HARRIET GIBSON,

Grievant,

v. **DOCKET NO. 97-55-331**

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Harriet Gibson ("Grievant"), employed as a bus operator, initiated this proceeding pursuant to the provisions of W. Va. Code §§18-29-1, et seq., challenging the seniority date that has been assigned to another employee, Sue Poindexter, for approximately ten years. As relief, Grievant requests that Ms. Poindexter be stripped of the seniority credit she received while improperly employed in a particular position, or, in the alternative, that Grievant's own seniority date be adjusted to be the same as Ms. Poindexter's. (See footnote 1)

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed as a regular bus operator by the Wyoming County Board of Education ("Board") since August 27, 1987. Prior to that time, she was employed by the Board as a substitute bus operator.

2. Grievant and another substitute bus operator, Kathy Bradford, filed a prior grievance,which was the subject of a level four decision entitled Gibson v. Wyoming County Bd. of Educ., Docket No. 55-87-060-4 (June 10, 1987), ("Gibson I"). In that decision, it was determined that the Board had improperly selected Sue Poindexter to fill a regular bus operator position, the "Skin Fork" run. Ms. Poindexter had less seniority as a substitute bus operator than either of the two grievants (and potentially other substitutes), so the Grievance Board ordered that the position be reposted and filled.

3. In Gibson I, the administrative law judge held that neither grievant had demonstrated she was the most senior candidate and entitled to the position in question. He also determined that Ms. Bradford had more seniority than Ms. Gibson, although the facts supporting this determination were not discussed in the decision.

4. None of the parties, including Grievant, appealed the decision in Gibson I.

5. Ms. Poindexter served in the position for which she was improperly selected from January 5, 1987, until June 10, 1987.

6. The Board did not “strip” Ms. Poindexter of the regular seniority she earned while working in the Skin Fork position. To date, Ms. Poindexter's regular seniority date is January 5, 1987, and she is higher on the seniority roster than Grievant.

7. When the Skin Fork run was reposted in accordance with the Gibson I decision, Grievant did not apply, because she had already applied for, and ultimately received, another regular bus operator position. She began working in that position on August 27, 1987.

8. Grievant knew that Ms. Poindexter's seniority date was still January 5, 1987, and that she was higher than Grievant on the seniority roster, as much as two years prior to the filing of this grievance.

Discussion

In a non-disciplinary matter, the grievant has the burden of proving each element of her claim by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). A preliminary matter which has been raised by the Board in this case is that Grievant's claim is untimely, which alone is cause for dismissal or denial. W. Va. Code § 18-29-4 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 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.

Both Grievant and Superintendent Blackwell testified that Grievant began questioning him regarding the results of Gibson I as it related to the seniority of the various parties as early as 1988.

However, according to Grievant, Mr. Blackwell stated on these occasions that he would “look into it,” and Mr Blackwell testified that he assured Grievant that the Board had properly complied with the decision. However, he did not state outright that he told Grievant in certain terms that Ms. Poindexter's seniority had been retained. Therefore, it is difficult to determine whether Grievant should have ascertained from these conversations that Ms. Poindexter retained the seniority she accumulated while wrongfully serving in the Skin Fork position.

Syllabus Point I of Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990) explained the “discovery rule” incorporated into W. Va. Code §18-29-4, stating “the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance.” While it is unclear what Grievant knew in 1988, Grievant testifiedunequivocally that she knew that Ms. Poindexter remained ahead of her on the seniority list for “at least two years” prior to the filing of this grievance. L II Tr. at 22. The record is clear that the only reason Ms. Poindexter was placed ahead of Grievant on the regular seniority list was because of her service in the Skin Fork position, later determined to be illegal. Therefore, Grievant clearly knew of the basis for this grievance at least two years prior to its filing. This alone is reason to deny the grievance. See Stratton v. Mingo County Bd. of Educ., Docket No. 97-29-387 (Oct. 21, 1997).

Although this grievance could be denied on timeliness alone, Grievant's claims on the merits also must fail. First, Grievant has asked, if the Board is not required to strip Ms. Poindexter's seniority while improperly serving in the Skin Fork position, that her own regular seniority date be changed to January 5, 1987. There is absolutely no basis for such action. Gibson I was not a case in which Grievant demonstrated her entitlement to the position. On the contrary, the administrative law judge specifically held that Grievant had not established she was entitled to the position, so it was reposted. Accordingly, there is absolutely no reason for Grievant to receive an earlier seniority date than August 27, 1987, the date upon which she first began performing her duties as a regular employee. See W. Va. Code §18A-4-8b and §18A-4-8g.

Moreover, Grievant cannot now challenge a final grievance decision which is res judicata (See footnote 2) upon these parties. Along with requesting an earlier seniority date, Grievant asserts that the ruling in Gibson I that Ms. Bradford had more seniority than Grievant was erroneous. “One cannot employ the grievance procedure to attack a final decision rendered in a prior grievance. Toney v. LincolnCounty Bd. of Educ., Docket No. 95-22-118 (June 30, 1995).” Manns v. Lincoln County Bd. of

Educ., Docket No. 97-22-257 (Oct. 20, 1997). Accordingly, Grievant cannot challenge the determinations in Gibson I that she did not prove entitlement to the Skin Fork position and that she had less seniority as a substitute than Ms. Bradford.

As to Grievant's request that Ms. Poindexter's seniority earned while wrongfully serving in the Skin Fork position be taken away from her, this Grievance Board's recent decision in Hall v. Mingo County Bd. of Educ., Docket No. 97-29-364 (Jan. 29, 1998), is applicable. In Hall, as in the instant case, Respondent noted that the Grievance Board previously held in Spaulding v. Mingo County Bd. of Educ., Docket No. 91-29-492 (Aug. 31, 1992), that employees placed in positions through board of education error must be given seniority credit for the time spent working in such positions. This holding was based upon the administrative law judge's interpretation of W. Va. Code §18A-4-8b ¶ 9, stating that “seniority of any service personnel shall be determined on the basis of the length of time the employee has been employed . . . within a particular job classification.” However, to the extent that Spaulding held that the statute requires that employees who have wrongfully been placed in positions must be allowed to retain the seniority earned while in such positions, it was overruled in Hall, supra. The administrative law judge in Hall reasoned that, because the statute “does not clearly require this result,” this Grievance Board will not determine that a board of education is required to either take away such seniority or allow the employee to retain it, if there is no showing that the board acted in an arbitrary and capricious manner.

In the instant case, Grievant has provided no evidence which would support a conclusion of arbitrary and capricious conduct on the Board's part in allowing Ms. Poindexter to retain seniority she earned while working in a position for which she was wrongfully selected, that selection havingbeen made by a simple misinterpretation of a statute. Moreover, in this case, it would seem terribly unfair to take Ms. Poindexter's seniority from her after Grievant, who disagreed with that determination by the Board, “sat on her rights” for ten years. This Grievance Board has recognized that “where one of two innocent parties must suffer because of the derelictions of a third party[,] it is the least culpable of the two innocent parties who should prevail.” Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987); See Lake v. Cabell County Bd. of Educ., Docket No. 96-06-256 (May 13, 1997). In this case, if there is a “less culpable” party, it is undoubtedly Ms. Poindexter.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate in this case.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of her claim by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. Pursuant to the provisions of W. Va. Code § 18-29-4, a grievant must file her claim within fifteen days of the event upon which the grievance is based, or within fifteen days of the discovery of the facts giving rise to the grievance. See Syl. Pt. I, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. Grievant filed her claim in an untimely manner, which is cause for dismissal of this grievance. See Stratton v. Mingo County Bd. of Educ., Docket No. 97-29-387 (Oct. 21, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the CircuitCourt of Wyoming 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.

DATE: February 9, 1998 _____ **V.**

DENISE MANNING

Administrative Law Judge

Footnote: 1

This matter was discussed with Grievant's immediate supervisor on February 27, 1997, and he was unable to grant relief. A level two hearing was conducted on June 10, 1997, followed by a decision denying the grievance dated June 30, 1997. Level three consideration was waived, and Grievant appealed to level four on July 16, 1997. In lieu of a level four hearing, the parties elected to submit this matter on the record developed below, accompanied by written proposals submitted by October 8, 1997. This matter was reassigned for administrative reasons on October 31, 1997.

Footnote: 2

"Res judicata" is defined by Black's Law Dictionary, (6th ed. 1991) as the "rule that a final judgment rendered by a

court of competent jurisdiction on the merits is conclusive as to the rights of the parties . . . and . . . constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."