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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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TAMMY LYONS¹

v.

Docket No. 89-54-601

WOOD COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Tammy Lyons, employed by respondent Wood County Board of Education (WCBE) as a school bus Aide II at Martin School, filed a level four grievance in October 1989. She alleged that WCBE "incorrectly calculated seniority for employees in the Aide classification" in violation of W.Va. Code §18A-4-8b(b). To resolve the grievance, she asked that the seniority list be corrected. A hearing was set but cancelled when the parties advised that the matter could be decided on the

¹The case originally had a co-grievant, Ruth Dailey. By letter dated November 13, 1989, Ms. Ruth Dailey's West Virginia Education Association representative stated that Ms. Dailey wished to withdraw from the grievance "because the level two decision afforded her the remedy she was seeking." Ms. Dailey's level four filing will be construed as error for which no further action is needed.

record. Briefs were submitted by the parties in November 1989, but decision was stayed pending grievant's notice of December 21, 1989, that a rebuttal brief would not be forthcoming.

The record in this case² reveals no claim that grievant's seniority date of September 24, 1987, is incorrect. Grievant, in fact, challenges the seniority attributed to only one WCBE Aide, Linda Wigal, a classroom teacher Aide IV also at Martin School. Grievant claims that if the current "seniority list" is not corrected, she could be adversely affected by missed future opportunities for bidding on voluntary transfers and extra-duty assignments and would also be prejudiced in matters of possible future involuntary transfers and layoffs. Grievant stated the seniority list for Ms. Wigal should reflect the date she entered into her assigned duties pursuant to W.Va. Code §18A-4-8b(b)³ and not some arbitrary date designated by the superintendent.

The record reflects that Ms. Wigal's seniority date was fixed in 1986. At that time WCBE posted and filled an aide's position with a male candidate, Greg Rymer, a substitute aide less senior than two other then-substitute aides, Linda Wigal and Kimberly Sall. That aide's position required a male to care

²The record consists of decisions at levels one through three rendered August 23, September 27 and October 3, 1989, respectively. The transcript and exhibits of the September 13, 1989, level two proceeding were filed October 1989.

³Code §18A-4-8b(b) states that a service employee's seniority "begins on the date that he enters into his assigned duties." The statute further establishes in-class seniority for reduction of force purposes within a particular job classification.

for a spastic-quadruplegic adolescent male student. Both Wigal and Sall filed a grievance on the matter and were represented by their West Virginia School Service Personnel Association's counsel. At level two, Superintendent William Staats denied the grievants' relief as to instatement because of the gender requirement, but nonetheless reasoned that Ms. Wigal, being more senior than Ms. Sall, missed the job opportunity solely because the position was gender-based. Ms. Wigal did not pursue the grievance further because of Dr. Staats' determination that she was therefore entitled to the next vacant aide's position with a retroactive seniority date of August 25, 1986.

Not satisfied, Ms. Sall advanced her complaint to level four but did not prevail. WCBE proved the employment of Mr. Rymer was the result of a bona fide occupational qualification for a male aide and Ms. Sall's seniority status did not entitle her to the position had there not been a gender-based requirement. Sall v. Wood Co. Bd. of Educ., Docket No. 54-87-03 (March 20, 1987).

Grievant identifies two issues in this case: Whether WCBE violated §18A-4-8b(b) "when [it] compiled [its] seniority lists for aides" and whether the superintendent of schools "has the authority to grant an employee a specific seniority date despite the fact that the employee had not yet entered into her assigned duties on that date." Grievant argues that Superintendent Staats' decision in the prior grievance was violative of the statute and that he was "clearly without authority to award Wigal an earlier seniority date." Grievant's Brief at 6.

An argument about authority was also made by WCBE at level two. Superintendent Staats' designee determined, Conclusion of Law No. 2, that he had no authority to resolve grievant's complaint stating, in part, that,

[W.Va. Code §18-29-7] provides in part that, "The decision of the hearing examiner shall be final upon the parties . . . : Provided, that either party may appeal to the Circuit Court of the County in which the grievance occurred . . . [text omitted]."

and, Decision at 3, points 2 and 3, he further determined,

--The seniority of Tammy Lyons is correct. . .

--The question raised through the testimony of the grievants concerning [Ms. Wigal's seniority] can not be reversed by a Level II hearing officer. [Her] employment and the establishment of her date of employment and subsequent adjusted seniority rank was established through an uncontested Level II grievance hearing on September 23, 1986. This hearing officer designee does not have the authority to alter that decision as per [§18-29-7] . . .

At level four, WCBE stands by the level two decision and further raises a timeliness issue that grievant "has offered no evidence whatsoever to explain her failure for almost three years to complain about the decision to measure Ms. Wigal's seniority from August 25, 1986, rather than from October 14, 1987."⁴ It cites Code §18-29-4, which requires a grievance to be initiated within fifteen days from the time the event giving

⁴This record is woefully inadequate about other factual circumstances relating to this grievance. For example, grievant's status in 1986, as relates to Ms. Wigal's, was not made part of the record. Because the outcome herein turns on other legal considerations, these matters are not dispositive and shall not be further discussed.

rise to a grievance occurred or became known or from the most recent occurrence of a continuing practice. WCBE argues⁵ that,

[b]ecause seniority rosters constitute public information which may be accessed by all employees . . . , surely it is incumbent upon one who challenges another employee's seniority, much less her own, to offer some evidence to explain her delay in detecting and seeking to rectify the perceived error. To hold otherwise would be to perpetually subject seniority rosters and similar personnel determinations to the possibility of attack, undermining the notion of finality which is surely incorporated in the time periods specified in §18-29-4.

Both parties in this matter have presented arguments, in different contexts, about the authority of a level two hearing examiner. However, these arguments do not have to be addressed. The crucial question and controlling issue presented by the facts and circumstances of this grievance is whether the grievant may prosecute her complaint pursuant to W.Va. Code §§18-29-1 et seq. Code §18-29-2(a) defines a grievance as

any claim by one or more affected employees . . . alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including . . . compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or

⁵ Ordinarily, the Grievance Board will not address issues at level four not fairly raised at the lower grievance levels when the matter is submitted for a decision on the record. However, it is noted that in the submitted briefing schedule, the parties agreed grievant should have additional time for a rebuttal submission, "if necessary." Grievant's representative notified the undersigned that a rebuttal brief would not be submitted, and did not respond to WCBE's timeliness defense in any manner. The late-breaking timeliness issue is not controlling herein and need not be addressed, see also n. 4.

practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Grievant's concerns about her seniority appears to be based on speculation and were unfounded, unproven or premature. Her opportunities to bid on voluntary transfers, presumably future job vacancies, are not affected by Ms. Wigal's seniority because Code §18A-5-8 now mandates that an aide vacancy be filled on the basis of qualifications. Moreover, grievant voiced no complaint of missed opportunities for extra-duty work over the past three years. In fact, seniority-within-classification as a determinant of eligibility for possible extra-duty work serves only as a basis for allocating employees to some type of hierarchical roster, for such occasional assignments must be meted out on a rotating seniority basis according to the provisions enunciated in W.Va. Code §18A-4-8b(b). All that remains is the effect of grievant's seniority status should a reduction in force of aides occur, and she presented no evidence or even a belief that such personnel actions by WCBE were imminent.

Grievant did not cite a single instance of any personnel action whereby her employment rights were adversely affected by Ms. Wigal's seniority. The grievant simply does not show an injury-in-fact, economic or otherwise, and her complaints of Wigal's status do not, at this time, constitute a matter cognizable under the grievance statute. See Shobe v. Latimer, 253 S.E.2d 54 (W.Va. 1979).

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant has been credited with seniority from the date she entered upon her duties with WCBE, September 24, 1987, and makes no claim that her seniority calculation is incorrect.

2. Linda Wigal was the most senior substitute aide on August 25, 1986, but was denied regular employment for a job vacancy at that time because of a legitimate qualification that the position be filled by a male. In recognition of her substitute seniority status, she prevailed on a grievance at level two that she would be employed for and have a retroactive seniority date when the next regular position became available.

3. Ms. Wigal began her duties as a regularly employed aide one month later than grievant in 1987, but WCBE's seniority roster lists August 25, 1986, as the commencement of Wigal's seniority.

4. In 1989 the grievant protested Ms. Wigal's seniority status asking, in essence, that the three-year-old uncontested Wigal grievance be disturbed and that Ms. Wigal's seniority be adjusted downward.

5. Grievant made no claim or showing that her compensation, hours, terms and conditions of employment or her employment status with WCBE have been adversely affected to date.

CONCLUSIONS OF LAW

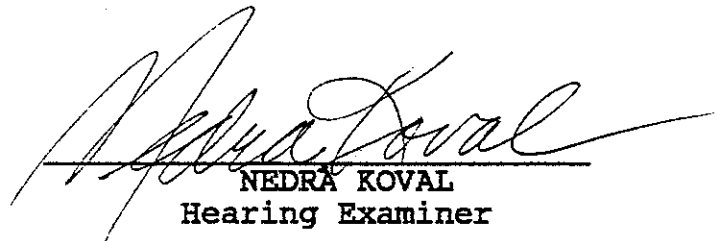
1. When the relief sought by a grievant is speculative or premature, or otherwise legally insufficient, her claim must be denied. Russell v. Kanawha Co. Bd. of Educ., Docket No. 89-20-671 (Jan. 17, 1990); Terek v. Ohio Co. Bd. of Educ. Docket No. 35-87-276-3 (April 4, 1988).

2. An employee does not ordinarily have standing in the grievance procedure to protest the employment status of a fellow employee unless harm is shown. W.Va. Code §18-29-2(a); See Shobe v. Latimer, 253 S.E.2d 54 (W.Va. 1979).

Accordingly, this grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

DATED: February 28, 1990


NEDRA KOVAL
Hearing Examiner