ELIZABETH PRITT,

Grievant,

v.

DOCKET NO. 98-42-211

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent,

DECISION

On July 21, 1997, Grievant filed a grievance stating that "after intervening on the Lambert v. Heckler case, I was advised by Judge Weatherholt to file a separate grievance. This grievance is about seniority between myself and Karen Heckler." (See footnote 1) Grievant later amended her grievance and further alleged "that Respondent violated W. Va. Code § 18A- 4-8b in the filling of an aide position at Elkins High School for the 1998-99 school year with Karen Heckler instead of Grievant and seeks instatement to that position with back pay and all other benefits including interest on any sum owed to her." After the grievance was denied at the lower levels, this matter was appealed to Level IV. A Level IV hearing was held on October 5, 1998. At the Level IV hearing, the parties agreed to hold any subsequent decision in abeyance until a decision was first made by the Circuit Court of Randolph County on the appeal of Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 26, 1998). This case became mature for decision on February 1, 1999, upon the receipt in this office of the decision of the Randolph County Circuit Courtupholding the Level IV decision of Administrative Law Judge (ALJ) Jeffrey Weatherholt in Heckler. The following findings of fact were derived from the record and testimony.

FINDINGS OF FACT

1. Grievant is employed as a Supervisory Aide IV by Respondent.

2. For an applicant to become a substitute aide with Respondent, an applicant must pass the state competency test for the aide classification and receive a favorable evaluation from the interview team. Applicants who pass the competency test are not guaranteed employment.

3. On or about December 5, 1995, fourteen applicants, including Grievant, Rodney Lambert and Karen Heckler, took the competency test to be eligible to become school aides. These tests were graded by Dr. Shannon Bennett, Respondent's Personnel Director. Ten applicants, including Grievant, were notified they had passed the test.

4. Upon passing the competency test, Grievant was placed on the substitute aide list.

5. Later in December 1995, Karen Heckler was advised by Dr. Bennett that she had failed the aide competency test. Ms. Heckler asked to see the test results in order to confirm Dr. Bennett's statement to her. Dr. Bennett refused Ms. Heckler's request.

6. Although Ms. Heckler had several questions about whether or not she had actually failed the test, she did not take any action to contest the grading of her test at that time.

7. As a consequence of Ms. Heckler's failure to pass the competency test, she didnot go through the second stage of the application process (interview), and was not hired by Respondent as a substitute aide. Grievant was hired as a substitute aide, along with nine other applicants, including Rodney Lambert. These ten new substitute aides, including Grievant and Mr. Lambert, participated in a random selection to determine which of them would be entitled to the first opportunity to work as a substitute and establish his or her seniority date as a substitute aide.

8. In the summer of 1996, Ms. Heckler again took the aide competency test, and passed the test. Again, Dr. Bennett administered the competency tests.

9. Ms. Heckler was hired on August 26, 1996, as a substitute aide. Based upon her successful completion of the test in 1996, Ms. Heckler became concerned that her test may have been inappropriately scored in 1995. Ms. Heckler requested that an investigation be performed by then Superintendent Larry Prichard regarding her 1995 aide competency test score.

10. Grievant was awarded a permanent position of employment with Respondent as a regular aide on December 5, 1996.

11. Superintendent Prichard found that Karen Heckler's original competency test had been misgraded by Dr. Bennett. Ms. Heckler had, in fact, passed the test in 1995. Ms. Heckler was informed of this fact on or about February 1, 1997.

12. Karen Heckler filed a grievance on February 5, 1997, seeking instatement into a regular aide position at EMS. By decision dated February 24, 1997, Superintendent Prichard, acting pursuant to W. Va. Code § 18-29-4 as the Level II Grievance Evaluator, determined that a mistake had been made in grading Ms. Heckler's December 5, 1995 aidecompetency test, and that, contrary to Dr. Bennett's statements to Ms. Heckler, she had passed the aide competency test in December of 1995. Superintendent Prichard, as the Level II grievance evaluator, determined that Ms. Heckler should have been hired as a substitute aide in December of 1995 along with the other ten successful applicants and, therefore, granted her grievance.

13. Superintendent Prichard, as Grievance Evaluator at Level II, determined that the numbers one to eleven would be put in a container, that Ms. Heckler would draw a number, and that would be her seniority ranking. The numbers one through eleven were used because ten persons had originally been hired in late 1995.

14. After the Level II decision, Superintendent Prichard conducted another random drawing with Ms. Heckler's name added to determine placement on the substitute seniority list. Ms. Heckler drew the number one which subsequently placed her first on the list. The ten original aides were not advised of the procedure, nor were they present at the drawing.

15. Superintendent Prichard, as the Grievance Evaluator at Level II, placed Ms. Heckler above all the individuals hired in December 1995, including Grievant, because she drew the number one for the purposes of substitute seniority, and indicated she would have taken the first available regular employment position offered to her to begin her regular employment seniority.

16. Superintendent Prichard also determined that Ms. Heckler should be placed in the position of the individual first awarded a permanent position of employment who was below her on the substitute aide seniority list. Pursuant to that decision, Ms. Heckler was placed in the aide position then held by Rodney Lambert at Elkins Middle School. 17. By virtue of the Level II grievance decision, Ms. Heckler was retroactively awarded a regular seniority date of September 18, 1996. This seniority date placed Ms. Heckler above Grievant on the county's regular seniority list for aides.

18. Rodney Lambert, and Grievant, intervened in Karen Heckler's grievance at Level II and

subsequently appealed the decision to Level IV. On February 26, 1998, Administrative Law Judge Jeffrey Weatherholt of this Grievance Board reversed the Level II decision and granted Mr. Lambert's request to be reinstated into the position of aide at Elkins Middle School. The Level IV decision also reduced Ms. Heckler's seniority to the seniority she had prior to Superintendent Prichard's Level II decision, thereby placing Grievant higher on the seniority list than Ms. Heckler.

19. This Level IV decision was appealed by Respondent to the Circuit Court of Randolph County. Respondent also filed a Motion to Stay implementation of the Level IV decision until the appeal was heard. This Motion was granted.

20. Both Grievant and Ms. Heckler were RIF'd in the Spring of 1998. Grievant and Ms. Heckler both bid on an aide position at Elkins High School in July of 1998. Ms. Heckler was awarded this position due to having more seniority based on the earlier Level II decision of Superintendent Prichard. Grievant later received another aide position at Elkins High School with no loss of pay or seniority.

21. On January 11, 1999, an Order was issued by the Circuit Court of Randolph County denying Respondent's appeal and upholding the decision of ALJ Weatherholt.

DISCUSSION

Although this case contains many facts, and has a rather lengthy procedural history, it is only necessary for the undersigned to address whether there is any reason the decision of ALJ Weatherholt in Heckler, supra, and subsequently upheld by the Circuit Court, which puts Karen Heckler below Grievant on the aide seniority list, should not be followed or otherwise does not apply to the instant case.

ALJ Weatherholt's decision in Heckler was based solely on the issue of timeliness as it relates to W. Va. Code § 18-29-4(a)(1) which, 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.

ALJ Weatherholt determined that "the event," in Heckler, was the board of education's

communication to Ms. Heckler that she failed the aide competency test and not when she was informed the test had been originally misgraded. Ms. Heckler learned that she failed the test in December 1995. Therefore, the ALJ ruled that Ms. Heckler failed to timely file her grievance because it was not filed until February 5, 1997. Because "the event" occurred, and ended in December 1995, "the event" does not constitute 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).

ALJ Weatherholt also found that:

> 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). Moreover, "[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)(emphasis in original). Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997).

Heckler, supra.

Although ALJ Weatherholt's denial of Karen Heckler's grievance was due to its untimely filing and not the merits of the case, the result as it applies to this grievance is not changed. ALJ Weatherholt clearly ordered that Ms. Heckler's seniority rank on the aide list falls below that of the ten people, including Grievant, who passed the original competency test and were put on the substitute aide list in December of 1995.

It is clear that the legal doctrine of *stare decisis* should be applied in this case. The Supreme Court of Appeals of West Virginia has explained the doctrine of *stare decisis* as follows:

> A simple statement of this rule will be found in Black's Law Dictionary, 3d Ed., wherein it is stated that it means: “To stand by decided cases; to uphold precedents; to maintain former adjudications, * * *. The doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.” Its further purpose is “To adhere to precedents, and not to unsettle things which are established.”

In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113 (1947).

Further, the law in West Virginia does not favor rehearing or reconsideration by administrative bodies absent explicit statutory language allowing for such, or at a minimum, agency regulations providing for such. See Atlantic Greyhound Corp. v. Public Service Commission, 132 W. Va. 650, 659-661, 54 S.E.2d 169 (1949); Hubbard v. SWCC, 295 S.E.2d 659, 666 (W. Va. 1981); Alfred S. Neely, IV, Administrative Law in West Virginia 5.49, 5.50 (1982). This is especially true when no new evidence has been presented. See Mustard v. City of Bluefield, 130 W. Va. 763, 766-67, 45 S.E.2d 326 (1947).

The parties, facts and issues presented in this proceeding are essentially the same as in Heckler, supra. Since this Grievance Board very recently ruled upon the basic issues presented in this case, as well as some of the same evidence, in Heckler, the doctrine of *stare decisis* essentially precludes this ALJ from changing the ruling rendered so recently on essentially the same evidence and issues.

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 non-disciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. and State Employees Grievance Bd. 156 C.S.R. 1§4.19 (1996); Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). See W. Va. Code §18-29-6. 2. The law in West Virginia does not favor rehearing or reconsideration by administrative bodies absent explicit statutory language allowing for such, or at a minimum, agency regulations providing for such. See Atlantic Greyhound Corp. v. Public Service Commission, 132 W. Va. 650, 659-661, 54 S.E.2d 169 (1949); Hubbard v. SWCC, 295 S.E.2d 659, 666 (W. Va. 1981); Alfred S. Neely, IV, Administrative Law in West Virginia 5.49, 5.50 (1982). This is especially true when no new evidence has been presented. See Mustard v. City of Bluefield, 130 W. Va. 763, 766-67, 45 S.E.2d 326 (1947).

3. This Grievance Board has already decided this matter, and is precluded by the doctrine of stare decisis from changing its decision so recently rendered on the very same facts and issues. In re Proposal to Incorporate Town of Chesapeake, 130 W.Va. 527, 536, 45 S.E.2d 113 (1947).

Accordingly, this Grievance is GRANTED. Respondent is ORDERED to place Grievant in the aide position at Elkins High School, which was awarded to Karen Heckler at the start of the 1998-99 school year, for the 1999-2000 school year, and in a higher position on the aide seniority roster than Karen Heckler, i.e., in the same seniority position Grievant occupied prior to the February 24, 1997 Level II decision of Superintendent Prichard.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Randolph 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 ofthe intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED: MARCH 30, 1999

R. K. MILLER

ADMINISTRATIVE LAW JUDGE

Footnote: 1 *See Heckler v. Randolph County Bd. of Educ., Docket No. 97-42-140 (Feb. 26, 1998).*