SANDRA STOWERS,

Grievant,

v. **Docket No. 99-22-093**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On January 4, 1999, Sandra Stowers (Grievant), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Lincoln County Board of Education (LCBE) was violating W. Va. Code § 18A-2-5 by reducing her current pay to compensate for a salary overpayment which had taken place due to an error in her previous written contract of employment. The grievance could not be resolved at Level I, and the matter was submitted to Level II where an evidentiary hearing was conducted on February 19, 1999. On February 22, 1999, the Superintendent's designee, Charles McCann, issued a decision denying the grievance at Level II. As permitted by W. Va. Code § 18-29-4(c), Grievant waived consideration of her grievance at Level III, appealing directly to Level IV on February 26, 1999. Following a continuance for good cause shown, a Level IV hearing was conducted in this Grievance Board's office in Charleston, WestVirginia, on May 17, 1999. (See footnote 1) At the conclusion of that hearing, the parties agreed that the record could be left open for further supplementation. Accordingly, on September 23, 1999, the undersigned admitted an additional affidavit submitted as evidence by Grievant and set a briefing schedule. This matter became mature for decision on October 4, 1999, following receipt of the parties' written post-hearing arguments.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Lincoln County Board of Education (LCBE) as a Secretary II.

2. During the 1996-97 school year, Grievant was employed by LCBE as a full- time Secretary II.

3. Prior to the beginning of the 1997-98 school year, Grievant applied for and was hired by LCBE as a half-time Secretary II at Ferrellsburg Elementary School.

4. The posting for the position described in Finding of Fact Number 3 provided that a Secretary II would be paid in accordance with Salary Schedule # 12. In accordance with Salary Schedule # 12, Grievant should have received an annual salary of $6,885, based upon her two years of experience at that time. Bd Ex 2 at L II. 5. On August 4, 1997, Grievant was issued a “Probationary Contract of Employment for Service Personnel” prepared by LCBE personnel, which erroneously stated that her annual salary would be $9,225. G Ex 2 at L II. The contract was duly executed by LCBE's Superintendent, Rick Powell, and LCBE Board President Fred Curry.

6. According to Salary Schedule # 12, Grievant would only be entitled to the salary level stated in her 1997-98 contract if she had 20 years of experience. Bd Ex 2 at L II. The contract does not indicate the number of years of experience with which Grievant is being credited.

7. When Grievant received her contract for the 1997-98 school year, she was expecting to receive approximately one-half the salary of her previous full time position. Grievant noted that the amount specified in the contract was greater than she had expected, but made no inquiry to LCBE officials to verify that the stated amount was correct.

8. LCBE did not discover the mistake in Grievant's contract during the 1997-98 school year, and paid her in accordance with that contract, resulting in an overpayment of $2,340.

9. Prior to the beginning of the 1998-99 school year, Grievant applied for and received a new position as a half-time Secretary II at Guyan Valley High School. When Grievant received her first paycheck from LCBE at the beginning of the 1998-99 school year, she noted that her pay had decreased significantly from the previous year. Grievant made inquiry to LCBE personnel and payroll employees and was advised that her currentsalary was correct. LCBE personnel further advised Grievant that her salary for the previous school year had been incorrect.

10. On October 19, 1998, LCBE's Personnel Director, Charles S. McCann, wrote to Grievant

informing her that she had been overpaid "$2,470.00," and the entire amount would be recovered from her pay during the remainder of the school year, resulting in 16 deductions in the amount of $138.80 each. (See footnote 2) G Ex 3 at L II.

11. Grievant filed this grievance challenging this action, and LCBE has refrained from deducting the overpayment from Grievant's paycheck, pending resolution of this dispute through the grievance process.

12. Teresa Ann Pauley was erroneously paid for a full-time position during the 1982-83 school year when she was actually working 3.5 hours daily in a half-time position. This error was discovered at the beginning of the 1983-84 school year when Ms. Pauley inquired about the reduced amount in her first pay check. She was informed by a board employee in the central office that she did not have to pay the money back for the previous school year as the Board of Education was at fault. G Ex B at L IV.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 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.

The parties generally agree that Grievant was issued a contract setting her pay at the wrong level by mistake (See footnote 3), and Grievant was paid more than LCBE would have been legally obligated to pay her, had the contract been completed correctly. This Grievance Board has previously held that a county board of education is not bound by an employee's mistake. Samples v. Raleigh County Bd. of Educ., Docket No. 98-41-391 (Jan. 13, 1999); Carr v. Monroe County Bd. of Educ., Docket No. 98-31-342 (Dec. 15, 1998); Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989), aff'd, Kanawha County Cir. Ct., No. 89-AA-172 (Oct. 4, 1991). However, Grievant's dispute with LCBE involves more than a county board's refusal to honor a mistaken promise, offer or unwritten agreement, the kinds of mistakes addressed in Samples, Carr, Berry, and Chilton, supra. Rather, LCBE has indicated that it intends to recover the money it paid Grievant under the terms of the contract it mistakenly issued by systematically deducting money from her current pay until the full

amount of the overpayment is recovered.

Grievant argues that she should be allowed to retain the overpayment in accordance with general principles of contract law which apply to a mutual mistake. Although it is clear that the error in Grievant's contract resulted from a mistake or oversight by one or more of LCBE's employees, Grievant acknowledged that the contract called for more pay than she was expecting, based upon her previous year's salary as a full-time Secretary II. In these circumstances, it would be inequitable to allow Grievant to rely upon LCBE's mistake when she failed to make any reasonable inquiry to verify the amount of her salary beyond looking at the face of her contract. On an annual basis, Grievant was receiving more than $4,500 above the salary she received as a full-time Secretary II for the 1997-98 school year. After two years of employment with LCBE, Grievant either knew, or should have known, that a salary increase of such magnitude would not be forthcoming, absent a promotion to a higher classification, or a clerical error in the preparation of her contract.

Grievant cites one prior Grievance Board decision involving an overpayment, Huff v. Marshall County Board of Education, Docket No. 93-25-490 (May 25, 1994). In that grievance, the Administrative Law Judge specifically declined to address the issue of repayment because the county board had not yet taken any action to recoup the overpayment. However, the Administrative Law Judge did observe that the employer could pursue recovery through the courts in accordance with W. Va. Code §§ 11-8-26 and 11-8- 28. Huff, supra. Although LCBE argues that this Grievance Board's decision in Huff establishes a school board's right to recoup overpayments, that decision only sanctions court proceedings, not the unilateral recovery mechanism which LCBE proposed to apply in this matter. Indeed, the undersigned is unable to find any definitive conclusion in Huff which supports the position of either party in this grievance. LCBE argues that recoupment of school employee salary overpayments is sanctioned by this Grievance Board's more recent decision in Smith v. Mingo County Board of Education, Docket No. 97-29-198 (Aug. 21, 1997). In Smith, the employee was paid for working a nine-hour split-shift for the 1996-97 school year when, in fact, she only worked a regular eight-hour shift. The employee claimed she was being improperly paid, but the Administrative Law Judge determined that her employer was simply recovering the prior year's overpayment in equal installments from the pay she was otherwise entitled to receive for her current year's work. Although the undersigned Administrative Law Judge is concerned that LCBE has not cited any specific authority for its proposed recoupment action, this Grievance Board attempts to follow the

doctrine of stare decisis. (See footnote 4) Therefore, consistent with the previous holding in Smith, Grievant has not demonstrated any entitlement to relief where the evidence indicates that the overpayments she received resulted from an error by one or more LCBE employees entrusted with preparing employment contracts for LCBE employees.

Grievant presented evidence that another service employee, Teresa Pauley, was overpaid by LCBE during the 1982-83 school year, but was not required to pay back the money. Whether or not LCBE is entitled to recover an overpayment from Grievant is substantially a question of law. The single isolated case over 15 years past involving Ms Pauley is not persuasive evidence that the current attempt to recoup money erroneouslypaid to an employee is improper, or is in conflict with LCBE's established practice in such matters.

Although Grievant did not specifically argue that this difference in treatment between Grievant and Ms. Pauley constitutes discrimination prohibited by W. Va. Code § 18-29-2(m), that issue should also be addressed. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case (See footnote 5) of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,
>
> (c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele, supra, at 15. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept.

of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. Dillon v. Cabell County Bd. of Educ., Docket No. 97-06-570 (May 29, 1998). See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Had Ms. Pauley been overpaid during the same school year as Grievant, a prima facie case of discrimination prohibited by W. Va. Code § 18-29-2(m) would be established. However, the incident regarding Ms. Pauley is too isolated and removed in time from the current situation regarding Grievant to establish a prima facie case of discrimination. Moreover, there is insufficient evidence to establish that LCBE has established a practice of forgiving employees who erroneously receive overpayments of their wages.

In her post-hearing brief, Grievant argued, for the first time, that LCBE would be in violation of the West Virginia Wage Payment and Collection Act, W. Va. Code § 21-5-3, if it proceeds with the proposed deductions from Grievant's pay. Because Grievant did not raise this issue prior to or during the Level IV hearing, LCBE has not had an opportunity to respond to this claim. This Grievance Board does not permit parties to raise new issues in post-hearing written arguments where the opposing party has no opportunity to respond. See Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-1207 (Feb. 29, 1996). Therefore, the question of whether the proposed deductions would violate W. Va. Code§ 21-5-3 will not be addressed in this decision. For the same reason, Grievant's new contention in her post-hearing brief that deducting the overpayment from Grievant's pay violates the provisions governing garnishment in W. Va. Code §§ 38-5B-1, et seq., will likewise not be addressed. (See footnote 6)

Grievant also argued that LCBE should be barred from recovering any overpayment by the doctrine of laches. Although this also appears to be a new argument not previously raised below, and therefore barred under Beckley, the undersigned Administrative Law Judge does not find that laches applies to this situation. Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Bd. of Educ., 178 W. Va. 53, 357 S.E.2d 246 (1987); Buchanan v. Bd. of Directors,

Docket No. 94-BOD- 078 (Nov. 30, 1994). Grievant has not demonstrated how LCBE's failure to discover the mistake until after the end of the 1997-98 school year, or failure to seek recovery of the overpayment until October 1998, represents such a significant delay as to warrant application of the laches doctrine to preclude recovery of public funds paid out in error.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 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. Generally, a county board of education is not bound by an employee's mistake. Samples v. Raleigh County Bd. of Educ., Docket No. 98-41-391 (Jan. 13, 1999); Carr v. Monroe County Bd. of Educ., Docket No. 98-31-342 (Dec. 15, 1998).

3. Grievant failed to establish that she should be permitted to retain $2340 which she received as overpayment of her salary as a half-time Secretary II for the 1997- 98 school year, where her employment contract contained an erroneous salary amount that resulted from the miscalculation of Grievant's experience level at 20 years, rather than the correct level of 2 years' experience.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: October 20, 1999

Footnote: 1

Grievant was represented by counsel, Joan G. Hill, with Crandall Pyles Haviland & Turner. LCBE was represented by its counsel, James W. Gabehart.

Footnote: 2

LCBE did not present any evidence to support the $2470 overpayment referenced in Mr. McCann's letter. As stated in Finding of Fact Number 8, the actual amount of the overpayment was $2,340.

Footnote: 3

Mr. McCann characterized this error as a "typing error" in his correspondence sent to Grievant. It would require an unusually inept typist to insert "$9,225.00" in a contract rather than "$6,885.00." It appears that someone misread Grievant's personnel record to indicate she had 20 years of experience as opposed to 2 years of experience, a fairly significant oversight, because Grievant was still a probationary employee who would not attain regular status until she completed 3 years of employment.

Footnote: 4

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (4th ed. 1968).

Footnote: 5

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th Ed. 1968).

Footnote: 6

It should be noted that this decision is limited to the question of whether a county board has authority to involuntarily recoup money through payroll withholding from an employee who has been overpaid in error. This decision does not address the question of the maximum amount that can be withheld from an employee's paycheck.