THELMA DAVISSON,

Grievant,

v. **Docket No. 99-21-287**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Thelma Davisson (Grievant) initiated this grievance on April 1, 1999, challenging the seniority credit given to her as an employee of Respondent Lewis County Board of Education (LCBOE). She requests that a random selection be conducted between herself and two other employees with whom she believes she is tied for seniority. The grievance was denied by Grievant's immediate supervisor on April 2, 1999. Upon appeal to level two, a hearing was conducted on May 26, 1999, followed by a written decision denying the grievance dated July 8, 1999. Level three consideration was bypassed, and Grievant appealed to level four on July 12, 1999. This grievance was placed in abeyance while the parties awaited preparation of the level two transcript, in an effort to potentially submit this matter on the preexisting record. Thereafter, Grievant requested a level four hearing to supplement the record, which was held in the Grievance Board's office in Morgantown, West Virginia, on November 9, 1999. Grievant was represented by counsel, John E. Roush, and Respondent was also represented by counsel, Kelly Kimble. This matter became mature for consideration on December 16, 1999, upon receipt of the parties' final post-hearing arguments.

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

Findings of Fact

1. Grievant began employment with LCBOE as an aide on February 12, 1973.

2. Grievant was continuously employed by LCBOE until she was reduced in force (RIF'd) at the conclusion of the 1980-1981 school year.

3. Six aides, including Grievant, who had been subject to the RIF described above filed a grievance with the State Superintendent of Schools. (See footnote 1)

4. On April 29, 1982, the State Superintendent issued a decision regarding the aides' grievance. In this decision, the Superintendent concluded that LCBOE had improperly RIF'd the six grievants, and awarded full-time positions to four of the grievants as relief. However, with regard to Grievant and one other petitioner, the Superintendent stated as follows:

> A school employee does not acquire tenure in an assignment; therefore, there is no perceptible reason why Misses Shirley Bennett and Thelma Davisson could have refused the board's offer of employment on August 28, 1981 and not in effect have resigned from the board's employ.[(See footnote 2)] . . . In any event because of these petitioners' refusal to accept the board's legitimate offer of employment, I cannot do more than recommend that the board again try to reach an accommodation with them.

The Superintendent did not award Grievant and Ms. Bennett any further relief, specifically any back pay or seniority credit.

5. LCBOE rehired Grievant as a regular employee in the Aide classification atthe beginning of the 1982-1983 school year.

6. On March 19, 1985, LCBOE's then-superintendent commented in correspondence to Grievant that he believed her seniority was tied with that of two other aides, Sandra Barnett and Jeannie Bleigh, who also began employment on February 12, 1973. (See footnote 3)

7. The seniority lists for LCBOE's employees in the Aide classification since 1990 have listed Grievant's “first day worked” as February 12, 1973, but have shown her total years of seniority to be one year less than Ms. Bennett and Ms. Bleigh. Grievant was aware of these seniority listings and their contents since 1990.

8. On October 30, 1997, pursuant to discussions with Assistant Superintendent Gabriel Devono regarding her seniority credit, (See footnote 4) Grievant wrote to Superintendent Joseph Mace, requesting that she be given seniority credit for the 1981-1982 school year, pursuant to the prior State Superintendent's decision.

9. In response to Grievant's request, and at Superintendent Mace's direction, Mr. Devono wrote a letter dated December 10, 1997, informing Grievant that the prior decision had not awarded her any back pay or seniority.

10. On November 30, 1998, a Title I Aide position was posted by LCBOE. Grievant applied for

the position. 11. At LCBOE's meeting on December 23, 1998, Jeannie Bleigh was selected to fill the Title I position, due to her superior seniority. Grievant was present at the Board meeting and knew the reason she was not awarded the position.

12. This grievance was not filed until April 1, 1999.

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. LCBOE contends that this grievance was not initiated within the time limits specified in W. Va. Code § 18-29-4(a)(1), which states:

> 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.

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE- 130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). As required by W. Va. Code § 18-29-3(a), Respondent asserted at the level two hearing that this grievance was untimely. L II Tr. at 10. See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd.of Educ., Docket No. 95-39-413 (May 8, 1996).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997). Respondent argues that, at the very least, Grievant knew that she had one year less seniority than Ms. Bleigh and Ms. Barnett at the December 23, 1998, Board meeting. Moreover, Respondent contends that Grievant actually knew she had not been given seniority credit for the 1981-1982 school year as early as 1990, when she admittedly saw the county's seniority rosters, listing her as

having one year less seniority.

The undersigned finds that Grievant knew how much seniority LCBOE had actually credited her with at least by the December 10, 1997, letter from Assistant Superintendent Devono advising her of such. At any rate, she should have known unequivocally that she had less seniority than the other two aides in question when she witnessed the Board's award of a position to Ms. Bleigh in December of 1998 on that very basis. There is no question that Grievant waited far more than the fifteen working days allowed by statute before filing this grievance.

Grievant contends that, because the Title I Aide position did not actually begin until August of 1999, her grievance was timely filed. However, Grievant's reasoning is flawed, because the “event” she is grieving is her seniority calculation, which occurred much earlier. Alternatively, she argues that her seniority miscalculation is a continuing practice. However, this Grievance Board has expressly held that the calculation of seniority is nota continuing event as contemplated by W. Va. Code § 18-29-4(a)(1). Heater v. Barbour County Bd. of Educ., Docket No. 96-01-497 (Sept. 30, 1997); Hazelwood v. Mercer County Bd. of Educ., Docket No. 94-27-258 (April 27, 1995).

In addition to being untimely, Grievant's claim must also fail on the merits. Essentially, Grievant is challenging the Board's interpretation of the Superintendent's decision issued in 1982. The portion of that decision which is quoted in Finding of Fact No. 4 is quite clear. The Superintendent obviously concluded that Grievant and the other petitioner had effectively resigned their positions with the Board by refusing offers of alternative positions after their RIF. Therefore, they were entitled to no relief, and he merely suggested that the Board try to reach some accommodation with them. The Board did so by offering them re-employment for the 1982-1983 school year. There is nothing in this decision upon which to base the conclusion that Grievant was found to be entitled to any rights, much less seniority for the 1981-1982 school year during which she did not work. This decision was apparently not appealed, and its provisions are res judicata upon the parties to the present grievance. This Grievance Board has applied this doctrine to preclude grievants from relitigating issues which were resolved in prior grievance decisions. See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Woodall v. W. Va. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994). See also Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975); Ramsey v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-478 (July 31, 1991). The Superintendent did not award Grievant seniority credit, and she is prohibited from revisiting that issue

here. Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-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. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A grievance must be filed "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." W. Va. Code § 18-29-4(a)(1).

4. Respondent has established by a preponderance of the evidence that this grievance was untimely filed.

5. The doctrine of res judicata precludes grievants from relitigating issues which were resolved in prior grievance decisions. See Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Woodall v. W. Va. Dept. of Transp., Docket No.93-DOH-393 (Feb. 2, 1994). See also Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975); Ramsey v. W. Va. Dept. of Health and Human Resources, Docket No. 90-H-478 (July 31, 1991).

6. The Superintendent's decision dated April 29, 1982, awarded Grievant no relief, and she is not entitled to seniority credit for the 1981-1982 school year because of that decision.

Accordingly, this grievance is **DENIED**.

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

Date: December 29, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The education employees' grievance procedure set forth in W. Va. Code § 18-29- 1, et seq., did not come into existence until 1985.

Footnote: 2

Apparently, Grievant and Ms. Bennett had refused alternative positions offered to them by the Board for the 1981-1982 school year.

Footnote: 3

The record indicates that this letter was prompted by a potential reduction in force which was being discussed by LCBOE, but which never occurred.

Footnote: 4

It is not clear from the record why Grievant and Mr. Devono were discussing her seniority credit, but he apparently informed her that he did not believe she had received credit for the 1981-1982 school year.