LINDA L. OLIVETO

Grievant,

v. **Docket No. 96-17-210**

UNITED TECHNICAL CENTER and

HARRISON BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant filed this grievance against the United Technical Center on or about March 1, 1996. She states (through her representative) as follows:

> Grievant is a regular employee (Secretary) of the United Career Center. Prior to her employment with the center, she was employed by the Harrison County Board of Education as a substitute secretary. Grievant has been reduced in force by the center. Grievant alleges that the Harrison County Board of Education has failed to place her on its preferred recall list in violation of W.Va. Code §18A-4-8c. Grievant seeks the joining of the Harrison County Board of Education as a Respondent as it is an indispensable party with an interest in the outcome of the grievance. Grievant seeks placement on the preferred recall list and instatement into any position which she would receive if she had been placed on the preferred recall list with back pay, seniority and other benefits.

The grievance was denied at Level I on March 20, 1996. Grievant appealed to Level II, where a hearing was held on April 19, 1996. The Level II denial was issued May 22, 1996. Level III was waived and the matter was filed at Level IV on or about May 30, 1996. The Harrison CountyBoard of Education was joined as a party at Level IV and a hearing was held January 30,1997. After submission of briefs by the parties, the matter became mature for decision on March 7, 1997.

DISCUSSION

Grievant was an employee at United Technical Center (United), formerly known as United Career Center. She had been employed as a Secretary II since August 14, 1986. Due to a reduction in force, her employment contract with United was terminated effective the 1996-1997 school year. She was placed upon their preferred recall list. Just prior to her employment with United, she had been

employed for three years with the Harrison County Board of Education (Board) as a substitute secretary. In November of 1993, she learned that her name was on the seniority list for the Board as a secretary with a seniority date of August 16, 1986. Then, her name was removed from the list soon after November 8, 1995. She is requesting as relief that her name be placed back on the Board's seniority list as a regular employee and that she be credited with all time spent working at United. She further requests that she be placed upon the Board's preferred recall list. Grievant claims that W.Va. Code §18A-4-8c authorizes this remedy.

Respondent, Harrison County Board of Education, argues that all her employment with United cannot be credited toward regular employment for seniority purposes at the Board. This is because all her work with the Board was as a substitute. She was never a regular employee at the Board. To give her regular employee status with seniority for working at United would be unfair to those actual Board employees with less seniority. They further assert that her name appearing on the seniority list was an apparent error, which when discovered was removed. The Board was the financial agent for United and kept their employee work records. United's employees's names became mingled with the Board's inadvertently. The facts of this grievance are not in dispute. Stipulations were reached at the Level II Hearing of April 19, 1996. Accordingly, the following findings of fact can be made.

FINDING OF FACTS

1. Grievant was employed as a secretary for the 1995-1996 school year under contract with the United Career Center although her duties were with Tri-County High School.

2. Prior to employment with United Career Center, Grievant was employed by the Harrison County Board of Education for three years as a substitute secretary.

3. She began employment with the United Career Center as a regular employee with an effective seniority date of August 14, 1986, and has since worked continuously as a regular secretary.

4. Grievant appeared upon the Harrison County Schools seniority list as a secretary with a seniority date of August 16, 1986 for a number of years and as recently as November of 1995.

5. Grievant's contract with United Career Center was terminated due to a reduction in force, at the end of the 1995-1996 school year.

6. Grievant was placed on the preferred recall list of United Career Center.

The issue which has been presented is one of first impression. Should Grievant be credited with seniority at the Board for her regular employment at United? And if so, should she be placed upon the Board's preferred recall list as a regular employee, after a reduction in force at United.

The statutes in question are W.Va. Code §18A-4-8c and W.Va. Code §18A-4-8g. They are as follows:

18A-4-8c.

Seniority rights for personnel employed by multi-county vocational centers. Professional and service personnel employed by a multi-county vocational center shall establish seniority on the basis of the length of time the employee has been employed by the multi-county vocational center, except that **any professional or service personnel whose employment with the multi-county vocational center was immediately preceded by employment with one of the county boards participating in the operation of the center or whose employment contract was with one of the county boards participating in the operation of the center (1) shall retain any seniority accrued during employment by said county board; (2) shall accrue seniority as a regular employee with said county board during employment with the center; (3) shall attain continuing contract status with both the county and the center if the sum of the years employed by the county and the center equals the statutory number required for continuing contract status; and (4) shall retain and continue to accrue county and center seniority in the event of reemployment by said participating county as a result of direct transfer from the center or recall from the preferred list.**

Reductions in work force in the center or employment by the center or county board shall be made in accordance with the provisions of sections seven-a and eight-b [§§ 18A-4-7a and 18A-4-8b] of this article: Provided, That only years of employment within the multi-county vocational center shall be considered for purposes of reduction in force within the center.

The seniority conferred herein shall apply retroactively to all affected professional and service personnel, but the rights incidental thereto shall commence as of the effective date [March 10, 1983] of this section.

18A-4-8g

(in pertinent part)

Determination of seniority for service personnel

Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose. Seniority acquired within different classification categories shall be calculated separately: Provided, That when a school service employee makes application for a position outside of the classification category currently held, if the vacancy is not filled by an applicant within the classification category of the vacancy, the applicant shall combine all regular employment seniority acquired for the purposes of bidding on the position.

Grievant argues that §18A-4-8c does not limit the operation of the statute to regular employees. It provides that **any** professional or service employee who worked for a county board just prior to working at a center shall accrue seniority at both facilities for employment at the center. It does not say, **any regular employee**. It is clear and can only be interpreted in that way. If the statute meant to limit its operation, it would say so.

Respondent, on the other hand, argues that §18A-4-8c must be read in conjunction with§18A-4-8g. However, the undersigned, upon doing so does not find that §18A-4-8g prevents anything other than calculating or adding the two together. Seniority acquired as a substitute cannot be added to seniority acquired as a regular employee. This does not prevent an employee from accumulating and distinguishing substitute seniority and regular seniority. In this case, grievant would have approximately three years seniority as a substitute and ten years seniority as a regular employee. The regular employment would be accrued at both the Board and United. There would be no “mixing” of regular and substitute employment seniority as suggested by Respondent. (See footnote 1) The result would differ if Grievant had been employed as a substitute at United also. §18A-4-8c, at (2), permits only seniority acquired as a regular employee at the center, to be accrued at the county board.

The intent of the Legislature undoubtedly was to allow regular employees to go from employment with the county board to the center without losing seniority benefits. This would make it easier to fill positions with experienced people at the centers. Otherwise, qualified people within the school

system would not apply for work at the centers because they would be, in effect, starting over with the accumulation of seniority. §18A-4-8c helps resolve this problem.

That much is clear. There is no problem with allowing her seniority with the Board for work done at United. Thus, as to this point, W.Va. Code §18A-4-8c is clear and unambiguous and can only be read one way. “When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute.” Syl. Pt. 4, McGraw v. St. Joseph's Hospital, Inc.,1997 W.Va. Lexis 15 (1997). Keen v. Maxey, 193 W.Va. 423, 456 S.E.2d 550 (1995).

However, Grievant, wishes to take one more step. She wishes to be placed upon the Board'spreferred recall list as part of her relief.

The preferred recall list is composed of employees with insufficient seniority to retain employment in any capacity after a reduction in force. After failing to find a job opening in any position for which that employee may be qualified, his/her name is placed upon a list, based on seniority, from which the first selections are made for future available positions. See W.Va. Code,§ 18A-4-8b. It further states that all persons on the preferred list “shall be recalled to any position openings by the county board within the classification(s), where they had previously been employed, or to a lateral area for which an employee has certification and/or licensure.”

As stated above, the undersigned believes that the intent of the legislature was to allow employees to seek employment with either facility, without the loss of seniority. §18A-4-8c, at number three (3) of the first paragraph states that the employee: “shall attain continuing contract status with both the county and the center....” Number four (4) of the same paragraph states that the employee: “shall retain and continue to accrue county and center seniority in the event of reemployment by said participating county as a result of direct transfer from the center or recall from the preferred list”

This statute has significance in this matter. It indicates that the Legislature intended that the center and the county are, as far as the employee is concerned, a single entity. There may be other differences caused by its multi-county nature, but it is intended that employees may freely seek and obtain employment at either without jeopardizing those benefits which are integral with seniority. This would be the case, as indicated in four (4) quoted above, with both transfer and reemployment from the preferred recall list.

Accordingly, the undersigned concludes that a reduction in force at the center or in this case, United, would require the placement of the employee's name on both the Board's and United'spreferred recall lists, as though they were merely two separate schools within the same system.

Consistent with the foregoing, the following Conclusions of Law are appropriate.

CONCLUSIONS OF LAW

1. In a grievance involving a nondisciplinary action, Grievant must prove her case by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R 1 §4.19 (1996); Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988)

2. W.Va. Code §18A-4-8c provides in part:

any professional or service personnel whose employment with the multi-county vocational center was immediately preceded by employment with one of the county boards participating in the operation of the center or whose employment contract was with one of the county boards participating in the operation of the center (1) shall retain any seniority accrued during employment by said county board; (2) shall accrue seniority as a regular employee with said county board during employment with the center; (3) shall attain continuing contract status with both the county and the center if the sum of the years employed by the county and the center equals the statutory number required for continuing contract status; and (4) shall retain and continue to accrue county and center seniority in the event of reemployment by said participating county as a result of direct transfer from the center or recall from the preferred list.

3. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 4, McGraw v. St. Joseph's Hospital, Inc.,1997 W.Va. Lexis 15 (1997). Keen v. Maxey, 193 W.Va. 423, 456 S.E.2d 550 (1995).

4. W.Va. Code, §18A-4-8c allowed Grievant to obtain regular seniority at her former employer, the Harrison County Board of Education, while a regular employee with United

Technical Center.

5. Grievant has accumulated ten years seniority as a regular employee with the HarrisonCounty Board of Education and the United Technical Center.

6. Grievant should have been placed upon the Board's preferred recall list as a regular employee, with retroactive effect, after the reduction in force at United.

Accordingly this grievance is GRANTED and Harrison County Board of Education is ORDERED:

1. To give Grievant credit at Harrison County Board of Education for seniority accrued at United Technical Center.

2. To place Grievant upon the Harrison County Board of Education preferred recall list for the position of Secretary and any other positions for which Grievant is qualified, and that such placement be given retroactive effect, as would be required by law.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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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JAMES D. TERRY

Administrative Law Judge

DATE: September 5, 1997

Footnote: 1

Respondent's Level IV Proposed Finding's of Fact and Conclusions of Law, at 3.