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

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MARY BETH PROCTOR

v.

Docket No. 40-88-182

PUTNAM COUNTY BOARD OF EDUCATION

DECISION

Grievant Mary Beth Proctor is a classroom teacher employed by Respondent Putnam County Board of Education. She initiated this grievance at Level I on June 13, 1988, alleging that she "was. . .[not selected for] job[s] because of improper calculation of seniority." After denial there and at Level II, Respondent waived Level III consideration of the complaint per W.Va. Code §18-29-4(c); it was thereafter filed at Level IV, where hearing was conducted November 4 and December 9, 1988. The parties were directed, and they agreed, to submit proposed findings of fact and conclusions of law on or before January 6, 1989.¹

¹While Respondent's proposals were received according to schedule, Grievant's were not timely delivered and as such not considered herein.

Prior to school term 1988-89, Grievant had approximately seven years and ninety-one days in Respondent's service.² She was first hired as a regular, full-time employee on August 19, 1980. At that time, she had certification from the West Virginia Department of Education to teach physical education and special education/physically impaired students; in December, 1987, she became certified in elementary education.³ In March, 1988, Barbara Arnold, Respondent's Director of Personnel and General Counsel, told Grievant that the job she, Grievant, then occupied was being eliminated for 1988-89 and that she would thus be placed on "administrative transfer."⁴ Also at that time, Ms. Arnold advised Grievant that her seniority for purposes of vying for elementary teaching slots ran only from her

²Certain evidence catalogued Grievant's tenure with Respondent as seven years, ninety-one and one-half days. The actual figure is apparently significant, since one of Respondent's representatives testified at Level IV that, at least in some cases, seniority has been calculated to the quarter-day.

³Even though each of the certifications Grievant had by 1980 were specified for grades K-12, it is apparent that neither counted as and both are different from the general certification in elementary education Grievant achieved in 1987.

Other particulars of Grievant's work history are not directly relevant to this grievance or its outcome.

⁴Testimony at Level IV established that being placed on the administrative transfer list in Putnam County, West Virginia, is tantamount to a promise that the individual will have a job the following school year.

certification in that field, not from her original hire date with Respondent.

Thereafter, Grievant applied for some thirty-eight teaching jobs primarily on the grade-school level and was eventually awarded her current position at Liberty Elementary School.⁵ She contends that her seniority for purposes of all job placement should have been calculated at or about seven years, ninety-one days and that at least fifteen teachers with less overall seniority than she were given preference in hiring. She further asserts that five teachers subject to reduction-in-force (RIF), and thus "preferred recall," were granted priority over her during this application process.⁶

⁵The Liberty job, not one of her top choices, was the first elementary post Grievant was offered for 1988-89. After that school term started, she was selected for another elementary position which she declined, preferring her placement at Liberty.

⁶Teachers on "preferred recall" are not necessarily guaranteed a job for the coming school year, but are promised priority over applicants outside Respondent's regular, full-time employ. W.Va. Code §18A-4-8b(a). Whether the alleged priority given to these teachers in this instance is properly grieved at Level IV was the topic of lengthy discussion on both November 4 and December 9, 1988. The undersigned has determined that the issue is appropriate for consideration at this Level; however, the outcome herein precludes the necessity to resolve the same. It is noted, though, that evidence indicates that the placement of the five teachers in question onto the RIF list was not effective until the end of the workday, June 30, 1988, and that all of them had been hired for other positions on or before that date. Also noted without further comment is Respondent's argument that even if these teachers had not been placed by June 30, they still would have been entitled

(Footnote Continued)

Grievant cites W.Va. Code §18A-4-8b(a), which provides, in pertinent part:

The seniority of professional personnel shall be determined on the basis of the length of time the employee has been professionally employed by the county board of education. For purposes of establishing seniority as hereinafter provided, when an employee holds valid certification or licensure in one or more areas, the seniority shall accrue in each area. . . .

. . . A county board of education shall make decisions affecting . . . filling of any classroom teacher's position occurring on the basis of qualifications. If the applicant with the most seniority is not selected for the position a written statement of reasons shall be given to the applicant with the most seniority with suggestions for improving the applicant's qualifications.

The West Virginia Supreme Court of Appeals has interpreted this statute to "conclude that the legislature must have intended seniority to be the determinative factor when the applicants for a . . . vacant teaching position are otherwise so similarly qualified as to make a rational choice among the candidates impossible." Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58, 62 (1986) (emphasis supplied).

Respondent, post-hearing and without objection from Grievant, presented a March 13, 1987 Opinion of Tom McNeel,

(Footnote Continued)
to priority over Grievant for jobs for which they had longer time-in-certification than she.

then West Virginia State Superintendent of Schools.⁷ That opinion, titled "Teacher Seniority Computation," reads, in pertinent part, as follows:

In regard to computation of professional seniority per. . . [W.Va. Code §]18A-4-8b(a), . . . if you have taught for the county board of education [sic] for twenty-one years and your professional certificate is endorsed for five different teaching fields, have you earned twenty-one years' seniority in all five areas of certification or, on the other hand, have you earned seniority in each licensure area beginning with each respective date of certification/endorsement?

Professional seniority is earned separately by a teacher in each of her (or his) areas of certification, beginning with her/his date of certification or endorsement in each area (field) of licensure--but no earlier than the teacher's initial date of professional employment by the county board of education.

This means that if you were certified to teach in this state in all five of your areas of licensure when your employment with. . . [the county board of education began], then you have earned twenty-one years' seniority in each of your teaching fields (areas of certification).

If this is not the case, however, then you have earned seniority in each respective teaching field only from the date on which your teaching certificate was endorsed for a particular area of certification. . . .

Ms. Arnold testified that at least since October, 1987, when she assumed her present post, "there has never been a question. . . if you've got certification longer, you get the job." Stephen Baldwin, Respondent's Superintendent of Schools, verified this and further stated that he was aware that other county boards of education in West Virginia

⁷This Opin. was referred to extensively at the Level IV hearing.

operate on the principle that seniority applies to hiring determinations only when qualifications between or among applicants for professional positions are equal. He admitted that Respondent's hiring policy has been and is based on time-within-certification⁸ and not on qualifications or on total county seniority, but perhaps was moving in the direction that the other boards of education he referenced had adopted--i.e., the utilization of qualifications as the salient factor, with county seniority relevant only if the top applicants are equally qualified.⁹

The remainder of this Decision will be presented as findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant Mary Beth Proctor, prior to the commencement of school term 1988-89, had approximately seven years,

⁸ The length of time an individual had been certified in a given professional field was repeatedly and incorrectly referred to as a "seniority" at the Level IV hearing. It is noted, however, that this reference is consistent with Opin., State Supt. Schools re: Teacher Seniority Computation, March 13, 1987.

⁹ Such procedure is clearly the law of West Virginia. Dillon.

ninety-one days' seniority with Respondent Putnam County Board of Education.

2. At the time Grievant was first regularly employed by Respondent, she was certified by the West Virginia Department of Education to teach physical education and special education/physically-impaired students.

3. In December, 1987, Grievant was certified by the West Virginia Department of Education to teach the elementary grades.

4. In March, 1987, or before, Respondent advised Grievant that the position she then held was being eliminated. Consequently, Grievant applied for some thirty-eight other jobs with Respondent for the next school year.

5. Those thirty-eight jobs were filled based solely on what West Virginia State Superintendent of Schools, by Opin., March 13, 1987, and Respondent incorrectly referred to as "seniority," meaning time within a given certification of employment, not necessarily the total period of service with Respondent.

6. Grievant was credited with approximately six months of this misnamed "seniority" toward elementary education

positions. Accordingly, she was offered only two such positions, neither being a preferred one for Grievant.

CONCLUSIONS OF LAW

1. "The seniority of professional personnel shall be determined on the basis of the length of time the employee has been professionally employed by the county board of education. For purposes of establishing seniority. . .when an employee holds valid certification or licensure in one or more areas, the seniority shall accrue in each area. . ."
W.Va. Code §18A-4-8b(a). Applying that definition to the facts of this case, Grievant's seniority, for purposes of being considered for all professional positions with Respondent for which she applied, should have been calculated at or about seven years, ninety-one days as of the commencement of school term 1988-89.¹⁰

2. A county board of education in West Virginia is obligated to fill a professional position with the most

¹⁰ Some might contend that it is inequitable to allow an employee's accrual of seniority to retroactively apply to later-obtained certifications; however, it is certainly no more so than to allow that same employee's seniority to relate to areas of certification in which she or he has no actual work experience. In this regard, the reader's attention is invited to Conclusion of Law 4, infra.

qualified applicant therefor; seniority is relevant only if the top applicants are equally qualified, or if there is no reasonable basis for distinguishing between or among their qualifications. Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58, 63 (W.Va. 1986).

3. An Opinion of the West Virginia State Superintendent of Schools is relevant for consideration by this Grievance Board. McClure v. Kanawha Co. Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988). Opin., State Supt. Schools, March 13, 1987 re: Teacher Seniority Computation, as relevant to the instant case, is incorrect as a matter of law. See Worley v. Wyoming Co. Bd. of Educ., Docket No. 55-88-035-4 (July 13, 1988).¹¹

4. The date an individual became certified in a given area of employment, or the length of time she or he has actual work experience in that area, might reasonably be considered as pertinent to determining her or his qualifications, see

¹¹At the Level IV hearing, Respondent argued, in effect, that it should not be held accountable for actions taken in compliance with an Opin., State Supt. Schools if that Opin. is somehow incorrect, and further, that if such an Opin. is to be attacked, the West Virginia Department of Education and/or other state agencies or officials should be joined as parties-respondent. While Respondent's position is an understandable one, it at least in the context of this case is without basis in the law. See, e.g., Maynard v. Bd. of Educ. of the Co. of Wayne, 357 S.E.2d 246, 251 (W.Va. 1987).

State ex rel. Oser v. Haskins, 374 S.E.2d 184 (W.Va. 1988), but neither, in and of itself, may appropriately be considered seniority.

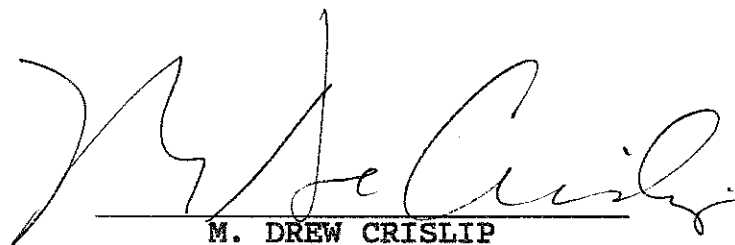
5. Respondent's calculation of Grievant's seniority for relevant purposes, and its selection of professional employees based not on qualifications or even seniority, but solely on time-within-certification, was inappropriate as a matter of law. Code §18A-4-8b(a); Dillon; also see Magro v. Monongalia Co. Bd. of Educ., Docket No. 30-88-151 (Nov. 29, 1988).

Accordingly, this grievance is **GRANTED**; accordingly Respondent is **ORDERED** to consider Grievant's seniority correctly, i.e., commencing with her original date of regular employment, with time deducted for any period Grievant was away from Respondent's employ and not on paid leave, for purposes of all future job applications she may submit, and to make any necessary attendant changes in her personnel records.¹²

¹²While Grievant's specific requests for relief in this case were slightly confusing and somewhat inconsistent, she did state at Level IV that she was willing and indeed felt an obligation to her students to remain in her position at Liberty for the remainder of school term 1988-89. The relief herein is awarded with that in mind and in recognition that the inequity suffered by Grievant as recounted in this Decision might otherwise likely reoccur.

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 (30) days of receipt of this decision. See W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board or 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.

Dated: February 1, 1989

A handwritten signature in dark ink, appearing to read "M. Drew Crislip", is written over a horizontal line.

**M. DREW CRISLIP
HEARING EXAMINER**