . .Each class title listed in. . .§18A-4-8. . .shall be considered a separate classification category of employment for service personnel, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment. . . .

For purposes of determining seniority under this section an employee's seniority begins on the date that he enters into his assigned duties.

. . .

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 as hereinafter provided, when an employee has been employed in one or more classifications, the seniority accrued in

each previous classification shall be retained by the employee.

Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy; Provided, That if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board [of education] if there is a vacancy and shall retain any seniority accrued in such classification or grade of classification.

. . .

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

. . .

No position openings may be filled by the county board [of education]. . .until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

There is no clear distinction made in this statute between time-in-service accrual of regularly-employed and substitute personnel⁵; however, Code §18A-4-15 provides substitute staff, upon the meeting of certain contingencies,

⁵ There is likewise no distinction made in Code §18A-4-8b(b) between so-called "permanent subs," i.e., those substitute employees who, for various reasons, remain in one assignment long-term, and those who might be referred to as "itinerant subs," i.e., those individuals who work a day or two at one school, then a week at another, and so forth. But see Code §18A-4-15.

with specified accoutrements of regular employment. Notably, the area of seniority is not included among them. Furthermore, past authority of the West Virginia Education and State Employees Grievance Board is that service employee substitutes do not accrue regular-employee seniority. In Day v. Wyoming Co. Bd. of Educ., Docket No. 55-87-289-4 (Jan. 26, 1988), for example, it was held,

A substitute custodian filling in for a regularly employed custodian. . . does not accrue seniority as a regular employee but as a substitute custodian,

Toth v. McDowell Co. Bd. of Educ., Docket No. 33-87-309-4

(Apr. 21, 1988), concurred as follows:

Pursuant to. . . [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.

See also Satterfield v. Marion Co. Bd. of Educ., Docket No. 24-87-253-2 (Feb. 26, 1988), which stated in dicta, "[It] is correct" "that seniority earned as a substitute does not apply to that of a regular position."⁶

⁶ But cf. Davis v. Marshall Co. Bd. of Educ., Docket No. 25-88-096 (July 11, 1988), and subsequent cases which cite it, which hold or reference that under certain rather specific circumstances professional workers attain regular-employment seniority for substitute service.

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

FINDINGS OF FACT

1. Grievant has been regularly-employed as an aide for Respondent since the beginning of the 1987-88 school term. Another aide, Brenda Lovejoy, worked as a substitute for the greater portion of each of school years 1986-87 and 1987-88 and has been regularly-employed in that capacity since the start of 1988-89.

2. Pursuant to a reduction-in-force, Grievant was identified as the least senior aide in Respondent's service and released from employment.

CONCLUSIONS OF LAW

1. "Seniority" for education service personnel in West Virginia is defined as follows: first, then-current employment status is determined, and "regularly employed service personnel" have priority over, i.e., greater seniority than, "service personnel whose employment has been discontinued in accordance with" Code §18A-4-8b(b) (RIF'd), who have priority over "professional personnel who held temporary service personnel jobs or positions prior to" June 9, 1982, "and who apply only for such temporary jobs or positions," who have priority over "substitute service personnel," who have priority over "new service personnel." W.Va. Code

§18A-4-8b(b); see also Meade v. Mingo Co. Bd. of Educ., 356 S.E.2d. 479, 481-82 (W.Va. 1987).

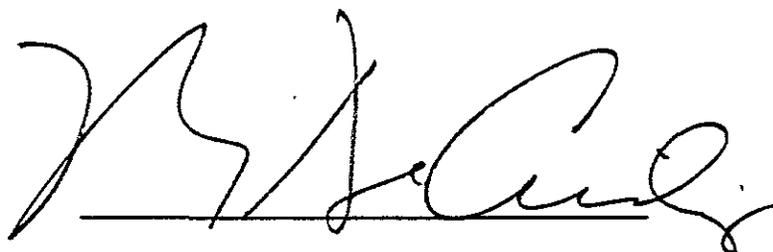
2. If two or more people with the same employment status then need to be compared, the person with the most time-in-service in the relevant classification of employment has the greatest seniority. Basham v. Kanawha Co. Bd. of Educ., Docket No. 89-20-581 (Nov. 21, 1989). In RIF situations, only regularly-employed staff is affected, and so, time-in-service in the relevant classification becomes pertinent.

3. Under Code §18A-4-8b(b), substitute service staff members do not accrue regular-employment seniority in the same manner as permanently-hired service personnel do. Toth v. McDowell Co. Bd. of Educ., Docket No. 33-87-309-4 (Apr. 21, 1988); Day v. Wyoming Co. Bd. of Educ., Docket No. 55-87-289-4 (Jan. 26, 1988). Therefore, only Ms. Lovejoy's time-in-service as a regularly-employed aide counts for purposes herein, rendering her less senior than Grievant and subject to reduction-in-force before Grievant.

Accordingly, this grievance is **GRANTED**, and Respondent ordered to reinstate Grievant as an Aide, with all attendant back-pay and -benefits less any appropriate setoff.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County and such appeal must be filed within thirty (30) days

of receipt of this decision. 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. This Grievance Board should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in black ink, appearing to read 'M. Drew Crislip', written over a horizontal line.

M. DREW CRISLIP
HEARING EXAMINER

Date: November 30, 1989