TRACY CURRENCE, et al.,

Grievants,

v. Docket No. 05-42-377

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

and

BRENDA TRAVISE and SHERYL WARE,

Intervenors.

DECISION

Grievants, employed as aides by Respondent Randolph County Board of Education, initiated this proceeding in late May and early June of 2005, with all grievances being consolidated for hearing at level two. (See footnote 1) After denials at the lower levels and a waiver of consideration at level three, this matter was appealed to level four by Grievants' various representatives in October of 2005. (See footnote 2) After a level four hearing was scheduled, the partieselected to submit this grievance for a decision based upon the lower level record, accompanied by fact/law proposals, which were submitted on January 23, 2006.

The following material facts have been proven by a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed by Respondent as aides, (See footnote 3) with various seniority dates.

2. In September of 1994, Responded posted positions to be employed in a state grant program, referred to as “Even Start.” One of the postings was for “Contracted Services Assistants,”

who would be employed for the purpose of assisting teachers working in the program. Even Start is an educational program for preschool age children which includes home visits and parenting classes for participating families.

3. The assistants were employed on an hourly basis, “utilizing the Randolph County service personnel salary schedule based on college courses and experience,” and, as stated in the posting, these employees would not be granted seniority, insurance or retirement benefits. Level Two, Administration Exhibit 1.

4. On September 19, 1994, Intervenors Brenda Travise and Sheryl Ware were hired as the assistants in the Even Start program.

5. Intervenors filed a grievance in 2005, requesting seniority credit for the time they spent working in the Even Start program. In a level two decision dated May 24, 2005, Superintendent Glen Karlen found that Intervenors had been performing the duties of AideIIIs since beginning their work as contract aides, and granted them regular employee status and seniority dating back to September of 1994.

6. The instant grievance was filed by other aides employed by Respondent, who believe that they could potentially be adversely affected in the future, due to Intervenors being placed on the seniority list.

7. To date, none of the Grievants in this case have competed with Intervenors for new positions, nor have their respective seniority dates been an issue in a transfer or reduction in force.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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.

Grievants contend that it is unfair and unlawful for Intervenors to be granted eleven years of seniority and to be placed ahead of some (not all) Grievants on the county seniority list. They argue that the level two decision granting Intervenors' request for regular status and seniority was “untimely,” and that Intervenors were not entitled to eleven years of seniority credit after “sitting on”

their rights for as many years.

This case involves a virtually identical situation to that presented in the recent case of Corbin v. Hampshire County Board of Education, Docket No. 05-14-093 (July 22, 2005). As in that case, Respondent argues first that Grievants lack standing to contestIntervenors' seniority dates, as they have yet to be adversely affected by them. Grievants' lack of standing is an affirmative defense asserted by the employer, and it must be established by a preponderance of the evidence. See Lewis v. Kanawha County Bd. of Educ., Docket No. 97-20-554 (May 27, 1998); Lowry v. W. Va. Dep't 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). 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 Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41- 479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Cremeans v. Board of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue the grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54- 601 (Feb. 28, 1990). As determined in Corbin, supra:

> In the instant case, Grievant has suffered no harm as a result of the seniority credit granted to other clerks. She has not been denied a position for which she has applied, nor has she been subjected to a transfer or reduction in force, as a result of her seniority versus the seniority of Ms. Wood and Ms. Lee. Accordingly, at the present time, Grievant has no standing to challenge the seniority dates of these individuals.

The exact same reasoning applies here, and Grievants clearly do not have standing at this time to challenge the seniority granted to Intervenors.

However, Respondent's correction of Intervenors' status is well-supported by established law. As

extensively discussed in this Grievance Board's decision in Ganoe v. Hampshire County Board of Education, Docket No. 97-14-229 (July 30, 1997), the Supreme Court of Appeals has previously determined that school boards cannot be allowed to circumvent the contractual scheme of school employment, which includes statutory-based salary, benefits and seniority. The following portion of the Ganoe decision provides a helpful discussion of the Supreme Court's ruling in State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W.Va. 176, 475 S.E.2d 176 (1996):

> The petitioners sought to prevent the Kanawha County Board from carrying out its plan to eliminate seven full-time homebound teaching positions and hire teachers on an hourly basis to fill the same instructional needs. . . . While the Court determined that it did not have the authority to direct the Board to only employ full-time teachers as homebound instructors, it did determine that the Board's plan was contrary to West Virginia's statutes governing employment of school personnel. The Court held that to allow the Board to eliminate full-time teaching positions, without a showing of a corresponding reduction in need, would circumvent the Code's contractual scheme of employment for teachers, whereby teachers must execute a contract before entering upon their duties and become entitled to various benefits and protections set forth by statute. The Boner Court further stated that, while it would not necessarily oppose the hiring of hourly-paid homebound teachers, authorization for any system allowing this would require new legislation.

As further noted in Ganoe, if school boards are allowed to employ personnel in full-time positions, without benefits and seniority, then:

> a county board of education could pick any group of employees and declare them to be hourly employees in order to avoid paying the benefits and protections associated with full-time employment. If this were allowed, all of the statutes governing the hiring, promotion, benefits, seniority and other issues affecting the employment of school personnel would be a farce.

In the instant case, Grievants take issue with Intervenors' not having been hired under a "contract," citing the provisions of West Virginia Code § 18A-4-8g(a), which states that "[s]eniority accumulation for a regular . . . employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in [§ 18A-2-5]." Because Intervenors were not given an actual contract, pursuant to the statutorily- prescribed form, Grievants argue that they are prohibited from accumulating seniority. However, when the employer has failed to give the employee the contract to which she was entitled, it would be improper to penalize the employee. See Hedrick v. Pendleton County Bd. of Educ., Docket No. 01-36-419R (July 14, 2003). Indeed, Code § 18A-4-8b states that "an employee's seniority begins on the date that he or she enters into his assigned duties." Accordingly, the undersigned finds that, since Respondent denied Intervenors the

opportunity to execute a proper employment contract, they cannot be denied credit for seniority earned while working for Respondent in regular, full-time aide positions.

Grievants also take issue with Intervenors being granted “back” seniority after working in their positions for approximately eleven years without filing a grievance. However, Grievants' allegation of “untimeliness” is not an appropriate mechanism for prohibiting Intervenors' seniority credit. In fact, in most cases where a board of education has “corrected” its error in failing to grant seniority credit to contract employees, thecorrection was not prompted by a grievance. In the cases of Corbin and Ganoe, discussed above, the grievance arose from a claim by other employees that they had been adversely affected by the granting of seniority credit to the contract employees. As the above discussion reveals, it is quite clear that the hiring of contract employees to perform the duties of school personnel is illegal, and those employees are entitled to seniority credit, regardless of whether or not they have grieved the error. Also, as noted by Respondent, the Supreme Court has expressly held that an employee's seniority exists by virtue of statutory mandate or board contract, and even if granted through board error, earned seniority cannot be taken from a school employee. Hall v. Bd. of Educ. of the County of Mingo, 208 W. Va. 534, 541 S. E. 2d 624 (2000). In this case, had Respondent not committed an error in the first place, Intervenors would have been earning seniority since 1994 and removal of their seniority dates would not even be an issue.

Moreover, Code § 18-29-3(a) provides that a timeliness defense “must be asserted by *the employer* at or before the level two hearing.” (Emphasis added.) Clearly, a subsequent attack in a separate grievance with regard to the timeliness of Intervenors' grievance filing is not permitted or appropriate for consideration at this juncture. Accordingly, for all of the foregoing reasons, Grievants have failed to prove by a preponderance of the evidence that Intervenors are not entitled to the seniority credit granted to them for serving in contract positions.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Cremeans v. Board of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992).

3. Grievants have not suffered harm as a result of the seniority granted to Intervenors, so they have no standing to file a grievance regarding that issue.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Randolph 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 GrievanceBoard. 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: February 10, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although many of these grievance filings stated a desire to "intervene" in the previous grievance of Intervenors Travise and Ware, that grievance had concluded with relief being granted, so these filings were treated as a new grievance which challenged the granting of the Travise/Ware grievance at level two.

Footnote: 2

Grievants include Jacqueline Calain-Plum, Tracy Currence, Leora Coberly, and Sharon Zirkle, who were represented by counsel, Eric Gordon; Grievants Janice Bennett, Charlene Bonnell, Charlotte Scott, Lola Collier, Elizabeth Pritt, Susie Starr, Judy Hamrick, Georgia Williams, Thomas C. Linn, Rodney Lambert, Donna White and Karen Spessert were represented by counsel, John E. Roush of the School Service Personnel Association; Grievants Rick Rinehart and Jackie Erwin White were represented by Mary Snelson of the West Virginia Education Association. Intervenors represented themselves, and Respondent was represented by counsel, Kimberly Croyle.

Footnote: 3

Grievants are employed in various aides classifications, i.e. Aide I, Aide II, Aide III, and Aide IV, as defined by West Virginia Code § 18A-4-8.