RON MATNEY,

Grievant,

v.

DOCKET NO. 97-29-522

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

JOE HOWARD, JOEL T. CRUM and

WILLIAM K. HALL,

Intervenors.

D E C I S I O N

Grievant, Ron Matney, filed the following grievance on October 19, 1994:

> On September 23, 1993 Buddy Hall was re-employed after a 20 year absence from any employment with the Mingo County Board of Education. He was given a 1 year regular status or until the status of the former employee was determined; giving Mr. Hall a position in the Merrimac area. On October 7, 1994, the BOE made a decision that Mr. Hall was to be placed behind me on the Substitute Seniority List. This acknowledgment, by the BOE, that I am the Senior member and should have been placed on [sic] the position formerly given to Mr. Hall on 9-23-93. Therefore, I am to be compensated for the entire time that Mr. Hall was working the position for which I should have been hired on 9-23-93. Instead I was left with no regular driving position in the 1993-94 school term.
>
> Further, my “preferred recall” status must have the date adjusted from 2-21- 94 to 9-23-93.

SUMMARY OF EVIDENCE

Level Two Grievant's Exhibits

Ex. 1. -

September 27, 1993 service personnel vacancies posting.

Ex. 2 -

Experience record of Ron Matney.

Ex. 3 -

Experience record of William K. Hall.

Level Two Testimony

Grievant testified in his own behalf. The Board presented the testimony of William Kirk. Intervenors Howard and Crum testified in their own behalf.

BACKGROUND

This case has a convoluted procedural history and some background facts are necessary to aid the reader in understanding this grievance. On September 27, 1993, Mingo County Board of Education ("Board") posted service personnel vacancies, including two bus operators for the Matewan High Area. G. Ex. 1. Grievant and Intervenors Joe Howard, Joel Crum, and William K. Hall applied for the two bus operator positions. The positions were awarded to Joe Howard and William K. Hall based upon seniority.

At the time of the selection, Mr. Hall represented to the Board that he had regular seniority from previous employment with the Board back in 1973, which he believed should be bridged with his current seniority. The Board agreed to bridge Mr. Hall's seniority, resulting in the following seniority roster: Hall, Howard, Matney, and Crum. The Board also adjusted Mr. Hall's substitute starting date to reflect that time, which placed him ahead of the other applicants on the substitute seniority list. The Board indicated, however, that it would search its employment records to verify that Mr. Hall had regular seniority with the Board from his previous employment in 1973. Following the appointment of Mr. Hall to one of the bus operator positions, Grievant and Mr. Howard approached Transportation

Supervisor Bill Kirk, Assistant Superintendent John Fullen, and Pierce Whitt, the President of the Mingo County School Service Personnel Association, to complain about Mr. Hall's selection. Tr., p. 8. (See footnote 1) They were informed that the Board was looking into Mr. Hall's representation about having earlier regular seniority, and about the legality of bridging his previous seniority with current seniority. Tr., p. 8. Mr. Whitt told Grievant he did not have a grievance, and based upon this information, Grievant did not file a grievance at that time.

Subsequently, approximately one year later, the Board concluded there was no documentary proof that Mr. Hall had previous regular seniority with the Board and it was an error to have bridged his time to give him more regular seniority than the other applicants. Tr., pp. 2, 7, 11. The Board then readjusted Mr. Hall's substitute seniority date, and discounted his time worked back in 1973, resulting in the following seniority roster: Howard, Matney, Crum, and Hall.

Grievant filed this grievance on October 19, 1994, contesting that he should have been placed in the bus operator position which Mr. Hall had been erroneously awarded in 1993.

At about the same time in 1994, the Board posted four bus operator positions. Mr. Hall, Mr. Howard, Mr. Crum, and Grievant, as well as others, applied for the positions. The positions were awarded to Patsy Dingess, Randolph Livingood, Joe Howard, and Joel Crum. Grievant grieved the placement of Mr. Crum into one of the positions, and basedupon his greater seniority, was instated into that position on December 2, 1994, at level two. Grievant received a back pay award from October 10 to December 5, 1994. Mr. Hall also grieved his non-selection for one of the four bus operator positions. Mr. Hall alleged he should have been able to bridge his time from 1973 as regular seniority, and that his substitute starting date should also be adjusted to reflect that time. Mr. Hall's grievance advanced to level four, where the Administrative Law Judge denied the grievance, holding that it would be error to adjust Mr. Hall's substitute seniority date, and, as he had not proven he had regular seniority in 1973, it would also be improper to credit him with regular seniority for that time. See Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995), aff'd Circuit Court of Mingo County, Civil Action 95-CAP-34 (June 18, 1997) ("Hall I"). However, the Administrative Law Judge ordered the Board to go back and properly calculate Mr. Hall's and Mr. Crum's regular seniority to determine who had greater seniority.

The Board complied with the direction in Hall I, and concluded that Mr. Crum had greater regular seniority than Mr. Hall. The Board decided not to credit Mr. Hall with any regular seniority for the

1993-94 year, when he was placed in three long-term substitute assignments (including the one which is the subject of this grievance) based on the erroneous bridging of his 1973 time. Mr. Hall grieved that decision, and it was held in Hall v. Mingo County Bd. of Educ., Docket No. 97-29-364 (Jan. 29, 1998)("Hall II"), that it was not arbitrary and capricious for the Board to "take away" Mr. Hall's regular seniority for the time he was erroneously placed in the three positions in the 1993-94 school year. However, the Administrative Law Judge allowed Mr. Hall to retain enough regular senioritytto place him directly behind Mr. Crum on the seniority list, finding the error in the 1993-94 school year occurred through no fault of his own. See Hall II, supra.

Because Mr. Hall had filed his Hall I grievance shortly before Grievant filed his grievance over the 1993-94 selection, the Board asked Grievant to hold his grievance in abeyance pending the decision in the Hall I case, since they both dealt with the seniority of all the interested parties. Tr., p. 10. As stated above, Hall I was decided by the Grievance Board on September 25, 1995, and affirmed in Hall v. Mingo County Bd. of Educ., Civil Action No. 95-CAP-34 (June 18, 1997).

Following the Circuit Court's decision, Grievant requested a hearing be set in his grievance, and a level two hearing was held on November 14, 1997. Mr. Crum, Mr. Howard and Mr. Hall intervened pursuant to W. Va. Code § 18-29-3(u). A level two decision was rendered by the Superintendent's designee, John Fullen, on November 24, 1997, and Grievant appealed the decision to level four on November 25, 1997. Hearing was set for January 29, 1998, at which time the parties agreed to rest on the evidence developed at the lower levels, and the case became mature for decision on February 17, 1998, the deadline for the submission of proposed findings of fact and conclusions of law.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. The Board posted two bus operator vacancies for the Matewan High Area on September 27, 1993. Grievant and Intervenors applied for the two positions. The two positions were awarded to Intervenor Hall and Intervenor Howard.

2. Grievant had more seniority than Intervenor Hall and Intervenor Crum in September 1993 when the two bus operator positions in question were posted. 3. Grievant and Mr. Howard were told by Pierce Whitt, President of the Mingo County School Service Personnel Association, that they

did not have a meritorious grievance over this selection.

4. Grievant and Mr. Howard were told by Assistant Superintendent John Fullen and Transportation Director William Kirk, that they were investigating Mr. Hall's claims that he had regular seniority in 1973.

5. Grievant did not file his grievance in 1993, immediately after the selection of Mr. Hall for the subject bus operator position.

6. Intervenor Hall drove the Matewan High Area bus route beginning on October 8, 1993. The ending date of this assignment is unknown.

7. Four bus operator positions were posted by the Board for the 1994-95 school year, and all of the parties applied. Mr. Crum was awarded one position, and Grievant filed a grievance over that position.

8. Grievant was instated into Mr. Crum's bus operator position at level two and awarded back pay from October 10, 1994 through December 5, 1994.

9. Mr. Hall also filed a grievance over his non-selection for the bus operator positions.

10. The Board asked Grievant to hold his grievance over the 1993 selection in abeyance pending the resolution of Mr. Hall's grievance.

11. Mr. Hall's grievance was denied in Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995), aff'd Circuit Court of Mingo County, Civil Action 95-CAP- 34 (June 18, 1997). 12. That decision held that Mr. Hall could not bridge the time he worked for the Board in 1973, and thus he did not have more seniority than Mr. Howard, Mr. Crum, or Grievant.

13. Following the Circuit Court's affirmance, Grievant proceeded with his grievance, and a level two hearing was held on November 14, 1997. Mr. Hall, Mr. Howard, and Mr. Crum intervened at level two, and a decision denying the grievance was issued on November 24, 1997.

PRELIMINARY ISSUE

Intervenor Hall moved to dismiss this grievance on the basis of timeliness at level two and again at level four. The basis for this allegation is that the non-selection for the subject bus operator position occurred in September 1993, but Grievant did not file his grievance until October 19, 1994, a year later. The Board did not raise a timeliness defense.

Timeliness is an affirmative defense, and the burden is on the party raising the affirmative defense to prove it by a preponderance of the evidence. Heater v. Barbour County Bd. of Educ., Docket No. 96-01-497 (Sept. 30, 1997); 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). Intervenors can also assert affirmative defenses, which would include a timeliness defense. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 646 (1997).

W. Va. Code § 18-2-94 (a)(1) provides, in pertinent part:

> 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 daysof 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.

It is clear the event which gave rise to this grievance occurred in September 1993, with the selection of Mr. Hall for the subject bus operator position, and Grievant did not file his grievance until October 19, 1994, a year later. However, it is also clear that Grievant relied upon the representations by the Board that it would correct the error if it determined Mr. Hall did not have regular seniority from 1973. Further, Grievant complied with the Board's instructions to hold his grievance in abeyance once he filed it in October 1994, pending the resolution of Mr. Hall's grievance.

While it sometimes is easier to apply a hard and fast rule regarding timeliness defenses, this is not one of those cases. Notwithstanding the representations made to Grievant by the Board and his representative, Mr. Hall had to be aware that Grievant had his own grievance pending while Mr. Hall's grievance was being decided. Grievant, Mr. Howard, and Mr. Crum intervened in Mr. Hall's grievance precisely so they could get a determination of the seniority issue which was plaguing Grievant at that time. It is simply not fair for Mr. Hall to allow Grievant to intervene in his grievance, knowing that the Board placed his grievance in abeyance pending Mr. Hall's resolution, and then come forth three or four years later and assert a timeliness defense against Grievant.

Further, Mr. Hall has no interests which need to be protected in this grievance. He has no interest in Grievant's back pay award, and to the extent Grievant is also requesting that the seniority Mr. Hall received while erroneously serving in the subject bus operator position be taken away, the Board has already done that, and that decision has beenupheld. See Hall I and II, supra. Mr. Hall appealed Hall

I to the Circuit Court of Mingo County, which affirmed the decision. He did not appeal to the West Virginia Supreme Court of Appeals. But now, through his role as Intervenor, Mr. Hall is seeking to accomplish what he could not accomplish in his own grievance: to maintain his regular seniority for the 1993- 94 school year.

I decline to revisit the issue of Mr. Hall's seniority status in this grievance, as that issue has already been litigated, and, as Mr. Hall has no interest in Grievant's back pay award, he does not have any intervention rights to protect in this grievance.

DISCUSSION

Grievant filed this grievance seeking regular seniority and back pay for a bus operator's vacancy which had previously been awarded to William K. Hall in the 1993-94 school year. Grievant also seeks back pay for the entire 1993-94 school year, and asks that Mr. Hall's regular seniority be “taken away” for the time worked during the 1993-94 school year. This grievance was filed before Hall II. Thus, at the time of the filing, Mr. Hall's regular seniority for the 1993-94 school year had not been taken away. However, as noted above, the Administrative Law Judge in Hall II affirmed the Board's later decision to take away Mr. Hall's regular seniority for that year, but allowed him to keep as much regular seniority earned during the 1993-94 school year as would place him directly behind Mr. Crum on the seniority list. As a result of Hall II, it appears Grievant's request for Mr. Hall's seniority to be taken away has already been granted, and I will not disturb the holding in Hall II insofar as it allowed Mr. Hall to retain some of his regular seniority, as it will not affect Grievant, who is ahead of Mr. Hall on the seniority list as a result of the adjustment in Mr. Hall's seniority. Thus, the only remaining issue to be decided is the amount of regular seniority Grievant should be credited for the 1993-94 school year, as well as his back pay award. It is clear that, had Mr. Hall not been placed in the subject bus operator position in 1993, Grievant would have received the position as he was the next most senior to Mr. Howard, who received the other bus operator position. Thus, there is no dispute that Grievant should be compensated from October 8, 1993, through the end of that assignment, and awarded back pay for that time period. (The ending date of that assignment is not in the record).

Grievant also asserts he should be given back pay for the entire 1993-94 school year. If the bus operator position awarded to Mr. Hall in October 1993 lasted the entire school year, then Grievant would be entitled to back pay for that entire time period. However, the record is unclear as to the

ending date of that assignment, and Grievant presented no evidence in this grievance of any other assignments he would have been entitled to during the 1993-94 school year.

CONCLUSIONS OF LAW

1. The burden of proof is upon Grievant to prove his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. Service personnel positions are to be filled on the basis of seniority, qualifications and evaluations of past service. W. Va. Code § 18A-4-8b.

3. When filling service personnel positions, the amount of regular seniority the applicants' possess must be utilized to award the position, if such seniority is present. Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993). 4. Grievant proved the September 27, 1993 bus operator position filled by Mr. Hall was improperly filled as he did not possess greater seniority than Grievant.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to credit Grievant with regular seniority for the long-term substitute assignment awarded to Mr. Hall beginning on October 8, 1993 until its end, which date the Board must ascertain through its personnel records. The Board is also **ORDERED** to compensate Grievant in the amount of back pay and benefits he would have received for that position.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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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MARY JO SWARTZ

Administrative Law Judge

Dated: April 13, 1998

Footnote: 1

The level two transcript will be referred to as "Tr., p. ___."