



Members
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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

MAMIE E. CROUCH

v.

Docket No. 40-89-010

PUTNAM COUNTY BOARD OF EDUCATION

DECISION

Grievant, Mamie E. Crouch, employed by Respondent Putnam County Board of education as a bus operator since 1973, alleges that Respondent violated the seniority requirements of W.Va. Code §18A-4-8b in denying her a supplemental assignment. Her statement of grievance is as follows:

I bid on a pre-vocational run, Winfield area, morning run, and a driver with less seniority got the job. The Putnam County Board of Education did not count the time I was absent and on Workmen's Compensation, this was from March 1, 1975--August 26, 1976. With that time applied to my seniority, I would have more seniority than the other driver.

Therefore, relief sought by me is receive credit for seniority denied while off on Workmen's Compensation, and get the job that I applied for, any back pay that I would have received.

Grievant filed at Level I on September 8, 1988, and her supervisor responded on September 15, 1988, as follows:

Mrs. Crouch was denied the supplemental assignment, pre-vocational run, Winfield Area, morning run because she had less seniority than Charles Beckett. Mrs. Crouch was absent without pay for the period from March 1, 1975, until August 26, 1976, and did not accrue seniority during that time period. Grievance denied.

The grievance was also denied at Level II on October 31, 1988, after hearing on October 24, 1988. At Level III Respondent waived its right to hear the grievance and so notified Grievant on January 3, 1989, on which date Grievant appealed to Level IV. Having requested that the decision be made on the record compiled below, Grievant supplemented the record on February 9, 1989.¹ With receipt of Proposed Findings of Fact and Conclusions of Law from Grievant on March 17, 1989, this matter can be considered for decision.²

Respondent has not disputed that the facts are as Grievant states them in her grievance, supported by her testimony. Indeed, Respondent's witnesses, Bill Duncan, Business Manager and Treasurer of Respondent, and Shelba McClanahan, employed by Respondent in the Payroll Division, testified that Grievant was denied seniority and other benefits for the time she was off work on workers' compensation after she had used up her accrued sick leave. Mr.

¹ Grievant provided copies of her employment contracts with Respondent for the school years 1975-1976 and 1976-1977 and also provided an opinion of State Superintendent of Schools Roy Truby dated July 21, 1983. Respondent did not object. Those records are accepted into evidence as Grievant's Exhibits 1, 2 and 3, respectively.

² The parties were notified that their proposals were due by March 17th and Respondent's Counsel stated in a letter of February 6, 1989, "I will be preparing and sending to you Proposed Findings of Fact and Conclusions of Law with optional brief[] before March 17, 1989." Since no such proposals have been received, it is accepted that Respondent has waived its right to submit them.

Duncan testified as follows regarding the practice of Respondent:

Q Could you explain for us the way seniority accrues, or does not accrue, with regard to sick leave? What happens, for instance, when one runs out of sick leave?

A When they run out of sick leave, at that time they stop accruing the normal benefits that they would have accrued during the time that they were sick, or were not sick.

Q Would you cite the instances when that happens? For instance, the variety of different kinds of leave we have in this county. Does it only just happen with people on Workers' Comp, for instance?

A Oh, no. Any time that they are on any type of a leave of absence and run out of their sick days, you know, at that point they no longer receive pay and they no longer accrue the benefits. You accrue sick days -- you continue to accrue sick days as long as you have sick days to use, and at the point you run out, it terminates.

Q You stop accruing benefits? Is that correct?

A Yes.

Q Would that be true if one, for instance, were allowed to use vacation days, or what we call personal leave days in this county? Once those were depleted that situation would be the same? They would stop accruing benefits?

A Yes, ma'am.

Tr. 19-20. Ms. McClanahan's testimony was as follows:

Q ...[W]hether a person is on maternity leave, or leave of absence, or any other kind of leave that this county allows, once they run out of vacation days or personal leave days, or sick days, what happens?

A They are no longer paid and they no longer accrue days after that.

Q Do they accrue benefits?

A As far as their insurance, if it's a medical leave, they can stay on their insurance.

Q But they accrue no vacation days?

A No.

Q They accrue no sick days?

A No.

Q They accrue no seniority?

A No.

Tr. 24-25.

Thomas v. Boone County Board of Education, Docket No. 03-88-087 (Oct. 18, 1988), held that while an employee of a board of education is off work on workers' compensation he or she is entitled to continue to accrue personal leave days, ruling as follows:

In Aftanas v. Brooke County Board of Education, [Docket No. 05-87-295-3 (Jan. 29, 1988)], it was held that an employee who remains under contract with a county board of education is entitled to his or her personal leave days granted by statute. The controlling factor in that case was the continuation of the employee's contract during the term of her disability.

At 4-5. Just as Grievant was entitled to accrue personal leave under the holdings of Aftanas and Thomas, so was she entitled to accrue seniority. Regarding W.Va. Code §18A-4-8b(b), which provides in pertinent part,

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

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[.]

Grievant properly argues,

The statute provides for accrual of seniority from the date of one's employment. It makes no reference nor does it imply that seniority may be interrupted when an individual is not physically engaged in work but

remains under contract while drawing Workers' Compensation benefits.³

Moreover, holding that Grievant was entitled to accrue seniority while off work on workers' compensation is consistent with the 1983 State Superintendent's Opinion submitted by Grievant, Gr. Ex. 3, that a service employee accrues seniority while off work on workers' compensation because he or she continues to be employed throughout such time.

Finally, Grievant testified that she never had received a poor evaluation and that when the length of her employment is calculated to include all the time she was off work on workers' compensation she had more seniority than the successful applicant, Mr. Beckett. That testimony was uncontradicted.

³ Grievant also notes,

Grievant was also granted continuing contract status for the first time by the Putnam County Board of education at the beginning of the 1976-77 school term after three years of acceptable employment in accordance with W.Va. Code §18A-2-6. The Putnam County Board of Education obviously treated the period of time that Grievant was receiving Workers' Compensation benefits as accrued towards completion of the Grievant's three years of acceptable employment. It is difficult to perceive the distinction that the Board draws between counting the Grievant's time that she received Workers' Compensation benefits as time accrued towards completion of three years of acceptable employment but yet not count that time as seniority accrued as determined by W.Va. Code §18A-4-8b.

Grievant's brief 2-3.

Nevertheless, this record fails to establish that Grievant is entitled to be placed in the position or to be paid back pay. The recent decision of Cole v. Putnam Co. Bd. of Educ., Docket No. 40-88-024 (March 17, 1989), upheld an additional criterion for assignment to the bus run involved in this case, that the operator's regular run be in the Winfield area, and ordered a reposting of the run. This record does not establish that Grievant fulfilled all criteria for the run and was entitled to it.⁴

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

Findings of Fact

1. Grievant has been employed as a bus operator by Respondent since 1973.
2. Grievant has never received a poor evaluation as a bus operator.
3. Grievant was injured on the job January 30, 1975. Her accrued sick leave ran out, by Respondent's calculations, at the end of February, 1975, and she remained off work on workers' compensation until August 26, 1976.

⁴ While the Level I response of Grievant's supervisor raises an implication that Grievant would have been awarded the position had she been considered senior to Mr. Beckett, the evidence does not so establish.

4. Grievant was not credited by Respondent with any seniority for the time between March 1, 1975, and August 27, 1976.

5. Grievant bid for a pre-vocational morning run in the Winfield area apparently in the fall 1988 but was denied the run.

6. If Grievant is credited with seniority from March 1, 1975, through August 26, 1976, her seniority is greater than the applicant, Mr. Beckett, who was awarded the run.

Conclusions of Law

1. A service employee who has an employment contract with a county board of education but is off work on workers' compensation is entitled to accrue seniority for the time he or she is off work on workers' compensation, and that seniority does not cease to accrue when the employee has used his or her accrued sick leave.

2. With proper inclusion of the seniority Grievant accrued while she was off on workers' compensation, she had greater seniority than Mr. Beckett, who was awarded the pre-vocational morning bus run in the Winfield area.

3. The pre-vocational morning run in the Winfield area must be considered extracurricular per W.Va. Code §18A-4-16. Cole v. Putnam Co. Bd. of Educ., Docket No. 40-88-240 (March 17, 1989). "Extracurricular service assignments must be made on the basis of seniority, qualifications and evaluation of past service per Code

§18A-4-8b(b). See Harrison v. Wyoming Co. Bd. of Educ., Docket No. 55-88-211 (Feb. 15, 1989). However, in order for a person to be qualified to take on an extracurricular assignment, he/she must further already be a regular employee of a county board of education and the assignment must not interfere with his/her normal duties or create unnecessary expense for his/her employer." Cole. "Respondent's practice of considering the geographic locale of a bus operator's regular run a qualification for employment for extracurricular duties is reasonable." Cole.

Accordingly, the grievance is **GRANTED** insofar as it requests reassessment of Grievant's seniority in accordance with this decision. Furthermore, Respondent is ORDERED to reconsider Grievant's application for the run and, should Grievant fulfill all the qualifications for the position, see Cole, and have the greatest seniority of the qualified applicants who have applied for the run pursuant to the reposting ordered in Cole, to place Grievant in the position.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County and such appeal must be filed within thirty (3) 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. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
HEARING EXAMINER

Date: April 13, 1989