
Solving the Mysteries of Service Employee Seniority and Experience: Multiclassified jobs, Substitute Assignments & Other Head-Scratchers

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- E-Newsletter Mailing List
- Send an email to Sarah Plantz:
 - splantz@bowlesrice.com
- Tell Sarah:
 - Who you are
 - Your position in public education
 - Your school board's name
 - That you want to receive the E-Newsletter



A Word About This Presentation

- We speak in general terms today. The specific facts of each situation can make a difference in the legal principles that apply
- This presentation must not be treated as legal advice about any specific situation
- Due to the rapidly changing nature of the law, information in this presentation may become outdated
- When in doubt, don't act or rely upon the information contained in this presentation without seeking legal advice



The Questions that Launched this Journey



Dictionary Definition

“A status attained by length of continuous service . . . to which is attached by custom or prior collective agreement various rights or privileges . . . on the basis of ranking relative to others”



In Our Supreme Court

- *Triggs* Supreme Court case (1992)
 - Seniority is created by statute. Look to the statutes
 - Allusion to private sector collective bargaining “custom and usage” surrounding seniority in the contract setting
- *McClung* Supreme Court case (2003)
 - Seniority may be a “seniority credit,” e.g., the right to retain a summer service position



In the Grievance Board

A hard-earned employee benefit for service to the public, based in statute



Who Earns Seniority?

- Most professional and service employees
- Regular full- and part-time professionals, 18A-4-7b
- Certain substitute professionals, 18A-4-7a
- Teachers, 18A-4-7a
- Counselors, 18A-4-7a
- Principals, 18A-4-7a
- Supervisors, 18A-4-7a
- Central office administrators, 18A-4-7a
- Summer school professionals, 18-5-39
- Professional employees who job-share, 18-5-13(t)
- Superintendents, 18A-4-7a
- Regular full- and part-time service employees, 18A-4-8g
- Substitute service personnel, 18A-4-8g
- Summer service personnel, 18-5-39
- Extracurricular service personnel, *Smith* Supreme Court decision
- Professional and service employees of multi-county centers, 18A-4-8c
- Consolidated central office administrative personnel, 18A-4-8d
- Others?



Who does not?

- Retired teachers serving as substitute teachers, 18A-2-3, 18A-4-7a
- Professional substitutes for years in which they work less than 133 days, 18A-4-7a
- Professional extracurricular personnel (as such)
- Temporary adult education teachers, 18-5-19b
- ESC employees (absent ESC policy)
- Independent contractors (but be careful)
- Volunteers
- Others?

“Tenure” Distinguished

- *Tenure: A continuing contract (18A-2-2, 18A-2-6)*
 - Professionals and service
 - *After three years of acceptable employment*
 - One year of acceptable employment if earned a continuing contract in another county
- *Completing 133 days of the term equals one full year toward tenure*

Tenure v. Seniority

- Question: How can an employee have tenure but only a year of seniority?
 - By earning a continuing contract in one county, then transferring to a different county and working one year there (with no break in service between the two counties)
- Important: Seniority does not follow an employee from county to county. But progress toward tenure may. Tenure is earned under different rules than seniority.

Salary Increments Distinguished

- *“Years of experience” for teacher salaries:*
 - Years of employment in the teaching profession, plus military service if under contract when inducted (18A-4-1)
- *“Years of employment” for service personnel salaries:*
 - Years in which an employee classified as service personnel has been employed by a board in any position, plus military service if under contract when inducted (18A-4-8)
 - **For both, 133 days in a school term count as a year**
- These increments are capped at 35 and 40 years, respectively (18A-4-2, 18A-4-8a)



Salary Increments v. Seniority

- Question: How can an employee have many years of salary increment credit, but only a year of seniority?
 - By gaining all but the last year of experience working for another West Virginia board of education
 - In the case of a professional employee, by working in the teaching profession for all but the last year in another state, or for a private school
- Important: Seniority does not follow an employee from county to county. However, experience for salary purposes may. Also, salary increment credit is earned under different rules than seniority.



Calculating Professional Seniority

It is expressed as a quantity

You can have more than one kind

Sometimes it is pro-rated

It can disappear and reappear

Professional Seniority is Earned in Categories

- Under 18A-4-7a, professional seniority is earned in these categories:
 - Classroom teacher seniority
 - Guidance counselor seniority
 - Principal/supervisor/central office administrator seniority
 - Separate categories for each other non-teaching area of professional employment



Classroom Teacher Seniority

- Granted in all areas of a certification and licensure
 - regardless of when certification/licensure was achieved,
 - regardless of whether the teacher ever taught in a particular area of his or her certification or licensure
- Any professional employee who is a certified classroom teacher accrues classroom teacher seniority for the time he or she is employed in any professional area (18A-4-7a)
 - E.g., a Superintendent earns teacher seniority while serving as Superintendent, if certified to teach



Guidance Counselor Seniority

- Distinct from classroom teacher seniority (18A-4-7a)
- A counselor with teaching certification or licensure earns classroom teacher seniority while working as a counselor
- Question: Does a professional who holds a counselor certificate earn counselor seniority while working as a classroom teacher?
 - Most likely not, even though for some purposes counselors are considered to be classroom teachers!

Principal/Supervisor/Central Office Administrator Seniority

- This is literally one brand of seniority
- Service in any of these assignments contributes to seniority in this category
- A principal, supervisor or central office administrator who also holds teacher certification earns classroom seniority while working as a principal, supervisor or central office administrator
 - The reverse is not true



Seniority in Other Non-Teaching Areas of Professional Employment

- E.g., registered nurses
- What other professionals are employed other than as
 - classroom teachers,
 - counselors, and
 - principals/supervisors/central office administrators?

**In All Categories,
Professional Seniority Is a
Quantity, Not a Date**



-
- **A professional employee**
 - begins to accrue seniority upon commencing his or her duties (18A-4-7b)
 - receives seniority credit for each day he or she is professionally employed (18A-4-7b)
 - cannot earn more than one year of seniority in a school year (18A-4-7a)
 - **Employment for a full employment term shall equal one year of seniority (18A-4-7a)**

The “Numerator/Denominator” Rule for Calculating Professional Seniority

- Apply the “numerator/denominator” rule (Grievance Board decisions)
 - Denominator = annual contract term
 - Numerator = number of contract days actually employed or on approved leave
- Who earned the most seniority in 2016-2017:
 - The new year-round administrator whose duties commenced on Day 2 of the 261-day term and was thus employed in the position for 260 days, or
 - A 210-day administrator whose duties commenced on Day 1 of the 210-day term and was thus employed in the position for 210 days?



Consequences of the “Numerator/Denominator” Rule

- It matters if you are employed less than a full contract term, regardless of the length of the term!
- Expressing professional seniority as a “date” won’t work and can lead to inaccurate and illegal results!
- Accurate records can be crucial to correct calculations of professional seniority



Days Counted Toward Professional Seniority; Days Excluded

- In counting days of professional employment, it is irrelevant whether the employee receives pay for a day(18A-4-7b)
 - Seniority accrues during approved leaves without pay while employed (18A-4-7b)
- Exclude disciplinary suspensions without pay (18A-4-7b)



Pro-Rating Seniority for Regular Part-Time Professionals

- If a professional is employed
 - for a full employment term
 - as a regular employee, but
 - for less than 3.5 hours per day,
- he or she earns seniority “pro-rated to the proportion of a full employment day the employee is required to work” (18A-4-7b)
- What if a part-time professional works less than a full employment term?
 - Pro-rate for the number of days worked and the number of hours worked (Grievance Board decision)



Substitute Teacher Seniority

- Upon completing 133 days of employment in a school year, a substitute teacher accrues seniority to be used *only for applying for employment as a permanent, full-time professional employee (18A-4-7a)*
- 133 days or more of substitute teacher employment in a school year are prorated as a fraction of the school year worked by permanent, full-time teachers (18A-4-7a)
 - Use the “numerator/denominator” rule

An Historical Oddity Involving Substitute Teacher Seniority

- For substitute teaching before August 1990, professionals earned *regular* seniority for subbing for at least 133 days
- This *regular* seniority was grandfathered in, to be retained & used like regular seniority, and not just for applying for regular full-time employment (*Townsend* Supreme Court case)

When Do Substitute Teachers Earn No Sub Seniority?

- In a fiscal year in which they work for fewer than 133 days
- Regardless of the days worked, retired professional educators serving as substitutes do not qualify for substitute teacher seniority, even if they work as substitutes for 133 days or more in a school year (18A-4-7a)

Break in Professional Service

- At one time, the statutes were silent about the effect of a break in service
- Under the *Triggs* Supreme Court decision, the fate of one's seniority depended upon whether a break in service was voluntary or involuntary
 - Voluntary: seniority wiped out for good
 - Involuntary: seniority restored when reemployed



Breaks in Professional Service: Today's Rule

- In the wake of the *Triggs* decision, the Legislature acted
- Now, if a break in service is voluntary or results from a RIF, upon reemployment the professional employee is credited with all seniority accumulated at the date of termination (18A-4-7b)
- What is “voluntary”?
 - Do any breaks in service still wipe out seniority for good?



Seniority Ties Among Professionals

- If two or more professionals accumulate identical seniority and you must determine the seniority priorities among them, use a random selection system (18A-4-7a)
 - Random system: Established by the employees and approved by the county board
- *Exception:* In RIFs, when two or more principals have identical seniority, base decisions on qualifications (18A-4-7a)



Calculating Service Seniority

It is expressed as a DATE

It is often fictitious

It accrues by classification

It can be lost and regained

Service Seniority is Earned in Classification Categories

- “The length of time the employee has been employed by the county board within a particular job classification” (18A-4-8b)
- For all purposes, seniority is accumulated in particular classification categories of employment(18A-4-8g)
- Seniority acquired in different classification categories is calculated separately (18A-4-8g)
- Thus, an employee with service in multiple classification categories may simultaneously have seniority in multiple classification categories



Classification Categories Defined

- Each class title is a separate classification category (18A-4-8b)
- But class titles having Roman numeral designations are considered a single classification of employment (18A-4-8b)
 - Thus, service in one grade of a classification category earns seniority in all grades of the classification category (Grievance Board decision)



(Classification Category Defined)

Under 18A-4-8b, in calculating seniority, this class title . . .

. . . is treated as being in the same classification category as:

Cafeteria manager
Executive secretary
Mechanic assistant
Chief mechanic
Paraprofessional
Autism mentor
ECCAT
Braille/Sign Specialist

Cooks
Secretaries
Mechanics
Mechanics
Aides
Aides
Aides
Aides



Classification Categories of Multi-Classified Service Employees

- Multi-classified service employees accrue seniority in *each* of the classification categories held and are considered to be employees of each classification category contained in their multi-classification (18A-4-8g; *Taylor-Hurley* Supreme Court Decision)



Regular Service Seniority Distinguished from Substitute Service Seniority

- Seniority acquired as a service substitute and as a regular service employee must be calculated separately and must not be combined for any purpose (18A-4-8g)
- Like regular seniority, substitute seniority is accumulated in classification categories of employment



Calculating Regular Service Seniority

- Regular service seniority under 18A-4-8g
 - Begins accumulating upon entering regular employment duties pursuant to a contract
 - Continues to accumulate until person's regular employments by the county board is severed
- Resignation from full-time employment wipes out all seniority and seniority rights (*McClung* Supreme Court Decision)



Calculating Substitute Service Seniority

- Substitute service seniority under 18A-4-8g
 - Begins accumulating upon entering into substitute duties after signing a contract
 - Continues until
 - the substitute enters into a regular contract (Grievance Board opinion), or
 - employment as a substitute is severed



Regular and Substitute Service Seniority Calculation: Inclusions

- Under 18A-4-8g, service seniority accrues when
 - an employee is absent without pay as authorized by the county board, or
 - an employee's absence is due to illness or other reasons over which the employee has no control as authorized by the county board

Regular and Substitute Service Seniority Calculation: Exclusions

- Under 18A-4-8g, seniority does not accumulate during the time an employee is
 - willfully absent due to a concerted work stoppage or strike, or
 - suspended without pay



Breaks in Service Rule: the *Hazelwood* Rule for Service Employees

- Under the *Triggs* Supreme Court decision, the fate of one's seniority depended upon whether a break in service was voluntary or involuntary
 - Voluntary: seniority wiped out for good
 - Involuntary: seniority restored when reemployed
- The *Hazelwood* Supreme Court decision recognized that the Legislature has never acted to change the *Triggs* rule for service employees (but it did change the rule for professionals)



Service Seniority is Expressed as a Date, Not a Quantity

- Unlike the professional seniority statutes, the service seniority statutes do not
 - speak of earning no more than one year of seniority in a fiscal year, or
 - require pro-ration of a year's seniority for partial years
- 18A-4-8b equates service seniority with “the length of time the employee has been employed” in a particular classification category
- In fact, 18A-4-8g expressly refers to seniority dates and an initial seniority date



Service Seniority Lists Under 18A-4-8g Show Seniority “Dates”

- Twice each year, on or before September 1 and January 15, county boards must post at each school or working station the current seniority list or lists of each school service classification
- Each list shall contain the name of each regularly employed school service personnel employed in each classification and “*the date*” that each employee began performing his or her assigned duties in each classification



Fictitious Service Seniority “Dates” May Be Required Under 18A-4-8g

- **When a service employee**
 - transfers out of and returns to a classification category of employment (with no intervening resignation from employment by the board), or
 - **is willfully absent during a work stoppage, or**
 - is suspended without pay
- **A fictitious seniority “date” must be established to account for time when seniority did not accumulate**



Calculating Fictitious Service Seniority Dates (18A-4-8g)

- To account for transfer out of, and return to, a classification category of employment:
 - Establish the number of *calendar* days between the “date” the employee left the category and the “date” of return
 - Add this number of days to the employee’s “initial seniority date” to establish a new beginning seniority “date” within the classification category
 - The employee is then considered as having held uninterrupted service within the class title or classification category from the newly established seniority “date”



(Calculating Fictitious Service Seniority Dates)

- **To account for willful absence during a work stoppage:**
 - Calculate the employee's new seniority date "in the same manner" as in the case of an employee who transferred out of a classification category and returned (18A-4-8g)
- **To account for an unpaid suspension:**
 - Ditto! (Grievance Board opinion, State Superintendent Interpretation)

Miscellaneous Rules for Calculating Service Seniority

- The seniority granted to regularly employed service workers and the “seniority” granted to summer service employees are controlled by separate statutes and are not meant to be commingled (Grievance Board decision)
- Others?

So, to answer the questions
that launched this journey
into the calculation of
seniority . . .



Additional Questions?

Thank you!
