THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DENISE NOLAN,

Grievant,

v.

Docket No. 2008-0470-WooED

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Denise Nolan filed this grievance on September 17, 2007, challenging certain practices of the Respondent. In her statement of grievance, she briefly describes why she is filing this grievance as follows:

> Grievant Nolan was denied a position in the Extended Year Program because Respondent incorrectly used regular classroom seniority to fill positions rather than Extended Year seniority.
>
> Grievant seeks back pay, including appropriate interest, and Extended Year Seniority for each year she was not hired for the Extended Year Program due to Respondent's error.

A level one conference was conducted on October 11, 2007. By correspondence dated December 7, 2007, Superintendent Niday granted Grievant's request for four years of extended years seniority, and denied Grievant's request for back pay with interest. Grievant appealed this decision on December 21, 2007. The level two mediation session conducted on April 4, 2008, was unsuccessful. On April 14, 2008, Grievant appealed to level three. A level three hearing was conducted on June 2,

2008, before the undersigned Administrative Law Judge at the Board's Charleston Office. Grievant appeared in person and by Bruce W. Boston, West Virginia Education Association. Respondent appeared by Dean A. Furner, Esquire. This matter became mature for decision upon receipt of the last of the parties' fact/law proposals on July 7, 2008.

Summary

Grievant is professionally employed as a Special Education Teacher by the Wood County Board of Education ("Respondent"). Prior to 2007, the method for computing length of service for extended year programs (summer school programs) was erroneously based on regular employment seniority with the county rather than length of time in the extended year program. Respondent corrected this error, and adjusted Grievant's seniority an additional four years of extended year seniority. This represented an adjustment for each year Grievant was not employed in the program over the course of her tenure. Grievant seeks back pay for the years she was not given the extended year program employment. However, Grievant's award of back pay is limited to one year prior to the filing of the grievance. Grievant was employed during the 2006 and 2007 extended year programs; therefore, any award of back pay would be impermissible. This grievance is denied.

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels one and three.

Findings of Fact

1. At all times pertinent to this grievance, Grievant was employed as a special education teacher by the Respondent.

2. For most of the period ranging from 1991 to 2007 Grievant was employed by Respondent in the extended year program. Grievant did not work during the summers of 2000, 2002, 2003, and 2005, in that program. 3. Prior to 2007, the method of calculating length of service for extended year programs' positions was erroneously based on regular employment seniority instead of length of service in the extended year program.

4. In 2007, Yvonne Santin, Respondent's Director of Special Education, reviewed the minutes of the Board of Education from 1983 through 2007 in order to arrive at the appropriate level of extended year seniority for each employee who participated in the extended year program. Thereafter, seniority calculations for the extended year programs were brought into compliance with W. Va. Code § 18-5-39(e).

5. Grievant was awarded four years of length of service for the extended year program at level one. Grievant seeks a back pay award for those years.

6. Grievant compares her situation to that of co-worker Linda Howard. Ms. Howard entered into a settlement agreement with Respondent due to the miscalculation of seniority for the extended year program. Ms. Howard was given five years of extended year seniority to correct Respondent's error. Ms. Howard was paid the sum equal to all salary and/or benefits she would have received for being employed as an extended year program teacher for the 2006 extended year session.

7. Unlike Ms. Howard, Grievant was employed in the extended year program in 2006 (the year prior to the filing of the instant grievance).

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. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *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). “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).

Grievant acknowledges that “[W]hen it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.” W. Va. Code § 6C-2-3(c)(2). However, Grievant asserts she was unaware of the error that gave rise to the grievance until September 2007. Once she confirmed the facts of the error, she filed this grievance seeking seniority credit and back pay. Grievant construes Respondent's award of additional seniority credit as an acknowledgment that “error was made to the extent that Grievant Nolan was inappropriately denied employment in the Extended Year Program.” Grievant asserts the granting of seniority credit and the issue of back pay are inextricably intertwined and cannot be separated.

Respondent counters that the one year statute of limitations on back pay applies in this grievance. Grievant seeks back pay for summer school programs conducted in 2000, 2002, 2003, and 2005. Those years represent the sessions Grievant was not employed in the extended year program.

Under the one year statute of limitations, Grievant cannot go back further unless she can demonstrate that Respondent acted in bad faith in concealing facts which gave rise to her claim for back pay. In the instant matter, Grievanthas presented no evidence to show that any facts were concealed from her or that there was any bad faith involved in what has transpired.

Extended year programs or summer school programs are established and governed by W. Va. Code § 18-5-39. That section provides in pertinent part:

> (a) Inasmuch as the present county school facilities for the most part lie dormant and unused during the summer months, and inasmuch as there are many students who are in need of remedial instruction and others who desire accelerated instruction, it is the purpose of this section to provide for the establishment of a summer school program, which is to be separate and apart from the full school term as established by each county.
>
> (e) Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program.

Since Respondent does not dispute the fact that Grievant was entitled to credit for additional years of service in the summer program, the only remaining issue is whether she is entitled to back pay for the years she claims. Grievant relies upon the discovery rule exception set forth in *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), in support of her claim for back pay. In *Spahr*, several vocational teachers who were inadvertently not paid a salary supplement beginning with the 1982-83 school year were awarded back pay. The *Spahr* grievants did not have actual knowledge that other similarly-situated teachers were receiving a salary supplement until they met with their West Virginia Education Association ("WVEA") representative in the fall of 1986, and they filed their grievance in October 1986, within fifteen days of this meeting.

The Court concluded in syllabus points 1 and 2 of *Spahr* that W. Va. Code § 18-29- 4(a)(1), "contains a discovery rule exception to the time limits for instituting a grievance." Under this exception, the time limits on invoking the grievance procedure do not begin to run "until the grievant knows of the facts giving rise to a grievance." In the absence of such knowledge, the limitation period for filling a grievance is tolled as to prior years. In the text of *Spahr*, the Court also spoke of the grievants' lack of actual knowledge of their "entitlement to the supplement" until they met with their

WVEA representative. 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.

The instant situation is not similar to that in *Spahr*. Grievant seeks to compare her circumstances to that of her co-worker Linda Howard. The record of this grievance reflects that Ms. Howard was not similarly-situated to Grievant. Unlike Grievant, Ms. Howard was not employed the year prior to filing her grievance contesting an error by Respondent in following the wrong length of service requirement in filling the summer program position. Since the one year statute of limitation did not apply to her grievance, she was paid the salary she would have received for being employed as a summer school teacher for the 2006 summer school session. Grievant in the instant matter was employed in the 2006 summer school program. If she had been similarly-situated, the award of back pay that was provided to her co-worker would be appropriate. In addition, the undersigned does not agree with Grievant that the principle that a grievance can extend to prior yearsbecause the discovery rule exception tolls the limitations as to those prior years applies to the facts of this case. The one year statute of limitations for back pay awards operates to bar the relief Grievant seeks.

Grievant construes Respondent's award of additional seniority credit as an acknowledgment that “error was made to the extent that Grievant Nolan was inappropriately denied employment in the Extended Year Program.” Contrary to this assertion, Grievant's only offer of evidence at level three was an application for the summer school program with Respondent for the 2005 session. Grievant's Ex. 2, level three. “In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line.' *See Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1998).” *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05- 30-338 (Jan. 20, 2006). The record reflects that some 19 teachers were employed by Respondent in that summer program from 1982 to 2007. Grievant's Ex. 4, level three. Of the 19 teachers employed in the summer school program, three have more length of service in the county's summer school program. No evidence was

presented to the undersigned that proved Grievant was the most senior applicant for the position in 2005. To the contrary, the limited record of this matter establishes that for the summer session in question, more senior teachers filled the summer school positions. “When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied.” *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb.28, 1990); *See also Jennings v. Wyoming County Bd. of Educ.*, Docket No. 05-55-462 (May 18, 2006). Moreover, as noted in *Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003), granting relief under such circumstances would result in Grievant receiving “what, in essence, would be a windfall by paying her for . . . work she did not perform.”

Grievant's frustration with Respondent's failure to follow the statutory requirements with regard to this issue is understandable. Respondent sought to remedy this error by giving Grievant credit for the years 2000, 2002, 2003, and 2005 for the sessions she was not employed in the extended year program. Those particular years are now considered in Grievant's current extended year program length of time calculations. Pursuant to the one year statute of limitations, Grievant cannot go back further in seeking back pay unless she can demonstrate that Respondent acted in bad faith in concealing facts which gave rise to her claim. In this grievance, no evidence was presented to show that any facts were concealed from Grievant or that there was any bad faith involved in what transpired.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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. When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies. W. Va. Code § 6C-2- 3(c)(2).

3. Extended year programs or summer school programs are established and governed by W.

Va. Code § 18-5-39(e). That section provides that the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program.

4. Grievant is not entitled to back pay for the years 2000, 2002, 2003, and 2005. Back pay can only be granted for one year prior to the filing of the grievance absent a showing that Respondent acted in bad faith in concealing facts which gave rise to the claim.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be includedso that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: September 2, 2008

_____

Ronald L. Reece

Administrative Law Judge