



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

v.

Docket No. 89-13-203

GREENBRIER COUNTY BOARD OF EDUCATION

DECISION

Grievant, Joey Fitzwater, is employed by the Greenbrier County Board of Education (Board) as a teacher at Rupert Elementary School (RES). He filed a grievance at Level I May 11, 1989, alleging:

My contract was terminated pursuant to W.Va. Code §§18A-2-8A and 18A-4-8b. The Board of Education failed to give sufficient notice of the termination hearings and to provide substantive due process protection during the hearings.

Following a determination that no lower level proceedings had been held as required by W.Va. Code §18-29-4, the matter was, by order dated June 1, 1989, remanded to Level II for hearing. The hearing was held July 14, 1989 and the grievance was subsequently denied. The Board waived Level III proceedings and appeal to Level IV was made August 28, 1989, where hearing was held January

19, 1990.¹ The parties submitted proposed findings of fact and conclusions of law by February 6, 1990.

There is no dispute over the facts giving rise to the grievance and they are essentially stipulated. During the 1982-83, 1983-84, 1984-85, 1985-86 and 1987-88 school terms, grievant was employed by the Board as a substitute teacher on an as-needed basis. During the 1986-87 term, he worked one hundred eighty-five days at Greenbrier West High School (GWHS) with the majority of days spent in the school's vocational education program.² Grievant was advised in the spring of 1987 that a recommendation would be made that his employment be terminated at the end of the term due to a lack of need. He was afforded a hearing pursuant to W.Va. Code §18-29-4 before the Board accepted the recommendation. During the 1987-88 term, grievant substituted for approximately one hundred days. He was given a probationary contract of employment at the beginning of the 1988-89 term and assigned to GWHS as a "permanent substitute", which entailed filling in for teachers who were absent from the school. For pay purposes, grievant was credited for his 187 day service

¹The long delay in holding this hearing was the result of confusion and error on the part of the undersigned. After monthly reviews of the record containing grievant's initial improper Level IV appeal and other documents, it was erroneously determined that no other appeal had been made since the June 1, 1989 remand order. The mistake was discovered in late December 1989. For reasons discussed herein, the delay was fortunately of no consequence to either party.

²Grievant referred to this assignment as "mainly in the mill and cabinet classroom".

in the 1986-87 term. He was, however, not allowed to count the term as a year's seniority for the purposes of a reduction-in-force (RIF), which the Board initiated in the spring of 1989. Grievant was advised by letter dated April 4, 1989, that Superintendent of Schools Stephen Baldwin would recommend that his contract be terminated at the end of the term due to "reduced [student] population, program changes and reorganization". Grievant requested and was afforded a hearing on the proposal and the Board subsequently accepted the recommendation. Grievant's name was placed on a preferred recall list and, at the beginning of the 1989-90 school term and prior to the Level IV hearing, was again awarded a position at GWHS.

At the Level IV hearing grievant expressly abandoned any claim of denial of procedural safeguards in W.Va. Code §18A-2-7 and the request that he be instated to a position which he initially asserted should have been his pursuant to certain "bumping rights" contained in W.Va. Code §18A-4-8b(a). He merely asserted he should be credited one year of seniority for his work during the 1986-87 term. The Board made no objection to this change in request for relief and pursuant to W.Va. Code §18-29-3, the amendment was granted.

Grievant maintains that pursuant to the holdings in Harkins v. Ohio County Board of Education, 369 S.E.2d 224 (W.Va. 1988), Talerico v. Harrison County Board of Education, Docket No. 17-88-021-3 (June 23, 1988), and Davis v. Marshall County Board of Education, Docket No. 25-88-096 (July 11, 1988), he should not only be allowed credit for pay purposes and continuing contract

status for his service during the 1986-87 term, but also for seniority purposes. The Board maintains that Harkins is sufficiently ambiguous to allow for its interpretation that grievant is entitled only to count the year for pay and continuing contract purposes.

The West Virginia Supreme Court of Appeals in Harkins pronounced that substitute teachers who were entitled to count years in which they had worked for at least 133 days for purposes of attaining a continuing contract of employment. In Davis, supra, it was determined that an employee who was awarded a probationary contract was also entitled to count years in which she had served as a substitute teacher for more than 133 days for seniority purposes. This holding is consistent and not contrary to Harkins and must be followed in the present case.

To the extent that footnote four of Chapman v. Harrison County Board of Education, Docket No. 18-87-170-2 (March 1, 1989), indicates that substitute teachers do not accrue seniority for years in which they worked at least 133 days, it is contrary to Davis and in error.

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

FINDINGS OF FACT

1. Grievant, a substitute teacher employed by the Board during the 1986-87 school term, worked 187 days during that term. He was awarded a probationary contract of employment at the beginning of the 1988-89 term and has been credited with two

years of service for purposes of pay and attainment of a continuing contract of employment. For seniority purposes he has only been credited with one year.

2. Grievant expressly waived any right to positions which a recalculation of his seniority may have entitled him when he lost his position at the end of the 1988-89 term as a result of a reduction-in-force.

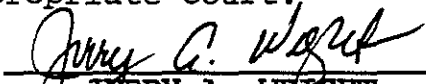
CONCLUSIONS OF LAW

1. Substitute teachers who obtain regular full-time employment with a board of education are entitled to credit toward obtaining a continuing contract of employment for each year in which they substituted at least 133 days. Harkins v. Ohio County Board of Education, 369 S.E.2d 224 (W.Va. 1988).

2. Substitute teachers who obtain regular full-time employment are also entitled to credit for said years for seniority purposes. Davis v. Marshall County Board of Education, Docket No. 25-88-096 (July 11, 1988).

Accordingly, the grievance is **GRANTED** and the Greenbrier County Board of Education is hereby **ORDERED** to recalculate grievant's seniority to reflect his attainment of one year's seniority for the 1986-87 school term.

Either party may appeal this decision to the Circuit Court of Greenbrier County or the Circuit Court of Kanawha 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 transmitted to the appropriate Court.


JERRY A. WRIGHT
Chief Hearing Examiner

Dated: March 30, 1990