WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

CATHY WYSOCKI and SHARON MOORE,
Grievants,

v.

Docket No. 06-25-172
Sue Keller
Senior Administrative Law Judge

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Cathy Wysocki and Sharon Moore ("Grievants") employed by Marshall County Board of Education ("MCBE") as School Nurses, filed individual level one grievances on March 17, 2006, alleging violations of *W. Va. Code* §§ 18-29-1; 18A-4-5a and 18A-4-1, when they were not granted prior experience credit. For relief, Grievants seek compensation for all prior experience with back pay to the date they were first employed by MCBE. Grievants' immediate supervisor lacked authority to grant the requested relief at level one. The grievances were consolidated at level two. Following an evidentiary hearing, the grievance was granted in part, with back pay limited to one year from the date the grievance was filed. Grievants elected to by-pass consideration at level three, and filed individual level four appeals on May 24, 2006.[1] West Virginia Education Association consultant Owens Brown, and MCBE counsel Richard Boothby, Esq., of Bowles Rice McDavid Graff & Love, LLP, agreed to submit the grievance for decision based on the

[1]It is not clear why Grievants filed individual level four appeals. Initially, Ms. Moore's grievance was assigned Docket No. 06-25-173; however, for purposes of this decision, the grievances will be consolidated under the docket number assigned to Ms. Wysocki's appeal.

lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law received on September 25, 2006.

The following facts have been derived from a preponderance of the credible evidence admitted into the record at level two.

Findings of Fact

_____1. Grievant Wysocki has been employed by MCBE as a school nurse since 1991. Prior to her employment by MCBE, Grievant Wysocki was employed by hospitals for thirteen years. At the time of her employment, Grievant Wysocki was given no prior experience credit for salary purposes.

2. Grievant Moore has been employed by MCBE as a school nurse since 1994. Prior to her employment by MCBE, Grievant Moore was employed by hospitals, the State Health Department, and as a school nurse for the Marshall County Health Department. At the time of her employment, MCBE credited Grievant Moore for the seventeen years she worked with the county health department, but not for the six years she worked at a hospital and for the state.

3. School nurses hired by MCBE in 1996, 1997, 2003, and 2005, were granted experience credit for all their prior nursing employment, in or out of a school environment.

4. Grievant Moore learned of the salary disparity during a conversation with another school nurse in October 2005, and promptly shared the information with Grievant Wysocki.

5. Grievants were granted credit for their prior experience pursuant to the level two decision, with back pay limited to one year.

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. "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 & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Grievants argue that they exercised due diligence in protecting their interests under the "discovery rule" exception to the statutory time lines. Grievants allege the failure to compensate them for all their prior experience violates *W. Va. Code* § 18A-4-5a. MCBE continues to assert that additional damages are barred by the doctrine of laches based on Grievants' lack of diligence in seeking out the relevant information, which now places it in a highly prejudiced position, potentially owing many thousands of dollars in back pay.[2]

The discovery rule exception to the statutory time lines, set forth in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), provides that "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." MCBE does not challenge Grievants'

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[2]Interestingly, MCBE did not raise the issue of whether this grievance was timely filed after Grievants learned of the disparity. Grievants testified that they learned of the salary differences in October 2005, but they did not file this grievance until March 2006, some five months later.

testimony that they did not learn of the salary difference until October 2005, but rather, argues their back pay should be limited to one year based on the doctrine of laches.

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 expenditure of public funds. Failure to do so constitutes laches. Laches occurs when an individual sleeps on his rights or neglects to assert a right of which is aware. For laches to attach, two elements must be established: lack of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay.[3]

MCBE argues that Grievants should have been more diligent in seeking out the information and filing a claim. The testimony of Grievants was that they had inquired about prior experience credit at the time they were hired, and were told that credit would only be given for school experience. Since that time they had no reason to believe the practice regarding experience credit had changed. It is not a usual practice for employees to inquire about the salary determination of all new employees. There appears to have been no annual report, or other documentation available to MCBE employees which would have put them on notice of the change in practice. While employees are to exercise diligence in protecting their rights, MCBE offers no basis upon which Grievants should be held

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[3] *Maynard v. Bd. of Educ. of Wayne County*, 357 S.E.2d 246, 255 (W. Va. 1987); *Carter v. Carter*, 148 S.E. 378 (W. Va. 1929); *Bank of Marlinton v. McLaughlin*, 1 S.E.2d 251 (W. Va. 1939); *Buchanan v. Bd. of Directors/Concord College*, Docket No. 94-BOD-078 (Nov. 30, 1994); *Dollison v. W. Va. Dept. of Emp. Sec.*, Docket No. 89-ES-101 (Nov. 3, 1989

responsible for obtaining this information. Thus, laches does not apply in this instance to bar Grievants' assertion of the discovery rule.

However, Grievants' request for back pay to their hire dates is inappropriate as there is no evidence that any school nurse hired before them had been granted prior experience credit for all nursing work. MCBE changed its practice regarding the credit when it hired Barbara Hart in 1996, and Grievants are entitled to back pay from that time.[4]

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. 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.

2. 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 expenditure of public funds. Failure to do so

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[4]The alleged violations of *W. Va. Code* § 18-29-1 and § 18A-4-1, were not pursued by Grievants at level four, and are deemed abandoned. Section 18-29-1, states the legislative purpose and intent of the grievance procedure, and Section 18A-4-1 defines "years of experience" for registered school nurses to mean "the number of years the nurse has been employed as a public school health nurse, including active work in a nursing position related to education, and service in the armed forces if the nurse was under contract with the county board at the time of induction."

constitutes laches. Laches occurs when an individual sleeps on his rights or neglects to assert a right of which is aware. *Maynard v. Bd. of Educ. of Wayne County*, 357 S.E.2d 246, 255 (W. Va. 1987); *Carter v. Carter*, 148 S.E. 378 (W. Va. 1929); *Bank of Marlinton v. McLaughlin*, 1 S.E.2d 251 (W. Va. 1939).

3. For laches to attach, two elements must be established: lack of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay.

4. Laches does not apply in this instance because there was no lack of due diligence by the parties in asserting their claim to the same experience credit granted to other school nurses.

Accordingly, the grievance is **GRANTED,** and MCBE is ORDERED to extend the back pay for prior experience credit to the effective date it was first awarded in 1996.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marshall 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 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: SEPTEMBER 29, 2006

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SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE