RITA D. HEATER,

Grievant,

v.

BARBOUR COUNTY BOARD OF EDUCATION,

DOCKET NO. 96-01-497

Respondent,

AND

SHIRLEY LOUK AND SHARON POE,

Intervenors.

DECISION

Grievant, Rita D. Heater, an aide, filed this grievance on September 5, 1996, against her employer, the Barbour County Board of Education, Respondent. She alleges that she "was hired as an Aide on October 9, 1992," and is contesting Respondent's failure to credit her with aide seniority for time she worked in that position. Therefore, as relief, she is "requesting seniority for the time [she] worked as an aide that year."

The grievance was denied at Levels I and II, on September 10, 1996, and November 21, 1996, respectively. Ms. Shirley Louk and Ms. Sharon Poe, aides employed by Respondent, were allowed to intervene at Level II. Grievant bypassed Level III, pursuant to W. Va. Code §18-29-4(c), and appealed directly to Level IV. On February 25, 1997, a Level IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia.

The case became mature on March 24, 1997, at the end of the post-hearing submission period. The following findings of fact were derived from the record.

FINDINGS OF FACT

1. Grievant and Intervenors are employed by Respondent as aides.

2. Respondent's aide seniority roster, dated January 17, 1995, listed Grievant and Intervenors as

holding a seniority date of August 25, 1994.

3. Intervenor Louk initiated a grievance in May, 1995, contesting her seniority date. See, Louk v. Barbour County Bd. of Educ., Docket No. 95-01-386 (May 23, 1996). She had not been given seniority for working as a special education/bus aide, 3.5 to 4 hours a day, between January 6, 1992, and June 8, 1992. Intervenor Louk's grievance was granted. (See footnote 1)

4. As a result of the Louk decision, Intervenor Louk became more senior than Grievant and Intervenor Poe.

5. In the Fall of 1996, Grievant learned that Intervenor Louk received the seniority she grieved in Louk. Grievant filed the instant grievance to attempt to receive credit for a similar assignment she performed several years ago. During the 1992-1993 school year, Grievant was employed as a half-time cook at Volga- Century Elementary School (VCES). On October 14, 1992, she also began working approximately one hour a day as a supervisory aide at VCES, and held this position until May 5, 1993.

6. Grievant knew by March, 1996, and at the latest by July, 1996, that she had not received aide seniority for the position inquestion.

7. Grievant did not file her grievance within fifteen days of learning that she was not going to receive seniority for the above supervisory aide service.

8. Grievant filed the instant grievance on September 5, 1996. Level II, Gr. Ex. 1, Informal Conference form.

DISCUSSION

In this case, Respondent and Intervenors raised an affirmative defense - timeliness. The burden of proof, proving the affirmative defense by a preponderance of the evidence, is upon the party asserting the grievance was not timely filed. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995).

W. Va. Code §18-29-4(a)(1), in pertinent part, 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 to discuss the nature of the grievance and the action, redress or other remedy sought.

First, one must determine what is “the event,” and second, when did it occur. In this case, the event is Respondent not providing Grievant seniority for time she worked during the 1992-1993 school year as an aide. The event ended when the position ended - 1993.

Therefore, because the event has ended, this case does notinvolve a “continuing practice”. See Hazelwood v. Mercer County Bd. of Educ., Docket No. 94-27-258 (Apr. 27, 1995) (a miscalculation of seniority is not a continuing event that may be grieved at any time.)

Similarly, there is no exception to the fifteen day filing deadline in W. Va. Code §18-29-4(a)(1) for a school board employee's discovery that a certain event may have been a grievable event. See Kish v. Mercer County Bd. of Educ., Docket No. 94-27- 080 (Apr. 27, 1995). At the Level II hearing, the following colloquy occurred:

> Grievant's Representative: ... Okay. Now, what was your feeling about this job? You thought you were an aide? Is that correct?
>
> Grievant: Well, I thought I was an aide, but, you know, I, I didn't get any time for it, but I thought that's the way it worked. And I didn't even realize it until after I had heard that Shirley Louk had got time for bus aide that I really even realized that I would be eligible to also have my time.
>
> Grievant's Representative: Okay. So you just recently came under the understanding that there was a potential grievance...
>
> Grievant: yes.

Level II, Tr. at 11.

Even if the Louk decision may have triggered and directed Grievant's memory to her failing to receive aide seniority for the 1992-1993 VCES position, her September 5, 1996, filing does not comply with W. Va. Code §18-29-4(a)(1). Interestingly, the cases (See footnote 2) upon which the Louk decision is based were decided in 1992, and before Grievant's 1992-1993 VCES position ended. Moreover, the Grievance Board has held that

> “[A]s a general rule, ignorance of the law... will not suffice to keep a claim alive.” Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). “[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for

> determining whether [her] grievance is timely filed. Instead, if [she] knows of the event or practice, [she] must file within fifteen days of the event of occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar. 23, 1989).

Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

Grievant's testimony and credibility is, at the least, questionable. The undersigned finds Grievant's testimony, that she did not learn that she had not been credited with the 1992-1993 VCES aide seniority until shortly before she filed her grievance, incredible. Grievant testified that she had learned to check the seniority postings, and had seen a seniority posting at school dated January 8, 1997. Moreover, Intervenor Louk testified that Grievant often ate with her and Intervenor Poe, and that they had discussed aide seniority.

Also during the Level IV hearing, Ms. Sharlene Mills, Executive Secretary to the Superintendent and Coordinator of Services, testified that Grievant called her, during February or March 1996, and inquired about the Louk decision. (See footnote 3) Ms. Mills alsocredibly testified that in July, 1996, Grievant stopped by, and spoke with Superintendent John H. Hager, in her presence, about aide seniority and the Louk case. Superintendent Hager confirmed Ms. Mills' testimony.

Because Grievant learned that Respondent had not credited her with the amount of seniority in question by March, 1996, and at the latest by July, 1996, it is clear that Grievant did not file her grievance pursuant to the deadlines established in W. Va. Code §18- 29-4(a)(1). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

In addition to the foregoing formal findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. The burden of proof is upon the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95- 54-041 (May 18, 1995).

3. W. Va. Code §18-29-4(a)(1), in pertinent part, provides:

> Before a grievance is filed and within fifteen days following the occurrence of the event

> upon which thegrievance 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.

4. A miscalculation of seniority is not a continuing event that may be grieved at any time. See Hazelwood v. Mercer County Bd. of Educ., Docket No. 94-27-258 (Apr. 27, 1995).

5. There is no exception to the fifteen day filing deadline in W. Va. Code §18-29-4(a)(1) for a school board employee's discovery that a certain event may have been a grievable event. See Kish v. Mercer County Bd. of Educ., Docket No. 94-27-080 (Apr. 27, 1995).

6.

> "[A]s a general rule, ignorance of the law... will not suffice to keep to a claim alive." Reeves v. Wood County Bd. of Educ., Docket No. 91-54-337 (Dec. 30, 1991). "[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether [her] grievance is timely filed. Instead, if [she] knows of the event or practice, [she] must file within fifteen days of the event of occurrence of the practice." Harris v. Lincoln County Bd. of Educ., Docket No. 89-22-49 (Mar,. 23, 1989)(emphasis in original).

Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

7. Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). 8. Respondent and Intervenors proved by a preponderance of the evidence that Grievant failed to timely file her grievance.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Morgan 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.

DATED: 9/30/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 In Louk, Respondent had different legal counsel than in the instant grievance, and timeliness was not raised by Respondent.

Footnote: 2 Vance v. Logan County Bd. of Educ., Docket No 92-23-045 (May 21, 1992); Miller v. Lincoln County Bd. of Educ., Docket No.91-22-463 (Apr. 14, 1992).

Footnote: 3 The Louk grievance, supra, was filed on May 5, 1995, and decided on May 23, 1996.