CYNTHIA TANNER, et al.

Grievants,

v.

Docket No. 97-21-443

LEWIS COUNTY BOARD OF EDUCATION,

Respondent,

NATALA AUVIL, et al.,

Intervenors.

D E C I S I O N

Grievants are seventeen (17) teachers employed by the Lewis County Board of Education (Board). On February 10, 1997, Grievant Cynthia Tanner filed a level one complaint in which she stated "[w]ith the transfer of 5th grade students to RLBMS [Robert L. Bland Middle School] I discovered that the county has me listed with one year less seniority than records indicate. I believe my proper seniority should be restored." The grievance was either waived or denied and Grievants advanced the matter to level two, at which time twenty-five (25) additional teachers were joined as Intervenors. Following an evidentiary hearing, the grievance was denied, and appeal was made to level four on October 7, 1997. The parties determined that a decision could be made on the lower-level record, and the grievance became mature for decision with the submission of proposed findings of fact and conclusions of law by Grievants on December 15, 1997. (See footnote 1)

The facts of this matter are undisputed and are made upon a review of the record in its entirety.

Findings of Fact

1. Grievants and Intervenors are employed as teachers by the Lewis County Board of

Education.

2. Grievants were previously employed by Respondent as substitute teachers, and worked one hundred thirty-three (133) days or more, during at least one year prior to August 1990.

3. Intervenors did not work as regular or substitute employees prior to 1990.

4. Grievants received retirement credit for their work prior to 1990, but were not granted seniority for other purposes.

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Discussion

The sole issue presented in this matter is whether Grievants are entitled to seniority credit for their work as substitutes prior to 1990. Grievants argue that they are entitled to the credit, which would benefit them during any potential reductions in force, and cite Townsend v. Mercer County Bd. of Educ., Docket No. 97-27-093 (Nov. 5, 1997), in support of their position. The Board and Intervenors assert that the grievance must be denied based upon current statutory language, and prior decisions issued by the Grievance Board, including Hoffman v. Kanawha County Bd. of Educ., Docket Nos.91-20-278/279 (Jan. 31, 1992). Although both the Board and Intervenors acknowledge that several circuit courts have held that seniority earned as a substitute employee prior to August 30, 1990, should be afforded to professional school employees, Intervenors note that the Lewis County Circuit Court has not ruled on this matter, and that other court rulings are not controlling. The Board asserts that it is discretionary as to whether it adopts a policy that would grant seniority in this instance, and that it has declined to do so.

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ.,Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Prior to August 30, 1990, seniority rights for teachers were controlled by W. Va. Code §18A- 4-8b(a), which stated, in pertinent part, “[t]he seniority of professional personnel shall be determined on the basis of the length of time the employee has been professionally employed by the county board of education . . . . Employment for a full employment term shall equal one year of seniority[.]” Under

this provision, a substitute teacher was credited with one year of seniority after working for one hundred thirty-three (133) days or more during the school year, and upon regular employment, the teacher retained this credited seniority. During the third executive session of the 1990 Legislature, W. Va. Code §18A-4-7a was enacted, and became effective August 31 of that year. Section 7a, provides that:

[t]he seniority of classroom teachers as defined in section one, article one [Section 18A-1-1] of this chapter with the exception of guidance counselors shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education and shall be granted in all areas that the employee is certified and/or licensed.

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Upon completion of one hundred thirty-three days of employment in any one school year, substitute teachers shall accrue seniority exclusive for the purpose of applying for employment as a permanent, full-time professional employee. One hundred thirty-three days or more of said employment shall be prorated and shall vest as a fraction of the school year worked by the permanent, full-time teacher.

In a series of cases beginning with Hoffman, supra, the Grievance Board applied W. Va. Code §18A-4-7a, as written, denying any seniority accrued pursuant to the earlier provisions through employment as a substitute prior to August 31, 1990. However, after considered review of the several Circuit Court cases which had reversed Grievance Board decisions regarding this issue, Hoffman and its progeny were expressly overruled in Townsend, supra, “to the extent that theyapplied retroactive statutory changes (regarding seniority accrued through teaching as a substitute for 133 days or more in one school year) enacted in the third executive session of the 1990 Legislature, which became effective August 31, 1990, and which do not contain clear language evidencing the Legislature's intent that they be retroactively applied.” The ultimate result of this ruling was that “[s]ervice as a substitute teacher for 133 days or more in any single school year, which was credited toward one's seniority prior to August 31, 1990, may be retained.” Therefore, Grievants in the present matter are entitled to credit for seniority earned as substitute employees prior to August 31, 1990.

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

Conclusions of Law

1. In a nondisciplinary grievance, the grievants have the burden of proving each element of the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. Effective August 31, 1990, W. Va. Code §18A-4-7a, provides that the seniority of classroom teachers be determined by the length of time the employee has been employed as a regular, full-time certified and/or licensed professional educator by the county board of education. This provision did not include any clear language evidencing the Legislature's intent that the provision be retroactively applied. Townsend v. Mercer County Bd. of Educ., Docket No. 97-27-093 (Nov. 5, 1997). 3. Absent any clear language that W. Va. Code §18A-4-7a, is to be retroactively applied, individuals employed as substitutes prior to August 31, 1990, must be granted seniority earned under W. Va. Code §18A-4-8, i.e., for the length of time the employee had been professionally employed by the county board of education.

4. Grievants are entitled to seniority credit for the period of time, prior to August 31, 1990, that they were professionally employed as substitutes by the Lewis County Board of Education.

Accordingly, the grievance is **GRANTED**, and the Board is Ordered to recompute Grievants' seniority consistent with this decision.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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 thecivil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: March 20, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 This matter was transferred to the undersigned for administrative reasons on October 21, 1997.