JOAN KISH

v. Docket No. 93-27-080

MERCER COUNTY BOARD OF EDUCATION

DECISION

The grievant, Joan Kish, is employed by the Mercer County Board of Education (Board) as a secretary assigned to the Mercer County Technical Education Center (MCTEC). She initiated this grievance at Level I October 22, 1993, citing W.Va. Code §18A-4-5b and alleging that she had been "denied credit for service with previous employers" and that "similarly situated secretaries have received three years of experience credit." The grievant's supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held February 24, 1994. The Board, at Level III, waived participation in the matter, and appeal to Level IV was made March 8, 1994. A hearing was held August 15, 1994 (See footnote 1) and the parties submitted proposed findings of fact and conclusions of law on September 20, 1994.

I.

The parties do not dispute that beginning in the late seventies, (See footnote 2) the Board began a practice of awarding newly-appointed secretaries credit for up to three years of prior "non-Board" secretarial experience for the purposes of determining their salaries under W.Va. Code §18A-4-8a (See footnote 3) It appears that no formal Board action was taken to establish the practice and that it was conceived by the then-superintendent of schools and perhaps the Board's Personnel Department as part of their efforts to offer salaries which were competitive with those in the private sector. At least fifteen secretaries, presently employed by the Board, were awarded the extra credit.

Apparently, problems occasionally arose over whether a particular type of previous experience was truly "secretarial." The record suggests that there might also have been complaints from secretaries seeking credit for more than three years of prior experience. In any event, the Board's Personnel Department was in the process of reviewing and revising the practice in October 1985 when William Baker was appointed Superintendent of Schools. In late October or early November, then-Director of Personnel Steven Akers approached Mr. Baker with at least a draft proposal

forrevising and perhaps formalizing the practice. Mr. Baker responded that he believed the practice to be contrary to law and that it was to cease immediately. (See footnote 4)

At the urging of a newly-created personnel advisory board consisting of professional and service personnel, Mr. Akers asked Mr. Baker to reconsider the proposal. Superintendent Baker adamantly refused. There is no dispute that the practice ceased at that time (See footnote 5) and that those secretaries who had received the credit were allowed to retain it.

The grievant was first employed by the Board as a substitute secretary at the beginning of the 1988-89 school term. She noted on her application for that position that she had at least three years of secretarial experience with previous employers. (See footnote 6)

The grievant again listed the private sector experience on her subsequent application for permanent employment with the Board. She was hired as a regular full-time secretary in the Board's central office on August 17, 1989. (See footnote 7) She was not given credit forher prior experience. As previously noted, the grievance was filed October 22, 1993.

II.

The Board asserts that the complaint was not timely filed and the undersigned agrees. Accordingly, it is not necessary to set forth or address the grievant's claims on the merits of the case.

III.

The grievant testified that at the time she made application for her substitute position, Mr. Akers advised her of the policy in issue, but also told her it would only apply if she achieved regular employee status. She testified that she learned shortly after achieving such status that other secretaries assigned to the central office had received the credit. According to the grievant, she inquired of Mr. Akers either within a month of becoming a regular employee or "well into" the 1989-90 school year whether the policy was still in effect. She testified that he responded that he believed it was and that he would "check on it." According to the grievant, Mr. Akers made no further responses to her inquiry and did not respond to her other periodic inquiries during his tenure as Personnel Director.

In August 1993, Roger Daniels assumed the Director of Personnel post and the grievant inquired of him in early September whether she might receive the credit. At Mr. Daniels' direction, she reduced her concerns to writing in a September 7, 1993 memorandum in which she stated, "I was assured employees received [three years' credit for payroll purposes] based on verifiedemployment. (See

footnote 8) This issue has not been resolved or abandoned. Educational leave, activities in two school terms involving reductions in force, and transitions in central office personnel have contributed to a time lapse." (See footnote 9) When no response was forthcoming, the grievant reminded Mr. Daniels of her concerns in a September 22, 1993 memorandum. She specifically asked, "When will the three (3) years credit, given for payroll purposes, be reflected in my salary?"

Having received no response by October 14, 1993, the grievant again wrote Mr. Daniels explaining her concerns and requesting "the courtesy of a response." This complaint was filed when no answer to the memorandum was forthcoming.

Mr. Akers testified that he told the grievant upon her initial employment that the practice in issue had been in effect in previous years but that it had been discontinued. Mr. Akers was certain that he advised the grievant sometime during the 1989-90 school year that the practice was no longer followed and that she would not get the extra credit.

The undersigned finds Mr. Akers' testimony to be more credible and reliable than the grievant's regarding the content of theconversations that transpired between them and the approximate time of those conversations. Mr. Akers was forthright and convincing in relating that Mr. Baker had rejected his 1985 proposal. He even recollected that when he made the request for reconsideration Superintendent Baker did not even review the written proposal he presented and stated that he, Mr. Akers, "could throw it away" and that "it was not going to happen." In contrast, the grievant was less certain about the substance of her conversations with Mr. Akers. She was even more uncertain about when they occurred.

The undersigned further finds it implausible that Mr. Akers even suggested to the grievant in 1988 or 1989 that the policy was then still in effect, given Superintendent Baker's clear and inflexible last words on the matter in 1985. Accordingly, it is concluded that the grievant was advised unequivocally during the 1989-90 school year that the policy was no longer in effect and that she would not get credit for her prior secretarial experience.

W.Va. Code §18-29-4(a)(1) provides,

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor[.]

After a careful review of the record in the case, the arguments of the parties and the holdings in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990), the undersigned concludes that the event upon which the grievance is based is Mr. Akers' refusal, during the 1989-90 school year, to grant thegrievant three years' experience credit for pay purposes. Since the grievance was not filed until over three years later, it was not timely.

In Spahr, the West Virginia Supreme Court of Appeals addressed a fact pattern which is not substantively different from that in the present case. Certain professional employees of the Preston County Board of Education were awarded a pay supplement in 1982 and, because of an oversight, other similarly-situated employees were not. The excluded employees did not file a grievance until October 1986, when they first learned of the disparity.

In addressing the timeliness objections made by the county board, the Court rejected the grievant's contention that the ongoing difference in salaries constituted a "continuing practice" within the meaning of W.Va. Code §18-29-4(a)(1). Rather, the Court found that the case involved a "single act", i.e., the failure to include the grievants on the supplement pay list, and that "continuing damage" had ensued. The Court remarked that, "Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice." Id. at 742.

The Court went on to explain that the grievants, however, had not learned of the "act" until shortly before they filed their complaint and it, therefore, fell within the statute's provision for a "discovery rule" exception to the requirement that it be filed within fifteen days of the event upon which it was based.

Here, the grievant makes the same "continuing practice" contention and the same reasoning must be applied. The undersignedconcludes that the clear communication given the grievant by Mr. Akers in 1989 or 1990 is the equivalent of the grievable "act" in Spahr, i.e., the failure of the Preston County Board of Education to award the grievants therein the pay supplement in issue at the time it was given to other similarly-situated employees. Since the record fully supports that at the time of Mr. Akers' communication there were no further operative facts to discover, her complaint was untimely.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: April 27, 1995

Footnote: 1The evidence presented at this hearing was supplemental to the record developed at Level II.

Footnote: 2The record does not reflect precisely when the practice started. It appears, however, from a list of secretaries who received the "supplemental" years (Grievant's Exhibit 5), that it was in place at least as early as 1975.

Footnote: 3The statute provides minimum salaries for employees depending on the number of years they have been employed by a particular county board of education and the particular classifications held.

Footnote: 4Mr. Baker had been employed in the school system prior to his appointment to the superintendent post and had apparently learned of the some of the complaints the practice had generated.

Footnote: 5The record reflects that the last secretary to receive the credit was hired shortly before Mr. Baker's appointment.

Footnote: 6The grievant listed the following employers and periods worked: Princeton Community Hospital, from March, 1984 to November, 1985; Norris Screen Company, from November, 1985 to July, 1987; and Atlantic Distribution Center, from July, 1987 to June, 1988. There is no dispute that the grievant served as a secretary during these periods.

Footnote: 7The grievant was transferred to her present position at MCTEC on January 3, 1994.

Footnote: 8The remaining portion of the memorandum dealt with a question concerning the grievant's seniority, which the parties agree is not an issue in the case.

Footnote: 9The grievant confirmed at Level II that the last sentence in the memorandum was her attempt to explain why she had not raised the issue for a considerable period. It is noted that the memorandum suggests that she did not make inquiries of Mr. Akers at least during the last two years in which he served as Personnel Director.