MICHAEL PACK and JOANN DALEY,

v. DOCKET NO. 93-20-483

KANAWHA COUNTY BOARD OF EDUCATION.

D E C I S I O N

The Grievants, Ms. Joann Daley and Mr. Michael Pack, are before this Board requesting an additional year of administrative seniority for the 1992/1993 school year. Although both of these grievances arise from the same facts and were filed together, the Grievants are not similarly situated, contrary to Grievants' representative's representations. Thus, the facts will be considered jointly, but the legal conclusions must be considered separately.

Grievants Daley and Pack were elementary principals from 1989 to 1992. In 1992 there was a reduction-in-force in this position, and the Grievants did not have enough seniority to maintain their principalships. Further, they were informed they were not allowed to transfer into vice-principal (See footnote 1) positions because these positions were not considered lateral. Thereafter both Grievants receivedelementary principalships for the 1993/1994 school year. The individual facts diverge at this point.

JOANN DALEY

In 1992 Grievant Daley filed a timely grievance contending she should be allowed to "bump" less senior vice-principals. This grievance was denied at Level II. She then chose to abandon her grievance and did not proceed to Level IV.

Although unclear from the record, she apparently refiled a grievance at Level II sometime in October, 1993 after learning that similarly situated principals had pursued their claims and won.

Respondent argues this claim is not timely filed pursuant to W. Va. Cod e §18-29-4(a)(1). This Code Section states that a grievance must be initiated "within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date the event became known to the grievant . . . . "

Given the above-stated facts this grievance must fail for two reasons. First, Grievant's attempt to ground her current claim on other employees' success in similar grievances, when the facts were previously known to her, cannot be allowed. Harris and Tackett v. Lincoln County Bd. of Educ., Docket No. 89-22-049 (Mar. 23, 1989). Non-grievants, who find themselves in parallel work situations to successful grievants, are not allowed to "piggy-back" their claims. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). This would allow one employee to invest time and energy in a grievance, then allow another employee who had not soacted, to reap the same return. Id. Additionally, if this type of "tag-team endeavor" is allowed, it would effectively deny the Respondent's timeliness defense provided by Code §§18-29-3, 18-29-4(a). Id. W. Va. Code §18-29-4(c) states "[w]ithin five days of receiving this decision of the chief administrator, the grievant may appeal the decision . . . ." Grievant Daley did not appeal her Level II Decision to Level IV, thereby abandoning her claim. She cannot now be allowed to refile it.

Second, this grievance is not timely since the Grievant knew of the facts giving rise to the grievance in 1992, but did not file this particular grievance until October, 1993. See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

MICHAEL PACK

Grievant Pack's situation is somewhat different. Grievant Pack filed his case in the Kanawha County Circuit Court on a Writ of Mandamus on April 9, 1993. It is unclear why the Grievant took his case to this forum. In his Court pleadings the Grievant asked "to immediately be placed in the position of the least senior vice-principal in Kanawha County; award attorney's fees for the prosecution of this action; award all back pay, lost benefits or any other benefit of any kind because of the Respondent's failure to comply with the statutory mandate; and grant such other and further relief as the Court may deem fit and proper in this matter." Petition at 5. Judge Ranson's Order of May 17, 1993 granted the following relief: "the respondent [Kanawha County Board of Education] is **ORDERED** to instate the petitioner to thenext available administration (sic) which he is certified." Kanawaha County Circuit Court Order, May 17, 1993.

Clearly the Grievant did not receive all the relief he sought at the Circuit Court level. If he was displeased with the relief attained, he could petition that court with a "Motion to Reconsider" or appeal the decision to the West Virginia Supreme Court. (See footnote 2) In essence, Grievant Pack is asking

this Board to amend a Circuit Court Order. Of course, that is not within the powers of this Board.

The legal discussion and analysis contained in the foregoing discussion are incorporated into the following Findings of Fact and Conclusion of Law.

FINDINGS OF FACT

1) In 1992 the Kanawha County Board of Education ("KCBOE") had a reduction-in-force of elementary school principals.

2) The Grievants did not have enough seniority to retain their principalships and were told they would be returned to teaching. They were also told that Mr. Marockie, State Superintendent of Schools, had decided a principal would not be allowed to "bump" into a vice-principal's position as these were not considered lateral.

3) In 1992 Grievant Daley timely grieved this decision, but abandoned her grievance after a denial at Level II.

4) Grievant Pack petitioned the Kanawha County Circuit Court through a Writ of Mandamus on April 9, 1993 asking to be placed immediately in the position of the least senior vice-principal.

5) On May 17, 1993 that Court ordered the KCBOE to place the petitioner in the next available position, but ordered no other relief.

6) The Grievants filed this action in October, 1993.

CONCLUSIONS OF LAW

1) When a prior grievance has been abandoned by the failure of the grievant to proceed to the next level it cannot be refiled at a later date. Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994).

2) A grievant will not be allowed to overcome a timeliness defense by basing his current claim on another employee's successful grievance decision, if the events giving rise to the grievance were known to the grievant, but he delayed filing until the other employee received a successful outcome.

3) The correct procedure to amend a Circuit Court Order is to file a "Motion to Reconsider" with the Circuit Court or to file an appeal with the W. Va. Supreme Court. W. Va. Code §58-5-1.

Accordingly, Grievant Daley's grievance is **DENIED** on the grounds of abandonment and untimeliness and Grievant Pack's grievance is **DENIED** on the ground of lack of jurisdiction.

Any party may appeal this decision to the Circuit Court of Kanawha 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: June 30, 1994

Footnote: 1The term vice-principal was used by the Grievants and is assumed to be the same as the term assistant principal used in W. Va. Code §18A-2-9.

Footnote: 2Respondent stated at the Level II hearing that it was "not appropriate to resurrect what should have been a remedy in a court action through a grievance procedure.