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

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JIMMY SKEENS

v.

Docket No. 89-22-496

**LINCOLN COUNTY
BOARD OF EDUCATION**

DECISION

Grievant Jimmy Skeens, a bus operator for Respondent Lincoln County Board of Education, alleges that, in failing to award him a Summer 1989 bus run, Respondent violated W.Va. Code §18A-4-8b(b). The Level I evaluator ruled he had no authority to decide the grievance, and the Level II evaluator denied it. At Level III consideration of the grievance was waived,¹ and it was advanced to Level IV on

¹In a letter of August 15, 1989, to Grievant Respondent stated that it had voted "to deny" his grievance. Apparently no hearing was held at Level III and the letter fails to indicate that Respondent considered the record compiled at Level II and also does not provide any legal or factual basis for the denial of the claim. Since the record therefore indicates that no proper consideration was made of the grievance, Respondent's action at Level III is hereby ruled to have been a waiver of consideration of it. See W.Va. Code §18-29-4(c).

August 24, 1989.² This decision is based on the record below, as requested by Grievant.

The parties are in agreement on the facts of this matter. Grievant bid on a posted bus run for the Summer Career Youth Center Program and was the most senior applicant for the position.³ The run was awarded to another bus operator, Jack Saunders, because he had driven it the previous summer.⁴ The Level II evaluator and both parties rely on several 1986 and 1987 Opinions of the State Superintendent of Schools. The crucial and most detailed one is that of June 26, 1987, which answered the question, "Is the seniority which must be considered for employment in summer seasonal jobs total seniority or only the seniority earned on such jobs[?]," as follows:

Seniority earned in the summer jobs appears to be the answer to your question. The right to keep a summer seasonal job held previously is granted by this paragraph of W.Va. Code 18A-4-8b(b):

²Proposed findings of fact and conclusions of law were served by Grievant on September 25, 1989. Since that date was the deadline for service of proposals and none have been received from Respondent, it is accepted that Respondent waived its briefing rights.

³Grievant testified that he had nineteen years of employment with Respondent and his representative stated that the successful applicant had twelve. It is thus accepted that Grievant had more time-in-service as a bus operator with Respondent than any other applicant. See Code §18A-4-8b(b).

⁴Grievant had driven the run Summer 1986. In 1987 it was awarded to a more senior applicant. In Summer 1988 Grievant bid on and was awarded a higher-paid run, which was not retained in Summer 1989.

"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 [§18A-4-8b(b)] and thereafter."

This statute is clarified and strengthened by the relegation clause of W.Va. Code 18A-4-8 which provides:

"No service employee, without his written consent, may be reclassified by class title, nor may a service employee, without his written consent, be relegated to any condition of employment which would result in reduction of his salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his salary, rate of pay, compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and subsequent years."

The final two sentences of the Opinion are as follows:

Consequently, if service employees have successfully bid on a summer position and worked in the position for the length of the contract period, they have a continuing right to that position if it is available the next year. They would, however, be subordinate in seniority to those in the same employment classification who had worked more years in the summer, in the event the number of summer jobs has to be reduced.

Respondent relies on the first sentence; Grievant emphasizes the second.⁵

The pertinent provision of W.Va. Code §18A-4-8b(b), not mentioned by the Opinion, is the following:

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. . . .

⁵While Grievant relies on this sentence, there is no evidence that Grievant had worked more summers than had Mr. Saunders.

Applicants shall be considered in the following order:
(1) Regularly employed service personnel;. . . .

There is nothing in the statute supporting a system of seniority based on years of summer employment. Furthermore, summer runs such as the one at issue here do not continue from year to year but, as Respondent apparently recognized by posting them yearly, are awarded as separate summer contracts. There is nothing in the statute that grants an individual a right to a contract for a summer bus run simply because he had it the year before.⁶ Rather, as with all service positions that must be filled in accordance with the mandate of Code §18A-4-8b(b) set forth above, the applicant with the most years in service in the classification with Respondent is entitled to the position as long as he is qualified and has had satisfactory evaluations. Since the

⁶The section of Code §18A-4-8b(b) quoted by the Opinion only disallows removal of employees from positions held "prior to the effective date of this section and thereafter." In passing the provision the legislature's clear intent was that the then new requirements for filling positions of Code §18A-4-8b(b) would apply only prospectively and would not apply where the employee was already in the position at the time of enactment of those requirements. The provision does not apply to the filling of any position since the 1981 date of enactment of Code §18A-4-8b(b). Accordingly, even if the position at issue here could be considered continuous, since Grievant makes no contention that he has held it since 1981, there would be no basis to find the provision applicable. Moreover, the provision of Code §18A-4-8 quoted by the Opinion does not apply to special summer contracts, as the one here, but is a provision applicable to regular service employment contracts, which is clear by its terms and by the fact that it is included in the section of the statute titled, "Employment term and class titles of service personnel; definitions."

Opinion is clearly erroneous, it cannot be accepted. Smith v. Bd. of Educ. of Co. of Logan, 341 S.E.2d 685 (W.Va. 1985).⁷

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate:

Findings of Fact

1. Grievant, a service employee of Respondent for nineteen years, was the most senior applicant for a posted bus operator position for the Summer Career Youth Center Program in 1989. Grievant is a bus operator.

2. The position was awarded a less senior applicant because he had held it the previous summer.

Conclusions of Law

1. In filling a service personnel position, a county board of education in West Virginia must consider seniority, qualifications and evaluations of past service. W.Va. Code §18A-4-8b(b). Moon v. Wayne Co. Bd. of Educ., Docket No.

⁷Grievant proposes as a conclusion of law the oft-stated principle of law that "School personnel regulations and laws are to be strictly construed in favor of the employee." Such principle applies where the strict construction of such a regulation or law would work to the benefit of an employee and to the detriment of the employer. It does not apply where differing constructions would merely benefit one employee or another, which is true here since the construction Grievant supports, while benefiting him, would be detrimental to the employee who was awarded the position.

50-88-245 (Apr. 20, 1989); King v. Ritchie Co. Bd. of Educ., Docket No. 43-87-308-3 (Oct. 31, 1988).

2. "For purposes of determining seniority under this section, an employee's seniority begins on the date that he enters into his assigned duties." Code §18A-4-8b(b).

3. If the most senior candidate for a service position is qualified for the position and has had satisfactory evaluations, he or she is entitled to the position. Moon; King.

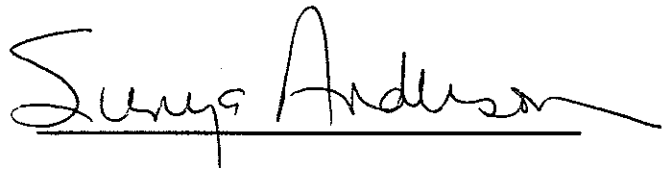
4. While this record tends to establish that Grievant is qualified as a bus operator and that he was the most senior applicant for the position, no evidence on whether Grievant's evaluations have been satisfactory were submitted.

5. The June 26, 1987, Opinion of the State Superintendent of Schools, ruling that where an employee has held a summer position, he is entitled to the position the next and subsequent summers, even if he is not the most senior applicant, unless another applicant has worked more summers, is contrary to Code §18A-4-8b(b). Since that Opinion is clearly erroneous, it is not accepted. Smith v. Bd. of Educ. of Co. of Logan, 341 S.E.2d 685 (W.Va. 1985).

6. Because whether an employee has had satisfactory evaluations was not a relevant inquiry under the June 26, 1987, Opinion, on which both parties relied, further assessment of Grievant's evaluations is required.

Accordingly, this matter is hereby **REMANDED** to Level II for a determination of whether Grievant's evaluations have been satisfactory. If it is determined that the evaluations have been satisfactory, the grievance must be granted and Grievant provided back pay for the Summer Career Youth Center Program bus run he was denied, minus appropriate set-off.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

A handwritten signature in cursive script, reading "Sunya Anderson", written over a horizontal line.

**SUNYA ANDERSON
HEARING EXAMINER**

Dated: October 24, 1989