ROBERT GOWER,

Grievant,

v. DOCKET NO. 94-42-090

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

The grievant, Robert Gower, a bus operator employed by the Randolph County Board of Education (hereinafter BOE), appealed to Level Four of the grievance procedure contending that the BOE violated state school laws governing the seniority of school service personnel and requesting that his seniority date be changed to a date several months earlier. The substantive legal issue presented is whether the grievant is entitled to regular employee seniority for several months during which he filled the position of another bus operator who had been suspended from employment. (See footnote 1)

There is no dispute regarding the facts surrounding the grievant's employment with the BOE. The grievant was employed as a bus operator under a regular contract of employment executed on July 20, 1992. (See footnote 2) Level Two Tr. at 6. Grievant started working as a bus operator under that regular contract at the beginning of the 1992-93 school year. Two other bus operators were hired later during the summer of 1992, and they began working at the beginning of the 1992-93 school term. Because the grievant and the other two newly-hired regular bus operators started working on the same day, they were each given the same seniority date in accordance with paragraph two of W. Va. Code § 18A-4-8g (1993). (See footnote 3) See Level One Response dated Dec. 29, 1993.

Before working under a regular employment contract, the grievant had been employed by the BOE as a substitute bus operator since 1987. Level Two Tr. at 7. During this period of substitute

employment, the grievant was called out to fill the position of a regular bus operator who had been suspended from employment for inappropriate sexual conduct until an investigation was completed. The grievant began substituting for the suspended employee on June 6, 1990, and continued to hold that position until November 27,1990. (See footnote 4) The grievant seeks to have his seniority date changed to include this period of employment.

Timeliness Defense

The first issue is whether this grievance was timely filed. The BOE properly raised the defense that the grievance was not timely filed. Timeliness is an affirmative defense that must be raised at or before the Level Two hearing under W. Va. Code § 18-29-3(a)[1992], or it is waived. Accordingly, the BOE bears the burden of proving by a preponderance of the evidence that a grievance was not timely filed. Moorefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992).

In order to properly address the BOE's timeliness issue, it is necessary to review the sequence of events preceding the filing of this grievance. As will be discussed more fully later in this decision, the Legislature enacted W. Va. Code § 18A-4-8g, effective on April 8, 1993. Section 8g defines how seniority for school service personnel must be calculated in much greater detail than prior law. Section 8g eliminated certain ambiguities that existed in prior law by defining more precisely the seniority rights of school service personnel, both substitute and regularly-employedpersonnel. (See footnote 5) It also imposed new responsibilities on county boards of education. As pertinent examples, Section 8g requires county boards of education to post current seniority lists for each school service classification twice each year on or before certain dates, and it requires county boards of education to conduct a random selection within a certain time period after two or more service employees acquire identical seniority dates to determine their relative priority for filling vacancies and for reductions in force.

As a result of the passage of Section 8g, the BOE undertook to recalculate the seniority of its regular school service personnel in accordance with the new legal requirements. Ms. Cheryll Halverson, the Executive Secretary and Certification Officer for the BOE, testified that the personnel records of all school service employees were searched to determine whether the employees had ever signed a regular employment contract and, if so, the date the employee had begun performing his or her duties. If a service employee had never signed a regular employment contract, the

employee was not given any regular employment seniority. Level Two Tr. at 16.

The record does not reflect when the BOE posted the seniority list for the grievant's bus operator classification. The record does indicate, however, that a seniority list for that classification was created and that the grievant "was upset about not receiving prior credit on the seniority list as a regular employee." Level Two Tr. at 16.

During this seniority recalculation process, the BOE determined that the grievant and two other bus operators had identical seniority dates because they had a regular employment contract and had begun performing their duties on the same day at the beginning of the school year. A random selection was therefore conducted on December 1, 1993, to break this tie, and the grievant placed second among the three.

The grievant testified that when the random selection was conducted he discovered that he "might have been or should have been credited with seniority for the time period ..." he substituted for the suspended employee, and that he filed a grievance four or five days later. Level Two Tr. 11-13. (See footnote 6)

At the outset it must be understood that the BOE is not contending the grievant failed to initiate the grievance process in a timely fashion after the random selection was conducted. Moreover, the testimony at the Level Two hearing supports a findingthat the grievant did start the grievance process in a timely manner from that point in time. Level Two Tr. at 32-33.

The BOE's contention is that the grievant was required to initiate a grievance in 1990 when he worked for the suspended bus operator. The BOE's Director of Transportation testified that during the second week of the 1990-91 school year, on either September 10 or 12, the grievant had stopped him as he was entering the bus garage and questioned him concerning whether he should have a written contract for continuing to drive for the suspended bus operator. Level Two Tr. at 23-24. According to the Level One response, the Director of Transportation informed the grievant at that time that he had not yet worked long enough in the suspended bus operator's position to be entitled to a regular employment contract.

The BOE stresses that the grievant knew in 1990 that he had not been given a regular employment contract and seniority after he had worked for more than thirty days for a suspended bus operator. The BOE even suggests that it was grievant's duty to demand a regular employment contract from the appropriate school administrator after he had worked thirty days.

On these facts the undersigned administrative law judge concludes the BOE has not proven by a preponderance of the evidence that the grievant did not initiate the grievance process in a timely manner. What happened here is that the BOE was required by a new law to recalculate the seniority of its regular service personnel and post a seniority list for each classification. Whenthe BOE advised the grievant of its determinations and conducted a random selection, the grievant challenged the BOE's seniority calculation in a timely manner. This appears to have been the grievant's first opportunity to contest the BOE's calculation of his seniority under the new law.

The BOE insists that the grievant was obligated to initiate a grievance in 1990; however, when this contention is analyzed in light of the subsequent changes in the laws governing the seniority rights of school service personnel, it must be rejected. The grievant's failure to file a grievance in 1990 cannot work to forfeit his right to challenge the BOE's calculation of his seniority under a new law in 1993. As is noted later in this decision, Section 8g applies retroactively and it may well require a school service employee's seniority date to be changed. The BOE apparently recognized that fact in this case and undertook to comply with the law by an examination of the work history of its school service personnel. In this case, the grievant's seniority under the new law may be greater than it was under prior law. (See footnote 7)

Regular Employment Seniority

Having determined that the grievance was timely filed, the merits of the grievant's argument must be addressed. In the LevelTwo decision and in its proposed findings and conclusions at Level Four, the BOE maintains that W. Va. Code § 18A-4-15(5) [1983], does not refer to seniority. In addition, the BOE argues that the grievant was not entitled to regular employment seniority under the law that existed in 1990 or under the recently enacted provisions of Section 8g.

The issue presented is one of statutory construction. The primary object in construing a statute is, of course, to ascertain and give effect to the intent of the Legislature. Snider v. W. Va. Dept. of Commerce, 441 S.E.2d 363 (W. Va. 1994). Clear and unambiguous language ordinarily must be applied not construed. Miller v. Board of Educ. of County of Boone, 190 W. Va. 153, 437 S.E.2d 591 (1993). Each section of a statute must be considered and given effect in the context of the entire statutory scheme of which it is a part, and statutes relating to the same subject matter should be read

and applied together so that the legislature's intention can be gathered from the whole of the enactments. W. Va. Dept. of Health and Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993); Williams v. W. Va. Dept. of Motor Vehicles, 187 W. Va. 406, 419 S.E.2d 474 (1992); Boley v. Miller, 187 W. Va. 242, 418 S.E.2d 352 (1992).

The question presented in this case is answered by the following plain and unambiguous language in paragraph seven of Section 8g:

> A substitute school service employee may acquire regular employment status and seniority if said employee receives a position pursuant to section fifteen [§18A-4-15(2) and (5)], subsections (2) and (5) article four of this chapter. [Emphasis added]. (See footnote 8)

The clear language of Section 8g compels the conclusion that the grievant is entitled to a change in his seniority date based upon the nature of his substitute employment in 1990. There is no dispute that the grievant was assigned a substitute bus operator position pursuant to W. Va. Code § 18A-4-15(5). Subsection 5 states, in part, as follows:

> To fill the vacancy created by a regular employee's suspension: Provided, that if the suspension is for more than thirty working days the substitute service employee shall be assigned to fill the vacancy on a regular basis and shall have and be accorded all rights, privileges and benefits pertaining to such position until such termination by the county board of education becomes final.

Likewise, there is no dispute that the grievant was employed in this position for more than thirty working days.

The BOE maintains that 8g contains a provision that prohibits it from giving the grievant any seniority credit for the period he worked in place of the suspended employee. That provision provides that "[c]ounty boards of education shall not be prohibited from providing any benefits of regular employment for substitute employees, but such benefits shall not include regular employee status and seniority." The BOE's reliance on this language ismisplaced. If the BOE's argument were accepted, the language in 8g quoted on page 7, permitting substitute employees in two specific situations to obtain regular employment seniority, would be rendered meaningless. This would be contrary to established rules of statutory construction.

In view of all the facts and circumstances, the undersigned administrative law judge reaches the

following conclusions of law.

Conclusions of Law

1. The BOE did not prove by a preponderance of the evidence that this grievance had to be filed in 1990 in order to be timely filed under W. Va. Code § 18-29-4(a)(1). A grievable event occurred when the BOE calculated the grievant's seniority in 1993 and changed his relative seniority on a seniority list for the bus operator classification.

2. By virtue of W. Va. Code § 18A-4-8g [1993], the grievant, a substitute school service employee, who was assigned in accordance with W. Va. Code § 18A-4-15(5) to fill the position of a regular service employee who had been suspended for more than thirty days, is entitled to regular employment seniority.

Accordingly, this Grievance is hereby **GRANTED**, and the BOE is **ORDERED** to modify the grievant's seniority date as a bus operator by subtracting the number of calendar days he was assigned to the suspended employee's position from his current seniority date to arrive at a new beginning seniority date.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Randolph 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 not any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

RONALD WRIGHT

Administrative Law Judge

Dated: May 8, 1995

Footnote: 1 The grievance was denied at Levels One and Two, and the grievant bypassed Level Three and appealed directly to Level Four as permitted by W. Va. Code § 18-29-4(c). The parties eventually agreed to submit the case for decision on the record developed below and the matter became mature for decision on April 7, 1995, upon receipt of proposed findings of fact and conclusions of law filed by counsel for both parties. On April 18, 1995, the case was

reassigned for administrative reasons to the undersigned administrative law judge for decision. Without objection, the grievant submitted two documents for consideration at Level Four that relate to the suspension and termination of another bus operator. These documents have been marked as Exhibits One and Two.

Footnote: 2 Regular employment is used in this context to differentiate it from substitute employment.

Footnote: 3 Section 8g, entitled "[d]etermination of seniority for service personnel", provides, as pertinent here, as follows:

"The seniority of service personnel shall be determined in the following manner:

Seniority accumulation for a regular school service employee shall begin on the date such employee enters upon regular employment duties pursuant to a contract as provided in section five [§ 18A-2-5] ... ."

Footnote: 4 The grievant worked for one day during the 1990-91 school term and then worked from the beginning of the next school year on September 4 through November 27, 1990. Level Two Tr. at 23. The grievant's employment came to an end because the suspended employee was terminated and the vacant position was posted and filled by another service employee.

Footnote: 5 When Section 8g was enacted, no change was made to the seniority language contained in W. Va. Code § 18A-4-8b. At least one paragraph in 8g, not material in this case, was apparently intended to codify precedent of the Grievance Board relating to seniority rights of school service personnel when a vacancy is to be filled by a school service employee who does not hold the classification title for that position. Compare Brewer v. Mercer County Bd. of Educ., Docket No. 91-27-002 (Mar. 30, 1992) at 11-12, with W. Va. Code § 18A-4-8g ¶11 (1993).

Footnote: 6 The record contains a letter to the grievant dated December 29, 1993, from Mr. Phares, the Director of Transportation, stating that the Level One grievance conference was held on December 16, 1993.

Footnote: 7 See e.g., Day v. Wyoming County Bd. of Educ., Docket No. 55-87-289-4 (Jan. 26, 1988), aff'd, Cir. Ct. of Kanawha County, CA No. 88-AA-46 (Jan. 31, 1992). In that case it was determined that a substitute employee who filled in for a regular custodian on a leave of absence from Feb. 1986 to Sept. 1987 was not entitled to regular employment seniority pursuant to W. Va. Code § 18A-4-15(2). Accord Toth v. McDowell County Bd. of Educ., Docket No. 33-87-309-4 (Apr. 21, 1988).

Footnote: 8 Section 8g became effective on or about April 8, 1993. The last paragraph of Section 8g, addresses the retrospective operation of this statute, as follows:

> *The seniority conferred herein shall apply retroactively to all affected school service personnel, but the rights incidental thereto shall commence as of the effective date of this section.*