DORTHA JEAN SMITH

v. Docket No. 95-05-025

BROOKE COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Dortha Jean Smith is employed as a substitute bus operator for Respondent Brooke County Board of Education (BCBE). She grieves because she was not granted a long-term substitute assignment for which she applied due to BCBE's adjustment of her substitute seniority following her completion of a prior long-term substitute assignment and acquisition of some regular seniority pursuant to W.Va. Code 18A-4-8g (1993). BCBE relies on a November 3, 1994 opinion rendered by the State Superinten dent of Schools which advised that an employee cannot accrue seniority both as a regular service employee and as a substitute employee. The case, submitted to level four for a record decision, became mature for decision on May 24, 1995.1

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1Although both parties had fully developed their arguments at the level two hearing, they were advised that fact/law proposals had to be submitted by May 24, 1995. BCBE's brief was posted on May 24 and received on May 25, 1995.

The parties have essentially stipulated to the facts set forth in the level two decision. Therefore, those fact find ings, as well as some additional information gleaned from the transcript of the January 12, 1995, level two hearing, form the basis for the following formal findings of fact.2

Findings of Fact

1. Grievant and another employee, Phillip Hamilton, had

identical starting dates of employment as substitute bus opera
tors, October 24, 1991. T.9.

2. Sometime in early 1994, a regular bus operator went on
leave of undetermined duration. After thirty days, it became
clear the operator would not return to his job by the end of the
school year, and BCBE placed him on formal leave of absence and
posted the temporary vacancy. T.10.

3. Grievant and Mr. Hamilton both applied for the tempo
rary position and participated in a drawing to break their
seniority tie. Grievant prevailed. T.8.

4. After the drawing, BCBE awarded Grievant temporary
regular employment for the job in question, effective May 10,
1994, at its May 9, 1994 meeting. T.9.

5. Grievant continued in the capacity of temporary,
regular bus operator until the end of the school year, June 13,
1994, at which time BCBE placed Grievant back on the substitute
list. T.10. In all, Grievant worked a total of twenty-five

2Adverse decisions were rendered at levels one and two on
December 19, 1994, and January 13, 1995, respectively.

days as a temporary regular employee, days for which she was
credited with regular employment seniority.

6. At the time Grievant was placed back on the substitute
operator's list, BCBE also "adjusted" her substitute seniority
by deducting the accrued twenty-five days of regular seniority
from her original starting date for substitute seniority,
October 24, 1991, thus moving her starting date for substitute
seniority forward twenty-five days to November 20, 1991. T.10.

7. Sometime in 1995, another temporary (substitute)

regular driving job became available. Again, both Grievant and Mr. Hamilton applied.

8. Mr. Hamilton, whose substitute seniority date of October 24, 1991 remained undisturbed, was awarded the position on the basis that his substitute seniority was greater than Grievant's because her substitute seniority had been recalculat ed to begin November 20, 1991. Mr. Hamilton apparently acquired thirty-eight days of regular seniority with respect to the job in question.3

9. Grievant filed a grievance in which she sought, among other things, a credit of thirty-eight days of regular seniori ty. Presumably, she wanted these days to be added to the

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3Although the record is silent on the subject, it is presumed that Mr. Hamilton's substitute seniority was also adjusted when he returned to the substitute list and that, given his thirty-eight days of accrued regular seniority, his new starting date for substitute seniority advanced to at least December 1, 1991, about thirteen days beyond Grievant's recalculated date of November 20, 1991. At that point in time, Grievant had greater substitute seniority than Mr. Hamilton. twenty-five days she had acquired previously. When Grievant did not prevail at the lower levels, she filed a level four appeal.

Discussion

The parties agree that, under 18A-4-8g, a substitute service employee who obtains a temporary job pursuant to 18A-4-15(2) and (5), accrues regular employment seniority status and seniority. The issue in this case is whether a substitute service worker can accrue uninterrupted substitute

seniority while, under certain circumstances, concurrently accruing regular employee seniority. Of course, what is at stake is seniority status, not only when a substitute worker bids for future temporary regular employment as those long-term jobs arise, but also when a worker vies for permanent regular employment as those true vacancies occur. According to Grievant, a substitute worker should be able to accrue both types of seniority simultaneously. Should Grievant prevail on this theory, she would gain a substantial advantage for all types of employment opportunities.

However, according to the State Superintendent's November 3, 1994 opinion, the answer to the question of whether substi tutes may acquire both substitute seniority and regular seniori ty at the same time is that they may not. The State Superinten dent was responding to an inquiry from a county superintendent about the seniority of substitute workers who accrued regular seniority. The question posed was, "Must their substitute seniority date be recalculated by adding to that original [starting] date the number of calendar days of regular seniority or does the substitute seniority date remain unaltered since they are still employed as substitute service personnel?"

In his response, the State Superintendent cites paragraph two of 18A-4-8g, with emphasis, as follows:

Seniority accumulation for a regular school service employee shall begin on the date such employee enters upon regular employment duties pursuant to a contract . . . and shall continue until the employee's employ ment as a regular employee is severed with the board of education. Seniority shall not cease to accumulate when an employee is absent . . . [for] reasons over

which the employee has no control as authorized by the board. Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in [Code 18A-4-15], after executing with the board a contract of employment as provided in [18A-2-5] . . . . The seniority of a substitute employee, once established, shall continue until such employee enters into the duties of a regular employment contract as provided in [18A-2-5] . . . or employment as a substitute with the county board of education is severed.

The opinion continues:
Based on the underscored language quoted above, it appears that some adjustment should be made in a substitute employee's seniority date . . . . The statute says that seniority accumulation for a substi tute employee continues until such employee enters into the duties of a regular employment contract or employment as a substitute is severed. If no adjust ment is made, then the substitute employee who ac quires a "temporary" regular job would continue to accrue substitute seniority while also acquiring regular seniority in the regular job.

BCBE believes that, based on the State Superintendent's opinion, its adjustment of Grievant's beginning substitute seniority date forward by the number of days of her credited regular seniority was correct. It reasoned that its action was also consistent with a portion of 18A-4-8g which states that "[s]eniority acquired as a substitute and as a regular employee

shall be calculated separately and shall not be combined for any purpose." Finally, BCBE also relied upon Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), and introduced a copy of that case into the record at level two.

A brief discussion of Ferrell is warranted. In Ferrell, two substitute cooks who also held some regular seniority applied for a half-time, regular cook's position. The grievant, who had entered into substitute service before the successful applicant, claimed she had more seniority and alleged a viola tion of Code 18A-4-8b. The administrative law judge ruled that no violation of 18A-4-8b occurred because the board of educa tion properly selected the substitute applicant with the great est amount of regular seniority. He also noted that the board's action was consistent with the provisions of recently enacted Code 18A-4-8g which spoke to the accumulation of regular seniority by a substitute worker.

Ferrell aside, Grievant believes that the State Superinten dent's opinion does not reflect the legislative intent of 18A-4-8g. She contends that the adjustment of her substitute seniority was contrary to the goals of a seniority system which was designed to reward loyal, long-term employees. She argues that the legislative intent of the portion of 18A-4-8g under scored by the State Superintendent was to cut off substitute seniority in the event an employee obtained full-time, regular employment and not when an employee merely filled a temporary position for an absent regular employee. Grievant reasons that, because she never entered into a regular employment contract, and because her substitute contract had never been severed, her substitute seniority should accumulate while holding the tempo rary job.4

Should she prevail at level four, Grievant requests, among other things, the reinstitution of her initial starting date as a substitute bus operator, a credit of thirty-eight more days of regular seniority which she apparently believes were lost to Mr. Hamilton when he received the job in question, and reimbursement for her loss of wages relative to the job awarded to Mr. Hamil ton. Grievant has not established that she is entitled to any relief in this case.

It is well established that the State Superintendent's interpretations of statutes affecting educational personnel are to be accorded great weight unless clearly erroneous. Smith v. Greenbrier County Bd. of Educ., 452 S.E.2d 412 (W.Va. 1994); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994). In this case, it cannot be said that the State Superintendent's opinion is clearly wrong.

The Superintendent's opinion foresees what might become an ongoing adjustment of a substitute worker's seniority. That determination is not unreasonable considering Code 18A-4-8g as

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4Grievant also argues that another portion of the paragraph which states that "[s]eniority shall not cease to accumulate when an employee is absent . . . [for] reasons over which the employee has no control as authorized by the board" must be given effect. According to Grievant, she had no control over the situation when absent from her substitute's job while temporarily filling a regular job. This theory is not persuasive. Grievant had control because she bid on the job. a whole.5 The statute clearly contemplates that a service worker's seniority may not remain constant, for it requires

boards of education to biannually post current (and correct) seniority lists of service personnel within each classification in schools and other work places. Seniority lists for substi tute employees must also be made available upon request. Moreover, under Code 18A-4-8g, a service worker may not accrue seniority in more than one job class unless the position held is multiclassified. In addition, the statute anticipates seniority adjustments and describes a procedure for the adjust ment of the in-class seniority of an employee who leaves one classification for another and later returns to the prior job class. The procedure is identical to the adjustment of substi tute workers' seniority endorsed by the State Superintendent. In the final analysis, it appears that Grievant is inaccu rate in her assessment that the adjustment of her substitute seniority would produce an unfair result and discourage loyal workers like her from from vying for temporary regular jobs for fear of "losing" some of their substitute seniority. While Grievant may now be ranked lower (seniority-wise) on the substi tute roster, her ability to secure short-term jobs is relatively undisturbed because assignments for that type of substitute work

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5For a recent discussion regarding statutory interpretation, see Gower v. Randolph County Bd. of Educ., Docket No. 94-42-090 (May 8, 1995).

must be made on a rotational basis. See Code 18A-4-15.6 Addi tionally, Grievant's ability to vie for long-term substitute jobs and regular employment is not necessarily compromised. Rather, Grievant's ability to secure jobs may be ultimately enhanced. When Mr. Hamilton returned to the substitute list

with his adjusted seniority, Grievant then had the greater amount of substitute seniority (but less regular seniority, her twenty-five days versus his thirty-eight days) and had priority over him again for the next temporary regular job.

As for Grievant's opportunities for permanent regular employment, much will depend on sheer luck, just as sheer luck came into play when Grievant reaped the benefit of the draw which initially broke the seniority tie between her and Mr. Hamilton. It would seem that the relative substitute seniority as well as the accumulated regular seniority of both Grievant and Mr. Hamilton could very likely remain in flux, in a see-saw fashion, as those workers compete for temporary regular jobs. As a result, Grievant's priority over Mr. Hamilton for a regular vacancy will depend on whether she ultimately attains the most regular seniority by the time a regular, vacant bus operator's position becomes available.

It is readily seen that the substitute worker who has attained the most regular seniority within a class title will

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6Notably, that portion of 18A-4-15 which requires that substitute employees work on a rotational basis does not distinguish between long-term and/or temporary "regular" assignments and short-term substitute jobs.

prevail for a regular vacancy in that class title, given a situation where only substitute employees holding that particu lar class title compete. See Ferrell, supra. Grievant's priority over Mr. Hamilton for any future bus operator's job, of whatever nature, simply depends on the circumstances when the job opportunities occur.

In addition to the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. Interpretations by the State Superintendent of Schools of statutes affecting educational personnel are to be accorded great weight unless clearly erroneous. Smith v. Greenbrier County Board of Educ., 452 S.E.2d 412 (W.Va. 1994).

2. The State Superintendent's interpretation of W.Va. Code 18A-4-8g that a substitute worker may not accrue seniority as both a substitute and a regular worker and that an adjustment must be made of a worker's substitute seniority date by the number of accrued regular seniority days is not clearly errone ous. See Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994).

3. The ability of substitute service employees to secure long-term temporary regular work as well as permanent regular employment is not compromised by their employers' adjustment of substitute seniority each time those workers accrue regular seniority.

4. Grievant has not established a violation of W.Va. Code 18A-4-8g on BCBE's part when it adjusted her starting substitute seniority date forward by the number of credited regular seniority days.

5. Grievant has failed to demonstrate any factual or legal basis for the relief she seeks.

Accordingly, the grievance is DENIED in its entirety.

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

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NEDRA KOVAL

Administrative Law Judge

Date: May 25, 1995