

## **DONNA DANIELS**

**v. Docket No. 96-13-132**

## **GREENBRIER COUNTY BOARD OF EDUCATION**

### **DECISION**

The grievant, Donna Daniels, is employed by the Greenbrier County Board of Education (Board) as a substitute bus operator. She filed a grievance at Level I February 1, 1996, alleging that the Board had erred in calculating her seniority. Her supervisor was without authority to grant relief. At Level II, the parties submitted joint exhibits and entered into factual stipulations; the grievance was denied at that level by decision dated February 26, 1996. The Board, at Level III, declined to address the matter and appeal to Level IV was made April 1, 1996. The parties subsequently agreed to submit the case for decision on the stipulations and exhibits submitted at Level II. Written legal argument was received by June 14, 1996.

### **Background**

The parties stipulate as follows. The grievant has been employed by the Board as a substitute bus operator since September 3, 1991. From March 16, 1995, to January 2, 1996, she filled in for a regularly-employed bus operator on leave of absence. Aware that she would obtain regular employment seniority for this period per W.Va. Code §18A-4-8g, [\(See footnote 1\)](#) but uncertain whether she would also accrue substitute seniority, the grievant approached either Vocational Director Danny Gray or Director of Transportation Kenneth Baker prior to taking the assignment. The grievant recollects that one or both advised her that she would accrue both substitute and regular employment seniority. [\(See footnote 2\)](#) At the time, Elsworth Buck, the Board's Director of Personnel, was of the same opinion; he does not recollect whether he communicated this to the grievant.

On December 1, 1995, Mr. Buck issued a memorandum to all substitutes advising that State Superintendent of Schools Hank Marockie had issued an opinion declaring that under applicable law,

they could accrue only regular employment seniority during long- term assignments. He further advised that this would be the Board's practice in the future. Mr. Buck later confirmed that Superintendent Marockie's November 3, 1994 opinion was consistent with the Education and State Employees Grievance Board's holdings in Smith v. Brooke County Bd. of Educ., Docket No. 95-05-025 (May 25, 1995). The grievant was not credited with substitute seniority for the March 1995 to January 1996 assignment.

### **Argument**

The grievant's primary argument is that Smith was in error and should be overruled. She notes that Code §18A-4-8g was amended effective July 1, 1996, to permit accrual of both types of seniority; [\(See footnote 3\)](#) implicit in her argument is that the amendment is indicative of the original intent of the legislation.

The grievant also asserts that she relied to her detriment on the representations of her superiors, and the Board should, therefore, be estopped from asserting the applicability of Smith or, presumably, any authority which contradicts those representations. The Board does not respond to the estoppel contention but asserts generally that the grievant's substitute seniority has been calculated in accordance with all applicable law. The Board does not rely on Smith, but stresses that legal opinions of the State Superintendent of Schools should be afforded deference, a key holding in the case.

### **Findings and Conclusions**

The grievant's argument for overruling Smith is wholly unpersuasive. It is doubtful that inferences regarding the change in Code §18A-4-8g should play any role in determining whether precedent based on its former language was in error. Certainly, the amendment, in and of itself, does not dictate that precedent should be overruled. The undersigned summarily finds that the pertinent holdings in Smith are not clearly wrong, see, Belcher v. Dept. of Transportation, Docket No. 94-DOH-341 (April 27, 1995), and that the Board properly applied those holdings in calculating the grievant's substitute seniority.

The grievant's remaining claim is also without merit. As a rule, the equitable theory of estoppel cannot be invoked to preclude a governmental body from claiming legal error in the representations of its agents. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991). The

stipulations of fact do not support that any exception should be invoked here; even assuming that the grievant has otherwise shown the theory's applicability, she has not demonstrated that she suffered any injury or "detriment" as the result of any advice given her by Board administrators. See, Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Greenbrier 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**JERRY A. WRIGHT**

**ADMINISTRATIVE LAW JUDGE**

**Dated: July 31, 1996**

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[Footnote: 1](#)

*"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." Code §18A- 4-15(2) provides that substitutes may be used to "fill the position of a regular service employee on leave of absence."*

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[Footnote: 2](#)

*The stipulations are unclear and generally confusing on several matters. They do not reveal why the grievant chose to approach Mr. Gray and do not address whether Mr. Gray recalls making any representations to the grievant. Further, the grievant's appeal to Level IV even suggests that the reference in the stipulations to Mr. Gray may have been in error, and that the grievant may have talked to Mr. Baker only. In any event, the parties do not dispute that she approached a Board administrator, and, ultimately, a resolution of the grievant's claims does not require further findings on these matters.*

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[Footnote: 3](#)

*The language, "Provided, that a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said sub sections [§§18A-4-15(2) and (5)] shall simultaneously accumulate substitute seniority" was added to paragraph 6 of the statute.*

*It is also noted that the original 1993 version of the statute included the language, "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." This language was retained when 1994 changes were made to the statute and was slightly revised when the July 1, 1996 amendments were enacted. The grievant's claims are in no way based on the provision, and the question of whether it now operates to afford her substitute seniority for the long-term assignment in issue is not addressed herein. It is clear that by initiating this action, the grievant was seeking to obtain and exercise the rights incidental to a greater amount of substitute seniority prior to July 1, 1996.*