CORA BRUNTY,

Grievant,

v. **DOCKET NO. 99-22-069**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Grievant Cora Brunty against the Respondent Lincoln County Board of Education ("LBOE"), alleging a violation of W. Va. Code §§ 18A-4-8a and 18A-4-15 occurred when she was removed from a long-term substitute cook position. As relief she sought return of her seniority and backpay. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant was employed by LBOE as a substitute cook from 1985 through September 22, 1993, when she voluntarily resigned her employment. She again applied for employment with LBOE on August 31, 1994, and has been employed by LBOE as a substitute cook since that time.

2. Grievant was selected to fill a posted long-term substitute, half-time cook position at Guyan Valley High School, starting May 6, 1998, and she worked in that position through the end of the 1997-98 school year. She earned regular seniority in the cook classification for her service in this position. Lisa Adkins, another substitute cook, did not apply for this position.

3. The reason Grievant was selected for this long-term substitute position was the substitute seniority list showed her employment date as December 8, 1987, rather than the date she had been re-employed in 1994. The substitute seniority list shows the employment date of the other applicant for that position, Donna Perry, as December 30, 1993.

4. On October 6, 1998, another long-term substitute, half-time cook position at Guyan Valley

High School was posted. Grievant applied, and was selected. She served in this position from about October 8, 1998, through November 4, 1998. Ms. Adkins had applied for this position.

5. Ms. Adkins has been employed by LBOE as a substitute cook since September 14, 1989. At the time the position at issue was posted, she had no regular seniority. 6. On November 4, 1998, Grievant was removed from the position and replaced by Ms. Adkins, after Ms. Adkins questioned Grievant's substitute seniority. LBOE corrected the substitute seniority list to reflect that Grievant was hired in August 1994, and had lost her previously earned seniority as a result of a voluntary break in service.

7. Ms. Adkins has more substitute seniority than Grievant.

Discussion

Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95- 29-476 (Mar. 28, 1996). Grievant presented two issues for resolution. First, what is her substitute seniority date; and second, should she have been removed from the long-term substitute position in the Fall of 1998?

The first issue is easily resolved. Generally, an employee "cannot recapture seniority based upon their years of experience before a voluntary break in service." Dempsey v. Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996). This principle was established in Chapman v. Webster County Board of Education, Docket No. 92-52-349 (February 25, 1993). Chapman was not retroactive, however. "[E]mployees who had been credited with experience prior to a voluntary break in service before the date of the Chapman decision would be allowed to keep it. Those employees who voluntarily left a board's employment after the date of Chapman, February 25, 1993, could not do so." Dempsey, supra. Grievant voluntarily left heremployment after February 25, 1993, and could not be credited with her years of service prior to her resignation.

Grievant argued, however, that Ms. Adkins had sat upon her rights, waiting four years to "grieve" the seniority issue. The record does not reflect that Ms. Adkins filed a grievance, although she did complain to LBOE about Grievant's seniority. It is not what Ms. Adkins did which is at issue here. It is the action taken by LBOE of correcting the substitute seniority list to properly exclude Grievant's years of service before her resignation. LBOE erroneously listed Grievant's substitute seniority date to include her years of employment prior to the voluntary break in service. Grievant cited no statute,

law, rule, regulation, or equitable theory which prevented LBOE from correcting the error. It was appropriate to correct Grievant's substitute seniority date.

While Grievant did not specifically argue she should be allowed to retain her substitute seniority because it had been promised to her, she did testify that a former superintendent had discussed her substitute seniority with her when other employees had complained that she should not receive substitute seniority credit for the period of time between her resignation and rehiring when she was not an employee of LBOE. She testified he told her he would have to remove that period of time from her substitute seniority because she had not been employed and employees were complaining, and she was agreeable to that. The superintendent never specifically addressed with Grievant whether she was entitled to the previously earned substitute seniority, although it remained on the substitute seniority list. There was no evidence that Grievant relied upon any promise that her prior substitute seniority would beretained in any employment decisions she made. Even if such a promise had been made, the superintendent had no authority to make such an unlawful promise, and LBOE cannot be bound by such a promise. Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415 (1985); W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 174 W. Va. 605, 328 S.E.2d 356 (1985); Chapman v. Dep't of Transp., Docket No. 97-DOH-261 (Nov. 24, 1997); Ollar v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-186 (Jan. 22, 1993).

As to the second issue, Grievant argued, regardless of the outcome on the first issue, she should have been in the position at issue in the Fall of 1998, due to the fact she had earned regular seniority, while Ms. Adkins had not. Respondent argued it appropriately looked only at who had the most substitute seniority, ignoring that Grievant had more regular seniority. Respondent argued no statute required that it look at regular seniority among substitutes in this situation, and if it looked to regular seniority over substitute seniority, a substitute with less substitute seniority who happened to occupy a temporary assignment for a period of time, could obtain a hiring preference over all substitutes with no regular seniority. LBOE believed this to be unfair. (See footnote 2) Charles McCann, LBOE's Director of Personnel, testified that LBOE's policy was to consider regular seniority earned by a substitute while in a long-term temporary position as a preference over other substitutes only while the substitute employee was occupying the long-term temporary position, and once the employee left that position, LBOE would look to the employee's substitute seniority only. He testified this is not a written policy, but is an unwritten operating policy of the superintendent, based upon his

interpretation of the statute, and is not a policy approved by the employees. Thus, the sole reason Grievant was removed from the position in the Fall of 1998 was that Ms. Adkins had more substitute seniority than Grievant when Grievant's substitute starting date was corrected.

With regard to filling long-term temporary positions, W. Va. Code § 18A-4-15 provides, in pertinent part:

> The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties: . . . (2) To fill the position of a regular service employee on leave of absence: Provided, That if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shallbe returned to such position and the substitute shall have and shall be accorded all rights, privileges, and benefits pertaining to such position.

It further provides regarding substitutes:

> Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

Code § 18A-4-8b provides that the selection of an employee to fill a posted position, whether permanent or long-term temporary, is to be made based upon seniority, qualifications and evaluation of past service. It further states:

> Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

. . .

For purposes of determining seniority under this section an employee's seniority begins on the date that he or she enters into his assigned duties.

. . .

The seniority of any service personnel shall be determined on the basis of the length of time the employee has been employed by the county board of education within a particular job classification. . . .

W. Va. Code § 18A-4-8g also addresses seniority for school service personnel, providing, in pertinent part:

Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five, article two of this chapter and continues until the employee's employment as a regular employee is severed with the county board. Seniority shall not cease to accumulate when an employee is absent without pay as authorized by the county board or the absence is due to illness or other reasons over which the employee has no control as authorized by the county board. Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen of this article, after executing with the board a contract of employment as provided in section five, article two of this chapter. The seniority of a substitute employee, once established, shall continue until such employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter or employment as a substitute with the county board is severed. Seniority of a regular or substitute employee shall continue to accumulate except during the time when an employee is willfully absent from employment duties because of a concerted work stoppage or strike or is suspended without pay.

For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e of this article:

. . .

> A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen of this article: Provided, That a substitute employee who accumulates regular seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.
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> . . .
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> Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose.

None of these statutory provisions clearly states whether regular seniority or substitute seniority is to govern when two substitutes are competing for a long-term temporary position under these circumstances. This Grievance Board has determined, however, that in such circumstances, "the actual amount of regular seniority time the applicants possess must be utilized to award the position, if such seniority is present." Dempsey v. Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996). (See footnote 3) It is apparent from reading the above cited statutory provisions together that regular seniority is to take precedence over substitute seniority, with one clear exception: when filling a position until it is posted. W. Va. Code § 18A-4-15 is clear in stating that in this instance, it is substitute seniority which governs. No other exception is stated. Grievant should have been placed in the position at issue in the Fall of 1998,rather than Ms. Adkins, based upon her regular seniority, and should have been left in that position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. An employee "cannot recapture seniority based upon their years of experience before a voluntary break in service." Dempsey v. Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996).

3. Grievant cannot be credited with her years of service prior to her voluntary resignation.

4. "[W]hen filling service personnel positions, the actual amount of regular seniority time the applicants possess must be utilized to award the position, if such seniority is present." Dempsey v.

Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996).

5. As the applicant with the most regular seniority, Grievant should not have been removed from the position at issue in favor of Lisa Adkins, as Grievant was entitled to placement in the position.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent is **ORDERED** to adjust Grievant's regular seniority to include the period of time from November 4, 1998, through the date the regular employee returned to the position at issue, and to pay Grievant backpay for that time period as though she had been employed in the position at issue, less the amount she earned serving in any other position as an LBOE employee. No interest is awarded as Grievant did not ask for any. Grievant's request to have her substitute seniority earned prior to her voluntary break in service returned to her is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law JudgeDated: July 13, 1999

Footnote: 1

This grievance was filed on or about January 25, 1999. It was denied at Level I on that date. Grievant appealed to Level II on January 28, 1999. A hearing was held at Level II on February 15, 1999, and the grievance was denied on February 16, 1999. Level III was waived by Grievant, and she appealed the Level II Decision to Level IV on February 19, 1999. A Level IV hearing was held on May 3, 1999. Grievant was represented by Anita Mitter, and Respondent was represented by James W. Gabehart, Esquire. This grievance became mature for decision on June 4, 1999, upon receipt of the last of the parties' post-hearing written arguments.

Footnote: 2

Respondent did not argue Grievant improperly acquired her regular seniority, and therefore, it should not be considered;

nor did Respondent remove Grievant's regular seniority. This Grievance Board has previously determined that a board of education is not required by statute to remove the employee's regular seniority earned as a result of a mistake in the seniority list, when the position the employee had filled was posted and filled according to the statutory requirements; nor does the Code require that the employee be allowed to retain his regular seniority acquired as a result of an error. "Acounty board of education decision on whether to credit an employee with regular seniority for the time he worked in a temporary vacancy should be upheld unless found to be arbitrary and capricious." Hall v. Mingo County Bd. of Educ., Docket No. 97-29- 364 (Jan. 29, 1998).

Footnote: 3

In Dempsey, and the other cases which have addressed this issue, the board of education had placed the substitutes on preferred recall when they had been removed from their long-term temporary assignments, and they held preferred recall status at the time of the selection. It does not appear that this fact was of any significance to the outcome in Dempsey, or in another of the decisions on the issue, Hall v. Mingo County Board of Education, Docket No. 94-29-1110 (September 29, 1995); although it may have been a factor in Davis v. Mingo County Board of Education, Docket No. 94-29-1082 (June 29, 1995).