

FILED

July 3, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Davis, J., dissenting:

In this proceeding, the Nicholas County School Board awarded a school bus driver position for the summer of 1999 to John O'Dell, a substitute bus driver. This decision was challenged by Robert McClung, a regular, full-time school bus driver. Although this decision was upheld at both the administrative and circuit court levels, the majority opinion, through tortured reasoning, has reversed the decision and ruled that the job should have been awarded to Mr. McClung. For the reasons set out below, I dissent.

THE ISSUE OF SENIORITY WAS NOT RELEVANT IN THIS CASE

The majority opinion reversed the decision of the lower tribunals upon finding that it was “improper for the School Board to apply . . . ‘seniority credit’ towards the 1999 summer school bus operator position and, thus, to award [Mr. O'Dell] the position.” This finding was not supported by the record. The record is clear. The School Board did not consider seniority in this case. Seniority was not relevant.

As a general matter, the use of seniority by a school board to fill a position is not always necessary nor mandatory. Our cases have recognized that it is “[o]nly when all other factors are equal should a board of education look to seniority.” *Board of Educ. of*

County of Wood v. Enoch, 186 W. Va. 712, 716, 414 S.E.2d 630, 634 (1992). Here, the School Board did not use seniority in awarding Mr. O’Dell the summer bus operator position. Instead, the School Board relied exclusively upon the applicable provision in W. Va. Code § 18-5-39 (1996) (Repl. Vol. 1999). This statute provides that “[a]n employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer.”¹ *Id.* This provision is without ambiguity. It clearly *does not* require filling a summer position based upon seniority, when an applicant has held the same position in the previous summer. As Justice Cleckley observed in *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994), under this provision “the legislature intended to give service employees of educational institutions the right to a continuing employment contract . . . if the same job position were still in existence the following summer.” *Adkins*, 192 W. Va. at 567, 453 S.E.2d at 401.²

In addition to addressing the issue of employing service personnel during the

¹The statute was amended in 2000 and the quoted language now appears in W. Va. Code § 18-5-39(f) (2000) (Supp. 2003).

²The majority opinion failed to acknowledge that summer employment for service personnel is not considered full school term employment. *See* W. Va. Code § 18-5-39 (1996) (Repl. Vol. 1999) (indicating that summer programs are “separate and apart from the full school term as established by each county.”). In order to fill a vacancy for a full school term service personnel position, school boards must do so “on the basis of seniority, qualifications and evaluation of past service.” W. Va. Code § 18A-4-8b(a) (2002) (Supp. 2003). These requirements do not extend to summer employment.

summer, W. Va. Code § 18-5-39 also provides for employing *professional* personnel during the summer. The provision for professional personnel requires seniority to be a factor in filling a summer position. Specifically, the statute states that “the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and *length of time the professional has been employed in the county’s summer school program.*” W. Va. Code § 18-5-39 (emphasis added).

The majority opinion contended that because Mr. O’Dell was a full-time employee when he worked during the summer of 1998, the only way that he could fill the 1999 vacancy as a substitute employee was through the seniority rights he accumulated before he retired as a regular employee. No language in the service personnel provision of W. Va. Code § 18-5-39 supports such reasoning. The effect of the majority opinion in this case is that of engrafting the seniority requirement for summer *professional* personnel into the provision addressing employment of summer *service* personnel. There is no legal justification for such a decision. The two provisions are mutually exclusive.

Under the service personnel provision of W. Va. Code § 18-5-39, in order for the School Board to award Mr. O’Dell the summer bus operator position it had to find that Mr. O’Dell (1) was an employee of the School Board and (2) that he worked in the vacant position during the previous summer. Mr. O’Dell met both requirements.

There is no dispute that at the time Mr. O'Dell sought the 1999 summer position he was employed by the School Board. Further, the record is uncontested. Mr. O'Dell worked as a summer bus operator for the School Board in 1998. The fact that Mr. O'Dell retired as a full-time employee was not relevant. His full-time employee seniority rights were simply not a prerequisite for the summer position.³

In view of the foregoing, I respectfully dissent.

³Seniority is determined by length of service. *See* W. Va. Code § 18A-4-8b(i) (2002) (Supp. 2003) (“The seniority of any service personnel shall be determined on the basis of the length of time the employee has been employed by the county board within a particular job classification.”). The service personnel provision of W. Va. Code § 18-5-39 is not concerned with the “length” of prior summer employment; it is concerned with the mere “existence” of prior summer employment.