JOSEPH HICKS,

Grievant,

v. **Docket No. 02-30-357**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance began as two separate grievances, the first of which was filed at level one on June 6, 2002, when Grievant challenged Respondent's failure to grant him 14 years of back pay for prior experience while working as a school bus operator in another state. Subsequently, the experience credit was taken away from Grievant, pursuant to language contained in the level two decision dated October 22, 2002, which stated that Grievant was not entitled to the experience credit at all, and certainly not back pay. This decision prompted Respondent to remove the experience credit from Grievant's salary, which resulted in the filing of another grievance on December 2, 2002. The second grievance was heard at level two on January 21, 2003, and denied on February 20, 2003. These grievances were consolidated at level four, and a hearing was held in the Grievance Board's office in Westover, West Virginia, on June 9, 2003. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Kelly J. Kimble. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 17, 2003.

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

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MCBOE") as a full-time bus operator for approximately four years.

2. During the summer of 2002, it came to Grievant's attention that another bus operator, David Kisamore, was receiving experience credit for driving a school bus in another state.

3. Grievant drove a school bus for a private contractor in the state of Connecticut for fifteen years. He was not directly employed by a school board.

4. Respondent conducted a survey of its employees' payroll information during the year 2000. Grievant did not recall receiving such a survey, which indicated that he was not receiving credit for any prior experience.

5. After consulting with Rick Williams, Assistant Manager for Human Resources, Grievant provided documentation of his work driving a school bus in Connecticut. Without consulting the superintendent or the Board, Mr. Williams directed the payroll office to add the 15 years of experience credit to Grievant's salary, effective August 1, 2002.

6. Although the experience credit was given to Grievant, he continued to pursue the grievance on the basis of back pay to the date of his initial employment, which had not been given to him by Respondent.

7. Subsequent to the level two hearing in the first grievance, Mr. Williams was informed that MCBOE did not believe Grievant was entitled to the experience credit, because he had been employed by a private contractor. Accordingly, the experience credit was removed from Grievant's salary, effective in November of 2002.

8. The experience credit was also removed from Mr. Kisamore's salary in November, because his prior work was also for a private contractor. That action wasrecently upheld by this Grievance Board in Kisamore v. Monongalia County Board of Education, Docket No. 03-30-059 (June 25, 2003).

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

As a preliminary issue, Respondent contends that this grievance is untimely, because Grievant knew when he began employment with Respondent that he was not being credited for prior experience, but did not file a grievance until years later. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, Grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). The grievance process must be started within 15 days following the

occurrence of the event upon which the grievance is based or within 15 days of Grievant's discovery of that event, pursuant to West Virginia Code § 18-29-4(a).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va.Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "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." In Spahr, the Court found the "fact" giving rise to the grievance was the knowledge that similarly-situated teachers were receiving a salary supplement but the grievants were not. Once the grievants confirmed that similarly-situated teachers were being paid the supplements, they were thus clearly made aware that their rights had been violated. The discovery of the facts in Spahr made the grievants aware of their rights. Hence, the facts and their entitlement were inextricably intertwined.

In the instant case, Grievant gave credible testimony that he did know the experience credit was possible until he discovered that Mr. Kisamore was receiving it. This situation is much like that which occurred in Spahr, supra. Although Grievant provided his experience information prior to his initial hiring by MCBOE, he was unaware that this experience could be used to enhance his salary, which became known to him when he discovered that another employee was receiving the pay. This is distinguishable from the facts of Chambers-Cooper v. Roane County Board of Education, Docket No. 90-44-385 (Jan. 15, 1991), where “Grievant was aware of all the operative facts when she was initially hired . . . [and] [t]he unknown was the law.”

As to the merits of this case, Grievant contends that, although he worked directly for a private contractor who issued his paychecks, the board of education had authority over him. As an example, he discussed an occurrence when there were allegations thatGrievant had behaved inappropriately while driving his bus, he was brought before the board of education for a “hearing.” No discipline was imposed. Respondent argues that Kisamore, supra, correctly held that work for a private contractor does not entitle a school employee to experience credit.

As to the issue of Grievant's entitlement to the experience credit and corresponding back pay, the Kisamore decision is dispositive. Based upon the language of Code § 18A- 4-8a, defining “years of

employment," which is employment "by a board," and the corresponding definition of "board" in Code § 18-1-1(d) as "the county board of education," the undersigned concluded that "the plain language of W. Va. Code § 18A-4-8 provides only for experience obtained while employed by a county board of education, which would clearly exclude Grievant's work for a private contractor." In addition it was noted that Respondent's Policy GD, governing the award of prior experience credit, provides that employees "may" have their prior experience counted for incremental pay purposes, providing MCBOE with discretion in granting the credit.

The Grievance Board adheres to the doctrine of *stare decisis* *(See footnote 1)* in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). Grievant has provided the undersigned with no compelling reason to deviate from the conclusions which were reached in Kisamore, supra. The evidenceestablishes that Grievant was not directly employed by a board of education, so he was never entitled to the experience credit.

Grievant also argues that the removal of the experience credit was the result of retaliation for the filing of his initial grievance. "Reprisal" means the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. W. Va. Code § 18-29- 2(p). To demonstrate a *prima facie* case of reprisal a grievant must establish by a preponderance of the evidence the following elements:

> that he engaged in a protected activity, e.g., filing or participating in a grievance;
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> that he was subsequently treated in an adverse manner by the employer or an agent;
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> that the employer's official or agent had actual or constructive knowledge that the grievant engaged in the protected activity;
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> that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment; and
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> that the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See W. Va. Dep't of Natural Resources v. Myers, 443 S.E.2d 229 (W. Va. 1994); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

If a grievant establishes a *prima facie* case of reprisal, the employer may rebut the presumption of retaliation by offering legitimate, non-retaliatory reasons for the adverseaction. If the respondent rebuts the claim of reprisal, the employee may then establish by a preponderance of the evidence that the offered reasons are merely pretextual. Myers, supra; Webb, supra. In the instant case, it is obvious that the experience credit was removed from Grievant's salary because Respondent did not believe he was entitled to it. Mr. Williams did not consult any official of MCBOE when he directed that the credit be given to Grievant, and Respondent removed the credit after the level two hearing in this case, when the matter came to its attention. It also took the credit away from Mr. Kisamore, further establishing that the action was taken for good reason, and no retaliatory motive can be inferred under these circumstances.

The following conclusions of law support the decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. “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." Syl. Pt. 1, Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. Grievant timely filed his grievance on June 6, 2002, after discovering that another employee was receiving experience credit for salary purposes.

4. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

5. School personnel are compensated based upon their “years of employment,” which is defined as “the number of years which an employee classified as service personnel has been employed by a board in any position[.]” W. Va. Code § 18A-4-8.

6. Grievant's employment by a private contractor driving a school bus does not entitle him to experience credit for those years of employment.

7. "Reprisal" means the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. W. Va. Code § 18-29-2(p).

8. Grievant has failed to prove that Respondent's removal of his experience credit was the result of retaliation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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 byW. 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: August 11, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Latin for "to abide by" or "to adhere to" decided cases.