**KITTY TOWNSEND,**

**Grievant,**

**v. DOCKET NO. 97-27-093**

**MERCER COUNTY BOARD OF EDUCATION,**

**Respondent.**

## DECISION

Grievant Kitty Townsend grieves her non-selection for a teaching position at Wade Elementary School (Wade), alleging that she was more qualified than the successful applicant. She requests instatement into the position and compensation.

The issue presented here is whether Respondent correctly assessed the qualifications of applicants for this position, under the second set of criteria identified in W. Va. Code §18A-4-7a. (See footnote 1) For reasons explained below, I find that Respondent incorrectly assessed the qualifications, and remand the case for Respondent's reassessment.

## FINDINGS OF FACT

1 1. Grievant has been a substitute teacher in Mercer County schools for eight years. She received her undergraduate degree in the spring of 1989. She taught in excess of 133 days during the 1989-1990 school year, and has substituted on many other occasions as well. She had at least one year of seniority for purposes ofapplying for vacancies, based upon her 1989-1990 substitution. (Tr. pp. 8-9, 47-55.)

2 2. On August 22, 1996, Respondent posted a teaching position for a first grade position at Wade Elementary School. (See footnote 2) At least thirty applications were received for the position. (Tr. pp. 35 and 56.)

3 3. Respondent assessed the applicants using the second set of criteria in W. Va. Code §18A-4-7a. The seven criteria assessed are: appropriate certification and/or licensure; total amount of teaching experience; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated

in the job description; receiving an overall rating of satisfactory in evaluations over the previous two years; and seniority.

4 4. Several applicants withdrew or accepted other positions, but the identity of these applicants is unknown from the record.

5 5. After other applicants withdrew or accepted different positions, Respondent determined that Sherri Foy was the most qualified applicant, and awarded the position to her. (Tr. pp. 21, 25-27.)

6 6. Ms. Foy has been a substitute teacher in Mercer County schools for two years, and received her undergraduate degree in 1994. Ms. Foy taught in excess of 133 days during school years 1994-1995 and 1995-1996. The record does not disclose how muchseniority Ms. Foy has, for purposes of applying for vacancies. (Tr. pp. 6-8, 43-45.)

7 7. Grievant was given four points, one each for credit in the following four criteria: appropriate certification or licensure; existence of teaching experience in the required certification area; degree level in the required certification area; and receiving an overall rating of satisfactory over the previous two years.

8 8. Ms. Foy was given five points, one each for credit in the following five criteria: appropriate certification or licensure; existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated in the job description; and receiving an overall rating of satisfactory over the previous two years. (Tr. pp. 30, 32, Board Exhibit 1.)

9 9. More than one applicant received one point for credit in each of the following criteria: appropriate certification and/or licensure; the existence of teaching experience in the required certification area; degree level in the required certification area; and receiving an overall rating of satisfactory in evaluations over the previous two years.

10 10. Only Ms. Foy received credit in the specialized training criterion. (Board Exhibit 1.)

11 11. Neither Grievant nor Ms. Foy received credit for the criteria "total amount of teaching experience" or "seniority", asother applicants had greater teaching experience and seniority. (Tr. pp. 40, 42-43; Board Exhibit 1.)

12 12. The applicant who received credit for the criterion "total amount of teaching experience" had eleven years' experience. This individual was the only applicant to receive a point in this criterion. (Tr. pp. 40, 42-43; Board Exhibit 1.)

13 13. The two applicants who received credit for the criterion "seniority" both had the same seniority date of October 2, 1995. No other applicant received a point for this criterion. (Tr. pp. 40, 42-43; Board Exhibit 1.)

14 14. Respondent determined that Ms. Foy was more qualified, based on Ms. Foy's specialized training.

15 15. Respondent assessed specialized training through a predetermined point system, where workshops each received one point; Governor's Institute programs and RESA programs each received two points; and courses taken towards another educational degree each received three points.

16 16. Ms. Foy's specialized training consisted of thirteen workshops and four courses taken towards her Masters degree. (Tr. pp. 21-25; Board Exhibit II.)

17 17. Grievant's specialized training included one Governor's Institute program; one RESA program; two courses taken towards another educational degree; one six-hour "Re-Certification" course in Special Education, taken at Concord College during the summer of 1992; and 32 workshops (each designated as between one and three hours). (Grievant Exhibit 1.) This information was submitted to Respondent. (Tr. p. 10.)

## DISCUSSION

In this non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she was the most qualified applicant or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. §4.19 (1996); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Circuit Court of Kanawha County, No. 90-AA-181 (Mar. 25, 1993); Black v. Cabell County Bd. of Educ., Docket No. 89-06- 707 (Mar. 23, 1990).

The selection process in this instance was governed by the "second set of criteria" found in W. Va. Code §18A-4-7a, and use of this set of criteria was not challenged. (See footnote 3) Selection was based on the following criteria:

> Appropriate certification and/or licensure; total amount of teaching experience; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated in the job description; receiving an overall rating of satisfactory in evaluations over the previous two years; and seniority... with each criterion being given

equal weight.

W. Va. Code §18A-4-7a.

Here, Grievant has challenged the assessment of three criteria: total amount of teaching experience, specialized training, and seniority. She alleges that proper consideration ofthese criteria would have resulted in Grievant, not the successful applicant, being assessed as most qualified for this position.

**TOTAL AMOUNT OF TEACHING EXPERIENCE:**

Grievant argues that she has a greater total amount of teaching experience than Ms. Foy, and thus should have received credit over Ms. Foy in this criterion. Respondent disputes this on two grounds. First, Respondent asserts that Ms. Foy has the greater amount of teaching experience. Second, Respondent contends that the applicant who received credit in this criterion had eleven years of teaching experience-- more than either Grievant or Ms. Foy-- and that therefore neither Grievant nor Ms. Foy can be given credit in this criterion. In other words, Respondent believes that the relative amounts of experience between Grievant and Ms. Foy are irrelevant, as neither of them received credit for the criterion.

Grievant has been substitute teaching for eight years, while Ms. Foy has only been substituting for two. However, the number of years during which one has substituted does not necessarily equate to that same number of years of teaching experience. Thus, that Grievant has had a substitute teaching contract for a longer time is not determinative.

Grievant failed to prove the number of days of substitute teaching she had performed, except to show that she had substituted for more than 133 days in 1989-1990. Grievant did not even estimate a number of days she has taught. While Respondent proved that Ms. Foy had worked in excess of 133 days in two different school years, it did not prove how many days she taught. On thisevidence, it is not possible to determine which of these two applicants had the greater total amount of teaching experience.

However, Respondent argues that such a determination between Grievant and the successful applicant need not be made, as it assigned credit in this criterion to only one applicant, and that applicant was neither Grievant nor Ms. Foy. (See footnote 4) Respondent failed to identify the person who was, in fact, credited in the criteria, "total amount of teaching experience," although the person was said to have eleven years' experience. It is thus unknown whether or not this applicant was one

who became ineligible for consideration by withdrawal or acceptance of another position. However, as one applicant with "11 yrs" noted in column two of Board Exhibit 1 appears to have equally qualified with Ms. Foy (with five points overall), it seems likely the credited applicant did become ineligible.

Prior decisions of this Grievance Board indicate that applicants' qualifications must be re-calculated during the selection process, to remove from consideration those applicants who withdraw, accept other employment, or otherwise becomeineligible for the position. Maynard v. Mercer County Bd. of Educ., Docket No. 94-27-047 (Nov. 16, 1994). As it appears that Respondent may not have re-calculated qualifications in accordance with Maynard, Respondent must reevaluate the qualifications on remand, as they existed at the time the posting was closed. (See footnote 5)

**SPECIALIZED TRAINING:**

Grievant next argues that the specialized training criterion was misapplied, as her specialized training is more relevant to teaching than Ms. Foy's, and she should therefore have received credit in this criterion. Respondent counters that Ms. Foy's specialized training is equally relevant, and that, according to its predetermined system for evaluating specialized training, Ms. Foy received the highest number of points, and therefore credit, in this criterion.

Grievant's specialized training is more closely related to classroom instruction or curriculum than Ms. Foy's training, which is primarily health-related. Respondent claimed that Ms. Foy's training is equally relevant, as a classroom teacher must be informed of public health issues and first aid techniques, as well as curricular matters. Respondent is best able to determine what constitutes the "specialized training" applicable to a given position, and I will not disturb that determination here.

As Grievant did not argue that Respondent's point assignment method of assessing applicants' specialized training was flawed, it is assumed that this is an appropriate method of determining which applicant receives credit for this criterion. However, it appears that Respondent's calculation of points for Grievant was seriously flawed.

Ms. Sandra Puckett, Principal of Wade Elementary School, confirmed that Ms. Foy's specialized training was translated into 25 points. This matched my calculations, based upon training itemized for Ms. Foy in Board Exhibit 2, and described in Finding of Fact number 11.

However, no one testified to the total points awarded to Grievant. Ms. Puckett confirmed that Grievant received two points for her Governor's Institute training, and two points for her RESA

training, and a total of six points for her two college courses. Ms. Puckett questioned several workshops, stating that she was not familiar with them, but did not state that any of the workshops listed in Grievant's Exhibit 1 were excluded from consideration. Respondent did not argue that any of the training listed was not relevant, or should not have been assessed using its point system.

Applying Respondent's point system to Grievant's Exhibit 1, it appears that Grievant's total score should have been approximately 43 points. This is a higher point score than Ms. Foy's. Thus, it appears that Respondent erred in assessing the specialized training criterion. Respondent must reassess this criterion, applying its point system to the applicants' training, as it existed at the time the posting was closed. **SENIORITY:**

Finally, Grievant argues that she has more seniority than Ms. Foy, as she should have been credited with one year's "regular seniority" for her substitute teaching in school year 1989-90. To support her argument, Grievant cites Landers v. Kanawha County Board of Education, Circuit Court of Kanawha County, Civil Action No. 92-AA-323 (Apr. 5, 1995) (which reversed this Grievance Board's decision in Docket No. 92-20-170/102, dated November 4, 1992). As with the first criterion discussed above, Respondent asserts that Grievant's facts are wrong, and also that it is irrelevant, as an applicant other than either Grievant or Ms. Foy had the greatest amount of seniority, and was thus given credit in the criterion.

Under current law, seniority is determined "on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education." W. Va. Code §18A-4-7a, paragraph 2. Obviously, neither Grievant nor Ms. Foy were regular, full-time employees. However, "[u]pon completion of [133] days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee." W. Va. Code §18A-4- 7a, paragraph 3. The 133 days, and any days in excess of that, are prorated, being calculated as some fraction of the school year worked by a permanent, full-time teacher. Id.; Hoffman v. Kanawha County Board of Education, Docket Nos. 91-20-278/279 (Jan. 31,1992). (See footnote 6) For purposes of applying for vacancies, there is no distinction between "regular" and "substitute" seniority, contrary to Grievant's apparent assertion.

Prior to the effective date of the above statutory revisions, however, seniority rights for teachers and substitutes was controlled by W. Va. Code §18A-4-8b(a), which stated, in pertinent part:

> The seniority of professional personnel shall be determined on the basis of the length of time the employee has been professionally employed by the county board of education... Employment for a full employment term shall equal one year of seniority[.]"

Under this provision, a substitute teacher was credited with one year of seniority when he or she worked as a substitute for 133 days or more during one school year. Further, if the substitute later became regularly employed, he or she retained any credited seniority due to substitute service as part of his or her permanent seniority. The statutory amendments to W. Va. Code §18A-4-7a which altered this method of calculating seniority were enacted in the third executive session of the 1990 Legislature, and became effective August 31, 1990.

A review of applicable Grievance Board decisions reveals that, beginning with Hoffman v. Kanawha County Board of Education, Docket Nos. 91-20-278/279 (Jan. 31, 1992), this Board has applied the statute as it is currently written, without regard for anyseniority accrued pursuant to the earlier provisions through working as a substitute prior to August 31, 1990. Ankrum v. Brooke County Bd. of Educ., Docket No. 93-05-130/153 (June 23, 1993); Humberson v. Hancock County Bd. of Educ., Docket Nos. 91-15- 163/164/165/166 ((Feb. 28, 1992), aff'd Circuit Court of Hancock County, Civil Action No. 92-P-48B (Apr. 7, 1994). See also, Vanskiver v. Webster County Bd. of Educ., Docket No. 92-51-193 (Sept. 30, 1992); and Fulk v. Preston County Bd. of Educ., Docket No. 92-39-266 (Jan. 4, 1993). (See footnote 7) This line of cases has been overruled by at least two different circuit courts, to the extent that the cases apply the statutory changes retroactively, in violation of the statutory prohibition on retroactive application in the absence of express legislative intent to do so. (See footnote 8) Hoffman, and therefore its progeny, were inarguably discredited in the Circuit Court's decision in Landers, which found that "[b]yretroactively applying W. Va. Code, §18A-4-7a, the Grievance Board's decision was contrary to law." Landers, at 5.

This Grievance Board adheres to the doctrine of stare decisis (See footnote 9) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (Jul. 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior

decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. Rulings by one or more circuit courts of appeals are not considered mandatory precedent, and are followed in future cases only to the extent that their logic and reasoning are compelling. In that regard, the articulated logic and sound reasoning expressed in the Circuit Court decisions noted persuasively support revisiting the legal conclusions reached by this Board in Hoffman and its progeny. On considered review of the cases, the Circuit Court decisions embody the better approach. The Hoffman line of cases is found to be in error, and we abandon application of the current statutory provisions to substitute service performed prior to their enactment. Hoffman and its progeny are hereby expressly overruled, to the extent that they applied retroactively statutory changes which became effective August 31, 1990, and which do not contain clear language evidencing the Legislature's intent that they be retroactively applied. Service as a substitute teacher for 133 days or more in any single school year, which was credited towards one's seniority prior to August 31, 1990, may be retained. (See footnote 10)

The sparse evidence on seniority shows that Grievant obtained 133 or more days of employment in school year 1989-90, while Ms. Foy obtained 133 or more days of employment in two more recent school years. The exact number of days worked in either instance was not proven.

Landers, cites Harkins v. Ohio County Bd. of Educ., 179 W. Va. 373, 369 S.E.2d 224 (1988), in support of the general proposition that one year of seniority was earned when a substitute teacher worked more than 133 days in one school year, prior to the statutory change of August 31, 1990. Harkins, although a tenure case, does indeed indicate that one is entitled to a whole year of credit upon substitute teaching for more than 133 days in a school year. Thus, applying Landers and Harkins, Grievant's teachingduring school year 1989-1990 counts as one whole year of seniority. Accord, Gwinn, supra.

For purposes of applying for this position, Ms. Foy is also allowed seniority credit for a prorated portion of each of the two years in which she substituted for more than 133 days, under the current statutory provision. Unlike Grievant, though, Ms. Foy is not necessarily entitled to one whole years' worth of seniority for each year in which she worked in excess of 133 days. This is because Ms. Foy's work was all performed after August 31, 1990, when the statute changed. Insufficient evidence was presented to allow calculation of Ms. Foy's prorated seniority. Thus, on this record it is impossible to determine whether Grievant or Ms. Foy had greater seniority.

Nonetheless, it appears that Respondent erred in assessing this criterion. First, Respondent again did not identify the person(s) to whom it gave credit for "seniority," and thus it appears qualifications may not have been recalculated after some applicants became ineligible, under Maynard. More importantly, however, it appears that Respondent improperly calculated seniority for Grievant, and perhaps others, who accrued seniority (for purposes of applying) while substitute teaching.

This position's posting was dated August 22, 1996. Grievant's minimum possible seniority of one full year should give her a calculated seniority date equating to approximately August 22, 1995, for purposes of applying for this position. The earliest dates written in the column for "seniority" on Board Exhibit 1 are for October 2, 1995. Consequently, it appears that Respondentimproperly considered the seniority of the applicants, in assessing this criterion. Respondent must reassess the qualifications of applicants under this criterion, as those qualifications existed on the closing date of the posting, in compliance with Maynard, and must properly calculate seniority, including the seniority accrued by substitute teachers for the purpose of applying for permanent positions.

## CONCLUSIONS OF LAW

1 1. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. 156 C.S.R. §4.19 (1996); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Circuit Court of Kanawha County, No. 90-AA-181 (Mar. 25, 1993).

2 2. The selection process in this case is governed by the "second set of criteria" found in W. Va. Code §18A-4-7a.

3 3. Remaining applicants' qualifications must be re-calculated during the selection process, to remove from consideration those applicants who withdraw, accept other employment, or otherwise become ineligible for the position. Maynard v. Mercer County Bd. of Educ., Docket No. 94-27-047 (Nov. 16, 1994).

4 4. "Upon completion of [133] days of employment in any one school year, substitute teachers shall accrue seniority exclusivelyfor the purpose of applying for employment as a permanent, full- time

professional employee. [133] days or more of said employment shall be prorated and shall vest as a fraction of the school year worked by the permanent, full-time teacher." W. Va. Code §18A-4- 7a, paragraph 3. For purposes of applying for vacancies, there is no distinction between "regular" and "substitute" seniority.

5 5. For purposes of applying for vacancies, one is entitled to one year of seniority for each year in which a substitute teacher worked more than 133 days, for each such year worked prior to August 31, 1990. Landers, et al., v. Kanawha County Bd. of Educ., Circuit Court of Kanawha County, No. 92-AA-323 (Apr. 5, 1995); Harkins v. Ohio County Bd. of Educ., 179 W. Va. 373, 369 S.E.2d 224 (1988). Such seniority, accrued prior to the effective date of statutory changes which affect seniority accrued by substitute teachers (August 31, 1990), may be retained.

6 6. Hoffman v. Kanawha County Board of Education, Docket Nos. 91-20-278/279 (Jan. 31, 1992), and its progeny, are hereby expressly overruled, to the extent that they applied retroactively statutory changes (regarding seniority accrued through teaching as a substitute for 133 days or more in one school year) enacted in the third executive session of the 1990 Legislature, which became effective on August 31, 1990, and which do not contain clear language evidencing the Legislature's intent that they be retroactively applied.

7 7. Grievant proved that there was a substantial flaw in the selection process, such that the outcome likely was affected.

Accordingly, this grievance is hereby **GRANTED IN PART**. Respondent is **ORDERED** to reassess the qualifications of applicants, as they existed at the time the posting for this position closed, in accordance with Maynard, Keatley, and the terms of this decision. Should Grievant be the most qualified applicant, Respondent is further **ORDERED** to instate Grievant to the position, and award her back pay and benefits to which she would have been entitled, had it properly selected her for the vacancy originally.

Any party may appeal this decision to the Circuit Court of either Kanawha or Mercer County. 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.

**Dated: November 4, 1997**

**JENNIFER J. MEEKS** **Administrative Law Judge**

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*Footnote: 1*

*The grievance was denied at Levels I and II, and was waived at Level III in accordance with W. Va. Code §18-29-4(c). At Level IV, the parties agreed to submit the matter for decision based upon the record below. This grievance became mature for decision on May 24, 1997, and was reassigned for administrative reasons on August 1, 1997.*

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*Footnote: 2*

*The position was actually a second grade position, but the posting contained a typographical error.*

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*Footnote: 3*

*Use of the "second set of criteria" is mandated where permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting.*

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*Footnote: 4*

*No prior Grievance Board decisions directly address whether Respondent may assess the criteria, which are to be equally weighted, in this fashion. It is troublesome that, in four criteria, many or all applicants may receive credit; but in three criteria, only one applicant receives credit. (Here, two applicants may have received credit in the criterion "seniority," but only because they both had exactly the same seniority date.) It appears that this method may present obstacles to equally weighting the criteria, as well as to a grievant seeking to prove he or she is more qualified than the successful applicant, and to a reviewing body. Nonetheless, Grievant did not directly challenge this assessment method, and it will not be approved or disapproved herein, without the benefit of some evidence regarding how the method affects "equal weighting" of the seven criteria.*

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*Footnote: 5*

*The "total amount of teaching experience" is to be calculated by looking at actual experience, rather than seniority. As noted in Keatley v. Mercer County Bd. of Educ., Docket No. 94- 27-641 (Apr. 26, 1995), aff'd __ S.E.2d __, Appeal No. 23844 (W. Va. June 19, 1997) the applicable statutory criterion is "experience," not seniority.*

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*Footnote: 6*

*Hoffman explains that "the denominator of the fraction is the number of days worked 'by the permanent, full-time teacher', at this time 200 days[,]" as distinguished from 365 days included in the school year by W. Va. Code §18-1-2. Hoffman, at 8. While Hoffman is overruled on other grounds herein, its explanation of this statutory phrase is accurate and approved.*

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*Footnote: 7*

*Cf., Gwinn v. Kanawha County Bd. of Educ., Docket No. 92-20- 208 (July 31, 1992), which held in Conclusion of Law Number 1 that "[u]nder the rule enunciated by Harkins v. Ohio Co. Bd. of Educ., 369 S.E.2d 224 (W.Va. 1988) (rule effectively voided as of August 30, 1990, by W.Va. Code §18A-4-7a), a substitute teacher who served at least 133 days in each of three school-terms, if offered subsequent employment, was entitled to a regular, full-time continuing contract."*

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*Footnote: 8*

*See W. Va. Code §2-2-10.*

*Ankrum was resolved on appeal by an agreed order entered in the Circuit Court of Brooke County in Civil Action No. 93-C-230-Sp (Feb. 15, 1995) which ordered that the grievants were entitled to seniority accumulated as substitute teachers prior to August 30, 1990.*

*In affirming the Grievance Board's decision in Humberson, the Circuit Court of Hancock County excepted from its affirmation that part of the Grievance Board decision which applied the statutory changes retroactively, holding that "the seniority awarded to substitute teachers prior to August 31, 1990 is to be retained by those teachers." Humberson, at 4.*

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*Footnote: 9*

*Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Resources, 451 S.E.2d 768, 771 (W. Va. 1994).*

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*Footnote: 10*

*This ruling in no way alters the applicability of the statute, as currently written, to service as a substitute performed after August 31, 1990.*