Triggs v. Berkeley County Board of Education
No. 20220

McHugh, Chief Justice, concurring, in part, and dissenting, in part:

I dissent, in part, from the majority opinion because I believe that the seniority of a professional employee of a board of education, who has voluntarily resigned or retired, is resurrected upon reemployment with the same board of education under W. Va. Code, 18A-4-8b(a) [1983].[1] However, I concur with the majority's ultimate judgment that this case be affirmed.

> In syllabus point 3, the majority opinion states:
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> W. Va. Code, 18A-4-8b(a) [1983] does not provide clear and unambiguous instruction concerning what happens to the seniority of a person who voluntarily resigns or retires from a public school system and is subsequently reemployed by the same board of education. However, based on the other code provisions dealing with professional employment and the commonly accepted meaning of the term 'seniority,' the court concludes that the legislature did not intend, upon reemployment, to resurrect the seniority of a person who had voluntarily resigned or retired. Thus, when a teacher resigns from a school system, that teacher loses seniority. That teacher, even if reemployed as a substitute teacher, does not regain even a limited employment preference until the reemployed substitute teacher has been employed in a professional capacity for 133 days or more

[1] The current code section dealing with seniority for professional employees is W. Va. Code, 18A-4-7a [1992] as the majority points out in footnote 6.

> in any one school year. W. Va. Code, 18A-4-7a [1990].

(emphasis in original).

The majority's holding is based on its conclusion that the definition of seniority contained in W. Va. Code, 18A-4-8b(a) [1983] is ambiguous. However, W. Va. Code, 18A-4-8b(a) [1983] clearly states, 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." (emphasis added). The majority's opinion in effect inserts the word "continuous" into the statute. Clearly, the legislature did not insert the word continuous before the phrase "length of time," which it could have easily done. Therefore, the legislature did not intend for seniority to be determined on the basis of a continuous length of time of employment. In syllabus point 2 of State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968), we stated: "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." The majority should have accepted the plain meaning of W. Va. Code, 18A-4-8b [1983] without resorting to the rules of interpretation since the statute is clear and unambiguous.

The state superintendent also found the statute to be clear and unambiguous in 1987 when he ruled that "[s]eniority no longer will be deemed extinguished, but only suspended during the hiatus in employment." We have held that the state superintendent is charged

by statute with authority to interpret laws regarding schools, and his interpretations are to be given great weight unless they are clearly erroneous. Smith v. Bd. of Educ. of the County of Logan, 176 W. Va. 65, 341 S.E.2d 685 (1985). The majority has failed to show that the superintendent's opinion is clearly erroneous.

Furthermore, the majority was grasping at straws in its interpretation of W. Va. Code, 18A-4-8b [1983]. The majority attempts to find the legislature's intent by analyzing W. Va. Code, 18A-2-2 [1990], which provides for teacher contracts and W. Va. Code, 18A-2-2a [1988], which provides for leaves of absence.

Specifically, the majority finds that W. Va. Code, 18A-2-2 [1990] states that if a teacher's employment ends, the continuing contract ends, and when the teacher is reemployed, the teacher must again serve a probationary period before being granted a continuing contract even if the teacher is reemployed in the same county. There is no language in W. Va. Code, 18A-2-2 [1990] which directly states the majority's finding. In fact, W. Va. Code, 18A-2-2 [1990] states, in pertinent part:

> [A] teacher holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year.

This portion of W. Va. Code, 18A-2-2 [1990] shows that the legislature did intend to give teachers who have held a continuing contract greater rights.

However, even if the school system follows the majority's interpretation of W. Va. Code, 18A-2-2 [1990], the majority fails to show how a continuing contract is related to the definition of seniority. The legislature intended to give teachers credit for the length of time they served a county regardless of whether or not they have a continuing contract. To hold otherwise would penalize the women who chose to leave teaching for a few years to raise their young children. The majority's holding also penalizes those teachers who leave teaching for a few years in order to obtain more education, such as pursuing a master's or doctorate degree. Certainly, we want to encourage teachers to care for their families and to broaden their education.

Similarly, the majority's analysis of W. Va. Code, 18A-2-2a(a) [1988] fails to show how a leave of absence is related to the definition of seniority. The majority correctly points out that a teacher retains all seniority rights during an approved leave of absence. Furthermore, I agree with the majority's conclusion that unless a teacher has an approved leave of absence, seniority will be suspended if a teacher leaves teaching for one year. However, I disagree with the majority's conclusion that the teacher's seniority will not be resurrected once the teacher is rehired.

The majority states that its conclusions regarding the effect of a voluntary termination on seniority rights are bolstered by custom and usage. However, in footnote 18 of California Brewers Ass'n v. Bryant, 444 U.S. 598, 607, 100 S. Ct. 814, 820, 63 L. Ed.

2d 55, 65 (1980), the Supreme Court noted that "a collective-bargaining agreement could provide that accumulated seniority rights are permanently forfeited by voluntary resignation[.]" (emphasis added). The footnote in California Brewers Ass'n, a case cited by the majority, weakens rather than bolsters the majority's conclusion since it states that "continuous service" can be added to the collective bargaining agreement which implies that if it is not added, then the service need not be continuous.

Based upon the foregoing, I concur only with the majority's ultimate judgment that Ms. Triggs is not entitled to be appointed to any of the positions to which she applied since she failed to show that she was the best qualified applicant.

I am authorized to state that Justice Workman joins me in this separate opinion.