LESSIE LAMBERT

v. **Docket No. 93-22-547**

LINCOLN COUNTY BOARD OF EDUCATION

D E C I S I O N

Ms. Lessie Lambert, Grievant, alleges the Lincoln County Board of Education ("LCBOE") violated W. Va. Code §§18A-2-6, 18A-2-7, 18A-4-8b, 18A-4-15, and 18A-29-2(a) (See footnote 1) in regard to her employment status. She contends she is entitled to employment as a Cook and "regular seniority credit" for the time she worked as a substitute Cook III. Relief sought was regular employment as a cook (See footnote 2) and all applicable benefits due. This grievance was denied at all lower levels. A Level IV hearing was held and the case became mature for decision on April 5, 1994.

Background

The employment history in this grievance is somewhat confusing and a narrative outline may be helpful in increasing understanding.

Prior to Grievant's employment with Big Ugly Elementary ("BUE"), the school had two cooks, Doris Ferrell, full-time, and Brenda Workman, half-time. In 1981 these employees switched positions making Brenda Workman the full-time employee. In the Spring of 1982 Ms. Workman suffered a work-related injury and was off on Workers' Compensation. Ms. Donna Wiley completed that year as a substitute cook in Ms. Workman's position. Ms. Wiley then worked in 1982-83 and 1983-84 school year as a substitute cook at BUE in Ms. Workman's position. (See footnote 3) During 1983-84 Ms. Wiley was diagnosed with cancer and she died without returning to work for the 1984-85 school year. Ms. Workman remains on Workers' Compensation.

Grievant was hired as a substitute cook in 1983. In the 1984-85 school year she was placed at BUE as a Cook III replacing Donna Wiley who had replaced Brenda Workman. Grievant remained at BUE as a full-time, substitute cook until 1987. In 1987 her position was changed to a half-time

substitute cook position. She remained in this position until 1992. She received three probationary, substitute contracts for the years 1983-84, 1984-85, 1985-86. At the beginning of the 1986 school year she signed a continuing, substitute contract. All the personnel forms entered into the record identified the Grievant as a substitute. These include contracts, evaluations, and the experience verification sheet.

After the 1991-92 school year, BUE was closed due to consolidation, and the Grievant's position no longer existed. She did not receive any type of notice from the Board. During her employment at BUE she received all the other benefits to which regular employees are entitled.

Issues

Grievant argues multiple violations, but since she is presently employed in a regular service position, the current focus of her grievance is the failure of LCBOE to grant her eight years of regular employment seniority for the years she worked at BUE. She also argues she did not receive proper notification of her termination or transfer pursuant to W. Va. Code §§18A-2-6 and 18A-2-7. Although not listed on the grievance form, the Grievant also argued at the lower levels that her applications for posted positions were lost and individuals with less substitute seniority than herself were placed in these positions.

The Respondent argues this grievance is untimely, since the Grievant was on notice she was a substitute cook and never grieved her status until the closing of BUE. LCBOE also argues she did not receive notification of her termination or notification of transfer because she was a substitute employee. On the issue of Grievant's entitlement to regular seniority, LCBOE contends that since the position was not filled by posting and bidding pursuant to the requirement of W. Va. Code §§18A-4-15(2) and 18A-4-8b she cannot be granted regular seniority.

Discussion

A review of the salient facts and applicable statutes reveals the Grievant's claim for eight years of regular seniority to be untimely. W. Va. Code §18A-4-15 requires the position of an employee on leave of absence beyond thirty days to be filled pursuant to the requirements of W. Va. Code §18A-4-8b. This code section states the position must be posted, and then outlines how the position must be filled, with substitute employees fourth in line for consideration. Any employment decision must be

made on the basis of seniority, qualifications, and evaluations of past service. Id. Once a position is filled in the prescribed manner, the substitute holding the position "shall be accorded all rights, privileges and benefits pertaining to such a position." W. Va. Code §18A-4-15.

W. Va. Code §18A-4-8g (¶7) clarifies this issue stating:

> A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to section fifteen [§ 18A-4-15(2) and (5)], subsections (2) and (5), article four of this chapter. County boards of education shall not be prohibited from providing any benefits of regular employment for substitute employees, but such benefits shall not include regular employment status and seniority.

Obviously, LCBOE should have posted the Cook III position thirty days after Ms. Workman went on Workers' Compensation leave, filled the position according to statute, and then allowed the employee to remain in the position until Ms. Workman returned. This LCBOE did not do. Once Grievant became an employee she couldhave grieved the failure of the school board to post the position. (See footnote 4) This the Grievant did not do. Apparently the Grievant never questioned her status during her eight years at BUE. She raised no questions about her employment status until after BUE closed, filing this grievance on June 29, 1993.

It appears that through this grievance the Grievant wishes to have her cake and eat it too. By LCBOE's failure to post the BUE Cook position, Grievant, who at the time she was hired had almost no seniority, was able to receive and maintain a position for eight years without going through the selection process. While she kept this position she received all the other rights and benefits of a regular employee, with the exception of regular seniority. She did, of course, accrue substitute seniority. Now that the position has ended and LCBOE cannot correctly post the position, Grievant complains because she did not receive regular seniority.

W. Va. Code §18A-29-4(a)(1) requires a grievant to file a grievance "within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of when the grievance became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to the grievance . . . ." Grievant knew from the time she was hired that she was in a substitute position. Subsequent substitute contracts and evaluations served to remind her of this fact. She also knew she had not received the job through a posting andselection process as required by statute. At this point in time it is impossible to know why the situation continued as it

did, and why the position was not posted in the first place. There is some evidence in the record that the position was not posted because Ms. Workman was expected to return and the position was being held for her. Indeed, Ms. Workman remains on Workers' Compensation.

This failure to post is a single act that may have caused the Grievant continuing damage. See, Spahr v. Preston Bd. of Educ., 182 W. Va. 729, 339 S.E.2d 723 (1990). Continuing damage does not ordinarily convert a single act into a continuing practice for the purpose of the grievance statute. Id. Spahr states once a grievant has knowledge of the act she has an obligation to act. Id. Grievant has known since her hiring that she was in essence "a long-term substitute"; she cannot now complain because she did not receive regular seniority in this position. Thus, this grievance is not timely.

Even if the grievance were considered timely, the Grievant still could not receive retroactive seniority. Grievant's argument that regular seniority is one of the rights, privileges, and benefits granted a substitute pursuant to W. Va. Code §18A-4-5(2) must fail. W. Va. Code §18A-4-8g clearly states that an employee shall acquire regular employment status and seniority only if the position is filled pursuant to the statutory requirements. Benefits not available to substitute employees are regular employment status and seniority. Id.

Grievant's arguments concerning violations of W. Va. Code §§18A-2-6 and 18A-2-7, failure to notify of termination (See footnote 5) or transfer have more merit. W. Va. Code §18A-4-15 grants a substitute all rights and privileges of a regular employee after thirty days in the position. LCBOE states they granted her these rights with the above-stated exclusion. It would appear that among these rights would be notice that the position was being terminated and placement of the transfer list. The Board's failure to notify the Grievant is a violation of these Code Sections.

The question then becomes what relief flows from this violation? Although the Grievant had actual notice her school was closing, this does not excuse the failure of LCBOE to notify her. (See footnote 6) A problem arises because the record does not contain evidence of any way the Grievant was harmed by this failure to notify. She continued to have a substitute contract and was placed at the top of her substitute cook list because of her seniority. Thus, the Grievant has failed to met her burden of proof on this issue.

Although not listed on the grievance form, the Grievant complained that her applications for employment were lost by the Respondent. She placed copies of these applications into the record, and the Respondent did not object to this issue being raised. Grievant testified that other employees

with less seniority than herself received positions prior to the beginning ofthe 1993-94 school year. LCBOE did not rebut this testimony. Accordingly, Grievant has proven that she would have been employed by the beginning of the 1993-94 school year but for the Respondent losing her applications. Thus, the Grievant is **GRANTED** the back pay of a half-time Cook III position for the period of time she should have worked in the 1993-94 school year.

The above narrative discussion of facts and law will be supplemented by the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant worked as a substitute cook at BUE from 1983 to 1992.
2. LCBOE never posted this position, but did give the Grievant regular employee rights, benefits and privileges to which she was entitled.
3. Grievant received a regular, half-time position on September 29, 1993.
4. Grievant filed this grievance on June 29, 1994.

Conclusions of Law

1. Since Grievant waited approximately eight years to file this grievance after she had knowledge of the violation, this grievance is untimely. W. Va. Code §18-29-4(a)(1); Spahr, supra.
2. Since the Grievant's substitute position was not posted and filled pursuant to the statute, she could not earn regular employment seniority. W. Va. Code §18A-4-8g.
3. Respondent committed a technical violation of W. Va. Code §18A-2-6 by not giving Grievant official notice of her termination. Since the Grievant did not demonstrate any harm that resulted from this failure no relief can be granted.
4. Grievant proved by a preponderance of the evidence that LCBOE's loss of her applications for employment resulted in her failure to receive a position at the beginning of the school year.

Accordingly, this grievance is **GRANTED** in part and **DENIED** in part. The Respondent is directed to pay the Grievant the salary she would have received for a half-time regular cook position from the beginning of the 1993-94 school year to September 28, 1993. She should also receive regular seniority from the beginning of the 1993-94 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 29, 1994

Footnote: 1Code §18A-29-2(a) defines a grievance. No explanation has been given for citing this area as a grievance, thus no violation of this code section is found.

Footnote: 2Since the filing of this grievance the Grievant has received a regular employment position with LCBOE.

Footnote: 3Because for some period of time employees were allowed to collect sick leave and Workers' Compensation leave at the same time, some of the older records indicate days worked when the employee was actually off work. Ms. Wiley was credited with ten days employment at BUE for the 1984-85 school year.

Footnote: 4Although the Grievance Board was not in existence at this time, there were procedures in place to grieve hiring practices. See, W. Va. Code §18A-2-11 [1981].

Footnote: 5Although Grievant's substitute cook contract was not terminated, her position at BUE was terminated.

Footnote: 6Grievant applied for other cook positions as early as October 6, 1992.