SANDRA RANAE HAZELWOOD

v. Docket No. 94-27-258

MERCER COUNTY BOARD OF EDUCATION

DECISION

The grievant, Sandra Hazelwood, is employed by the Mercer County Board of Education (Board) as an Aide assigned to Pikeview High School. She initiated this grievance at Level I March 30, 1994, alleging that the Board had calculated her seniority incorrectly. (See footnote 1) Her supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held June 16, 1994. The Board, at Level III, declined to address the matter and appeal to Level IV was made June 27, 1994. A hearing was held November 22, 1994, (See footnote 2) and the parties submitted proposed findings of fact and conclusions of law by January 17, 1995.

I.

The grievant was first hired by the Board as an Aide on October 1, 1979. She resigned her position December 13, 1984. She was rehired as an Aide at the Mercer School January 19, 1987. According to the grievant, from that date until the Spring of 1990 she received conflicting opinions from coworkers and at least one central office employee on whether she was entitled to be credited with seniority for her previous service with the Board.

The Board conducted reductions-in-force (RIFs) in its service personnel staff during school years 1991-92, 1992-93 and 1993-94. Upon learning that service personnel with hire dates prior to January 19, 1987, had lost their positions in the 1991-92 RIF, the grievant concluded or at least became more certain that she had been credited with seniority for her pre-1987 service.

The grievant's conclusions and/or suspicions were reinforced when she was retained during the 1992-93 and 1993-94 RIFs, and other employees, whom she at least believed had hire dates prior to January 1987, were again laid off. According to the grievant, it was not until March 1994, that she decided to make formal inquiry and verify the hire date used by the Board for the purposes of

determining her seniority. This investigation was prompted by the revelation, in late February 1994, that she would not be awarded an Aide post at Pikeview High School and that an employee whom she believed to be less senior was to be appointed to the position. (See footnote 3) If she had inquired earlier, she would have learned that the Board had always adhered to a policy of not giving its service employees such credit. It is likely if not probable that she would also have discovered that her retention and the termination of more senior Aides during the three RIFs discussed were the result of a clerical error. (See footnote 4)

The grievant testified at Level II that she became sure that her hire date was listed as January 19, 1987, on March 3 or March 4, 1994, when, for the first time, she obtained a copy of the Board's official service personnel seniority list. She requestedan informal conference with her supervisor pursuant to W.Va. Code §18-29-4(a)(1) (See footnote 5) on March 30, 1994.

II.

The grievant claims that, regardless of the reasons therefor, she was "credited" with seniority for the previous service and, pursuant to the holdings in Chapman v. Webster Co. Bd. of Educ., Docket No. 92-51-349 (Feb. 25, 1993), the Board must continue to count that service. The Board avers that neither the evidence nor Chapman support those conclusions and that the complaint was not timely filed. The undersigned concludes that the Board must prevail in the case.

III.

The undersigned doubts generally the assertions of the grievant regarding what she believed to be the Board's policy on recapturing previously-accrued seniority and when she became aware that her hire date was recorded as January 17, 1987. It seems likely that the grievant was aware of the Board's policy on that date or shortly thereafter and, therefore, had reason to suspect that an error had been committed during the reductions-in-force discussed.

The record, including the grievant's own testimony, supports that she has more than an inkling of the importance of seniority in school service personnel matters. It is not plausible that for nearly seven years she would assume rather than verify how hers' was calculated. It appears more plausible that she realized at the time the Pikeview position was filled, that the error had been corrected and that she filed this complaint to regain her previous advantageous position on the

Board's seniority rosters. The record in no way supports that the grievant has been harmed in any manner.

Regardless of the plausibility of the scenario advanced by the grievant, the record supports that the grievance was not timely filed. As noted, the grievant became certain on March 3 or 4, 1994, that Board records then reflected a 1987 hire date for her. (See footnote 6) The undersigned concludes that this discovery is "the event upon which the grievance is based"; that W.Va. Code §§18-29-4(a)(1) and 18-29-2(b) (See footnote 7) required her to schedule an informal conference with her supervisor on March 24 or March 25; and she did not.

The undersigned further finds that there were "continuing" consequences to having a hire date of January 19, 1987, but that the complaint is not based on consequences. If there was a "misdeed" to complain of, it was the Board's failure to "officially" credit the grievant with prior service at the time of her return in 1987 or the subsequent correction made to its seniority lists. There is nothing "continuing" about either event. Rather, the grievance falls within the statute's provision for the "discovery period" discussed in Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990), and the grievant was required by W.Va. Code §18-29-4(a)(1) to schedule the informal conference within fifteen days of learning of those events.

The grievant's assertions on the merits of the case must also be rejected. Applying the reasoning of the West Virginia Supreme Court in Triggs v. Berkeley County Bd. of Educ., 425 S.E.2d 111 (W.Va. 1992), Chapman, supra, held that under W.Va. Code §18A-4-8b, service employees who voluntarily left the service of a county board of education and returned to such employment could not recapture the previous experience for seniority purposes. The decision also held, again in accordance with Triggs, that employees who had been so credited would be allowed to retain it, but that employees who voluntarily left a board's employment after February 25, 1993, the date of the decision, could not do so.

Clearly, Chapman was addressing a situation where a county board, per policy, had granted its service employees credit for prior service. Here, there was no such policy and no administrator"credited" the grievant with the prior experience. The decision does not stand for the proposition that an employee who recaptures seniority through clerical error, like the grievant herein, must be forever afforded the benefit of that error. Rather, it fully supports the undersigned's conclusion that a board which did not have a policy or practice as of February 25, 1993, which

permitted an employee to recapture seniority, can and should correct such errors.

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: 1 *There were other allegations made at that time which were subsequently abandoned. See n. 3.*

Footnote: 2 *Two earlier hearings were continued on the joint request of the parties.*

Footnote: 3 *The grievant testified that despite that the post was not filled until March 2, 1994, she and others were aware prior to thatdate that a certain applicant would receive the post. She represented that employees always had "common knowledge" of who would receive a particular posted service personnel position, presumably as a result of their understanding of the role of seniority in such matters. It is also noted that at Level I, the grievant was protesting her non-selection for the post and what she believed to be an incorrect hire date but, because she subsequently obtained her current Aide position at Pikeview, she advanced her claim on the hire date only.*

Footnote: 4 *The grievant disputes that a clerical error was the cause but does not dispute that the Board has always denied service employees credit for prior service. She offers no plausible explanation as to why the Board would credit her and no other employee. The undersigned finds the testimony and opinion of Superintendent of Schools Deborah Akers to be persuasive on this issue. Superintendent Akers could not pinpoint precisely when the error occurred; who made it; or whether October 1, 1979, was the hire date mistakenly used during the RIFs. She opined, however, that since the Board's policy on "recaptured" seniority was a long-standing one, it was highly unlikely that any Board official had ever made an exception for the grievant and that clerical error appeared to be the only logical answer. The record as a whole supports her conclusion.*

Footnote: 5 *"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 to discuss the nature of the grievance and the action, redress or other remedy sought."

Footnote: 6In reaching this determination, the undersigned was required, at least to some degree, to assess and consider the grievant's overall credibility as a witness. She testified at Level II with seeming certainty that she learned of her 1987 hire date "three or four days" before March 7, 1994. At Level IV, she stated that the discovery could have occurred as late as March 7. On cross-examination, she conceded that she had "reviewed the dates" subsequent to the Level II hearing. The undersigned finds the Level II testimony more reliable.

Footnote: 7"Days means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with section two [§ 18A-5-2], article five, chapter eighteen-a of this code."