DENNIS UCHANSKI

v. Docket No. 95-35-008

OHIO COUNTY BOARD OF EDUCATION

D E C I S I O N

In part, this grievance raises the issue of whether a board of education can, under certain circumstances, remove from its ranks without any form of notice a substitute employee with more than thirty days' service and several years' seniority. Grievant, a former substitute custodian now regularly employed, claims such an action by Respondent Ohio County Board of Educa tion (OCBE) caused him to lose already accrued substitute seniority and an opportunity to be regularly employed at an earlier time. A level four hearing was conducted on June 8, 1995, at which time Grievant merely supplemented the record adduced at the level two proceedings.1 The case became mature for decision on July 31, 1995, the day designated by the parties

_____

1The transcript/exhibits of the December 8, 1994, level two hearing have been submitted for consideration. for the completion of post-hearing written argument and rebut tal.

There is little dispute over the salient facts giving rise to this grievance. The following findings of fact are gleaned from the record as a whole.

Findings of Fact

1. Grievant first signed a contract with OCBE as a substitute custodian for the 1989-90 school year and entered into the duties of a substitute custodian in September 1989. He

worked 150 days during the school year.

2. Grievant was contracted as a substitute custodian for the 1990-91 school year and worked 107 days during the school year.

3. Effective the end of the 1990-91 school year, OCBE reduced in force some service personnel, including custodians, and placed them on a preferred status for substitute work during the 1991-92 school year.

4. Grievant was contracted again as a substitute custodi an for the 1991-92 school year, his third year of employment. However, Grievant was called out to work less than a dozen times and accumulated only ten days' substitute work.

5. OCBE has a practice whereby, during the school term, a substitute worker is advised in writing that his name "will be removed from the substitute" workers' list upon repeated in stances of unavailability to work when called. See, Grievant's "Exhibit A" (12/8/94). Grievant never received any such notice during the 1991-92 school year.

6. Grievant was not offered a substitute's contract of employment for the 1992-93 school year, although he was never notified of any decision on OCBE's part that he would not be rehired or given an opportunity to respond to the non-hiring. In Fall 1992, OCBE's Personnel Director removed Grievant from the substitute custodians' roster for the 1992-93 school year because Grievant had worked only ten days the previous school year.

7. At some point in January 1993, Grievant learned OCBE had removed him from the substitute custodian roster at the beginning of the 1992-93 school year, and that he was "no longer under contract" with OCBE. He immediately requested that he be

placed back on the substitute custodians' roster.

8. Grievant was "reemployed" as a substitute by OCBE in January 1993, and he commenced working on March 5, 1993. OCBE considered this date as the beginning of Grievant's seniority under the reemployment. OCBE did not notify Grievant of the recalculation of his substitute seniority.

9. In October 1994, Grievant applied for a regular custodian's vacancy. On October 24, 1994, OCBE awarded the job, effective October 26, 1994, to Edward Brewer, a substitute initially employed for the 1991-92 school year.

10. When Mr. Brewer won the bid, Grievant discovered that Mr. Brewer had moved ahead of him in seniority due to OCBE's Fall 1992 removal of him from the substitute custodians' roster and its January 1993 decision not to credit him with previously-earned seniority. Grievant would have been awarded the position in October 1994, but for OCBE's actions in this regard.

11. Grievant initiated a grievance conference with OCBE's Assistant Superintendent on November 4, 1994, within fifteen working days after he learned the job was awarded to Mr. Brewer.

12. Effective November 15, 1994, Grievant was regularly employed as a custodian.

13. During the December 8, 1994, level two hearing, OCBE's representative raised timeliness and "laches" defenses. Howev er, these defenses were not addressed in the December 12, 1994, level two decision; in that decision, the grievance was denied based on the merits of the case.

14. OCBE again raised the timeliness issue at level four.

Discussion

OCBE argues the "grievance should be barred as it was not

timely filed." It claims Grievant knew, at the earliest, in Fall 1992, or at the latest, in January 1993, that he had not been issued a contract for the 1992-93 school year, but failed to take any action on the issue at that time. Under those circumstances, it argues, Grievant is not entitled to invoke the discovery rule exception contained in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990). This argument might be somewhat persuasive had OCBE notified Grievant when it "reemployed" him in January 1993 that it had also recalculated his substitute seniority. While this case certainly involves the issue of contract renewal, the heart and soul of the case, and the factor which impacts upon Grievant, is the issue of substitute seniority. Grievant lost his bid for a regular job in October 1994 on the basis of substitute seniority. When he discovered the reason he lost the bid, i.e., that he had lost his previously-earned seniority because of the break in service in 1992-93, he filed a grievance within the allowable fifteen days provided in W.Va Code 18-29-4(a)(1).

When OCBE placed Grievant back on the substitute roster in January 1993, it did not count Grievant's previously-accrued seniority and began crediting him with substitute seniority only after his first call-out for duties following the reemployment. OCBE never informed Grievant of the fact that it had not credit ed him with his three years of prior seniority. Hence, Grievant did not know about the "lost" seniority until he applied for the custodian vacancy in October 1994. Given those circumstances, Spahr is applicable. Therefore, it is determined that Grievant filed a timely grievance when he learned OCBE had not counted the three years' seniority he had accrued prior to January 1993.

As to the merits of the case, Grievant must prevail. Under

W.Va. Code 18A-4-15, once employed, a substitute service employee must, pursuant to Code 18A-2-5, hold a contract with a board of education before he can be assigned any duties.2 In

---

2The pertinent provisions of W.Va. Code 18A-4-15 are as follows:

Before any substitute service employee enters upon his duties, he shall execute with the county board of education a written contract as provided in [Code 18A-2-5] . . . .

addition, Code 18A-2-5 specifically requires that "[e]ach contract of employment shall be designated as a probationary or continuing contract." Thus, even substitute service workers' contracts must be designated as probationary or continuing.3 At the end of the 1991-92 school year, Grievant had fulfilled three years' probationary substitute service.

Additionally, substitute service personnel have been afforded substantial rights by the Legislature. Code 18A-4-15 provides that "[s]ubstitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel" in Code 18A-2-6, 18A-2-7, 18A-2-8 and 18A-2-8a.4 OCBE opines that, since Grievant did not work

---

3The question of whether substitute employees, as well as regular employees, must fulfill a three-year probationary period arose in Miller v. Wood County Bd. of Educ., Docket No. 54-86-298-3 (May 13, 1987). Prior to being regularly employed,

the grievant in Miller held a substitute contract as an aide. However, during her last year as a substitute, the grievant had worked at one school on a continuing, daily basis throughout the entire school year. Thus, she expected a continuing regular contract after two years' "probationary" work. The school board claimed the grievant's one year as a full-time substitute aide could only be counted toward her obligation to complete a probationary period as a substitute worker and could not be applied toward the required three year probationary period as a regular employee. The administrative law judge determined that, under Code 18A-4-15(2), the grievant had attained "regular" status and seniority during her last year as a substitute, and that this time could be applied toward the grievant's probationary period as a regular employee.

4W.Va. Code 18A-4-8g further provides that "[t]he 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."

thirty days during the 1991-92 school year he is, therefore, unable to claim the benefits delineated in the statute. This argument is rejected. The statute does not say the thirty days of substitute work must fall within one particular school year or that thirty days' work must accrue in each year of substitute employment.

Moreover, OCBE's personnel records for Grievant do not reveal that he began earning substitute seniority and work experince anew each succeeding school year. Further, W.Va. Code 18A-2-6 provides that, "[t]hose employees who have completed

three years of acceptable employment . . . shall be granted continuing contract status." Without question, once a substi tute service employee works thirty days for a board of educa tion, he or she is entitled to some notice, and an opportunity for a hearing, prior to any personnel action on the board's to terminate the substitute's continuing employment or, as in this case, not to offer another probationary contract or a continuing contract following three years' employment as a probationary worker.

Because Grievant had never been notified that his contract was not going to be renewed for the 1992-93 school year, he had every reason to believe he held a continuing contract after the 1991-92 school year. However, OCBE apparently determined not to offer Grievant a new contract for the 1992-93 school year and further, "severed" his employment and removed his name from the substitute roster without any notice. This clearly violated Grievant's rights under W.Va. Code 18A-2-6, 18A-2-7, 18A-2-8, and 18A-2-8a, and said virtual "dismissal" of Grievant in Fall 1992 is void and of no effect. See Cline v. Hancock County Bd. of Educ., 15-88-011-3 (June 16, 1988). OCBE's further failure to notify Grievant in January 1993 that his seniority would be recalculated served to compound the earlier wrongdoing. Obviously, because Grievant is now regularly employed, he does not seek as relief an adjustment of his substitute seniori ty. Rather, Grievant seeks a credit of regular seniority for the intervening days between October 26, 1994, the day he would have been regularly employed under the first posting, but for OCBE's impermissible actions, and November 15, 1994, the effec tive date of his regular employment as a full-time custodian under the second posting; back wages for lost work time, less

any set-off for substitute wages earned; and any and all other lost benefits. Grievant is entitled to the relief he seeks as a matter of law.

In addition to the foregoing findings of fact and discus sion, the following formal conclusions of law are appropriate.

Conclusions of Law

1. Given the facts and circumstances in this case, Grievant filed a grievance within the allowable fifteen work days provided in W.Va Code 18-29-4(a)(1).

2. Inasmuch as Grievant had attained more than thirty days' work as a substitute custodian from the inception of his first contract of employment as a substitute and three years' seniority as a probationary employee, Grievant's rights under W.Va. Code 18A-2-6, 18A-2-7, 18A-2-8, 18A-2-8a, 18A-4-8g and 18A-4-15 were violated when OCBE failed to notify him in Spring 1992 of the non-renewal of his substitute contract.

3. OCBE's removal of Grievant from the substitute roster list in Fall 1992 without any prior notice constituted an impermissible "dismissal" of Grievant, and said action is void and of no effect. See Cline v. Hancock County Bd. of Educ., 15-88-011-3 (June 16, 1988).

4. OCBE's failure in January 1993 to reinstate Grievant's previously-earned substitute seniority compounded the damage done by its prior failure to properly notify him of relevant personnel actions in Spring and Fall 1992.

Accordingly, the grievance is GRANTED, and OCBE is Ordered to recalculate Grievant's regular seniority and pay him regular back wages and benefits in a manner consistent with the findings and determinations herein.

Any party may appeal this decision to the Circuit Court of

Kanawha County or to the Circuit Court of Ohio 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.

_____

NEDRA KOVAL

Administrative Law Judge

Date: August 16, 1995