L. W. O.,

Grievant,

v. **Docket No. 03-33-414**

McDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, L. W. O. ("Grievant"),[1] is employed as a teacher by the respondent, the McDowell County Board of Education ("BOE"). She was not hired until twelve working days after the beginning of the 2003-2004 school year. As a result of what she terms "delay" in hiring her, Grievant claims that she should retroactively receive "[p]ayment and seniority for 12 days of employment."

This grievance was denied at Levels I and II on September 19, 2003, and December 18, 2003, respectively. Level III was waived and, upon agreement of the parties, the grievance was submitted for decision at Level IV on the underlying record. Grievant is represented by Ben Barkey, WVEA Region VII UniServ Consultant. BOE is represented by attorney Kathryn Reed Bayless. Upon submission by both parties of proposed findings of fact and conclusions of law, this grievance became mature for decision on April 12, 2004.

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[1]Grievant's name has appeared with various spellings throughout the record. For purposes of this decision, the undersigned has adopted the spelling most recently employed by Grievant's representative.

Discussion

Grievant complains that her hiring[2] was delayed, resulting in the loss of pay and benefits for the twelve working days school was in session before she began teaching at the Phoenix Center, which is an alternative school. Grievant refers to two positions that were open at the Phoenix Center for the 2003-2004 school year. The first was filled before school started. In reviewing the record, it is clear that the well-spring of Grievant's discontent is that she was not selected for that position and, thus, did not begin her duties at the Phoenix Center on the first day of the school year.

Grievant did not grieve her non-selection for the first Phoenix Center position. She grieved the delay in her hiring and the resultant lack of pay and seniority credit for the twelve work days that expired before she assumed her duties for the 2003-2004 school year. The focus of this grievance is whether Grievant can demonstrate some legal basis for paying her and giving her benefits for the days that school was in session before she assumed her duties at the Phoenix Center. Therefore, to the extent that Grievant's Level II testimony and her proposed findings of fact at Level IV relate to her qualifications vis-à-vis those of the Phoenix Center teacher who started at the beginning of the school year, they are deemed irrelevant to this grievance. To the extent that her proposed conclusions of law relate to Grievant's status as a teacher on the preferred recall list, they are likewise deemed irrelevant to this grievance.

There is nothing in the record to support Grievant's demand for a windfall from the public purse. During the first twelve working days of the school year, Grievant was neither

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[2]Although Grievant was on preferred recall status, she was hired for the Phoenix Center pursuant to West Virginia Code section 18A-4-7a.

working nor on any sort of leave that would entitle her to benefits and pay. She had not yet reported for work. She was hired within the statutorily-mandated time period after the posting for her position expired. There is simply nothing in the record to suggest that the delay in hiring Grievant was attributable to any impropriety in the hiring process. Grievant does not cite any legal authority or precedent that supports her demand for pre-employment pay and seniority credit. As set forth more fully below, this grievance must be denied.

Findings of Fact

Based upon a preponderance of the credible and relevant evidence of record, the undersigned finds as follows:

1. This grievance arises out of the 2003-2004 school year when Grievant was hired to fill one of two teaching positions at the Phoenix Center, after having applied for each of them.

2. At the time she applied for the Phoenix Center positions, Grievant was under investigation[3] by the West Virginia Board of Education("State Board"). The investigation arose from allegations of possible misconduct in the administration of the SAT-9 tests at War Elementary School where Grievant had taught the previous school year.

3. During the time pertinent to this grievance, the State Board had exercised its authority under West Virginia Code section 18-2E-5(l)(4)(C) by intervening in the operation of the school system in McDowell County. Hiring during this intervention period was subject to approval by the State Board.

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[3]The investigation is only pertinent to this grievance because it may have caused some delay in hiring Grievant.

4. One of the Phoenix Center positions for which Grievant applied was awarded to another applicant who assumed his duties at the outset of the 2003-2004 school year. Grievant asked BOE Assistant Superintendent Peggy Freeman why she had not been selected for that position.

5. According to Grievant, Assistant Superintendent Peggy Freeman explained that "the decision was up to Mr. Manchin [*i.e.*, Superintendent of the McDowell County schools] and that he was concerned about the issue at the State Department."

6. Grievant was offered and accepted the second position at the Phoenix Center.

7. The posting for Grievant's position closed on August 20, 2003.

8. The school year began on August 26, 2003.

9. Grievant assumed her duties twelve working days after the 2003-2004 school year began.

10. Grievant failed to identify any conduct or misconduct on the part of the State Board or BOE that resulted in the delay in hiring her.[4]

11. Grievant cites West Virginia Code section 18A-4-7a in support of her request for pay and seniority credit for the initial twelve days of the school session that elapsed before she began work. As noted at Level II, Grievant has failed to identify any particular portion of that statute upon which she relies.

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[4]Grievant complained that she had been told by a friend that her application was located in the back of a file drawer, separated from all of the other applications. She did not articulate any plausible theory as to the significance of this information. Nor did she offer any other evidence on this issue. In light of the fact that she was hired, it is reasonable to conclude that Grievant was not harmed by the manner in which her application was being stored by BOE.

Conclusions of Law

Based upon the foregoing and a review of the pertinent law, the undersigned hereby concludes as follows:

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. 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).

2. Grievant's allegations must be proven by a preponderance of the evidence. 156 W. Va. C.S.R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

3. "'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W.Va. 145, 351 S.E.2d 58 (W. Va. 1986)." Syl. pt. 2, *Hancock Co. Board of Educ. v. Hawken*, 209 W.Va. 259, 260, 546 S.E.2d 258, 259 (1999)(*per curiam*).

4. An action is recognized as "arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W.Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. Under the pertinent circumstances of this case, it is clear that there was no unreasonable delay in hiring Grievant.

6. It is not clear from the record what, if any, impact the State Board's investigation may have had on the timing of Grievant's hiring. However, a span of only 16 work days between the expiration of the posting and Grievant reporting for work could not be deemed unreasonable, arbitrary or capricious.

7. The requirements of West Virginia Code section 18A-4-7a(o)(3) were satisfied because Grievant was hired well within the thirty working-day period after the posting expired.

8. There is no provision in West Virginia Code section 18A-4-7a that requires or allows a board of education to pay a professional employee for days during the school year that have passed before such employee actually assumed her duties.

9. A day of work for purposes of calculating experience for salary increments "is construed to mean a day for which the teacher is entitled to be paid, including actual days of work, holidays, vacation days, inclement weather days, personal leave days, and other such days." November 30, 2001, State Superintendent Interpretation, *quoted in Cheryl Barnett v. Putnam County Board. of Educ.*, Docket No. 02-40-122 (June 21, 2002).

10. "A professional employee shall begin to accrue seniority upon commencement of the employee's duties." W. Va. Code § 18A-4-7b(a).

11. "An employee shall receive seniority credit for each day the employee is professionally employed[.]" W. Va. Code § 18A-4-7b(b).

12. There is no provision in West Virginia Code section 18A-4-7a that requires or allows a board of education to afford a professional employee seniority credit for days

in the school year prior to the date such employee actually assumed her duties. To the contrary, awarding seniority credit under those circumstances would run afoul of the above-quoted provisions of West Virginia Code section 18A-4-7b.

13. Nothing in West Virginia Code section 18A-4-7a supports Grievant's efforts to wrest money and benefits from BOE for time she was not employed.

14. Grievant has failed to cite any legal precedent that supports her claim of entitlement to the relief she seeks herein.

14. Grievant has failed to meet her burden of proof and this grievance must be denied.

ACCORDINGLY, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of McDowell 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 West Virginia Code section 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: May 7, 2004

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JACQUELYN I. CUSTER
Administrative Law Judge