FRANCIS GIRARD,

Grievant,

v. **Docket No. 93-21-094**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent,

and

PRISCILLA D. SUAN,

Intervenor.

DECISION

Mr. Frank Girard, Grievant, filed this grievance sometime in early March, 1993. (See footnote 1) He alleges a violation of W. Va. Code §18A-4-7a stating he should have been placed on the preferred recall list after his full-time substitute position ended in June of 1989.

This specific grievance grows out of a prior grievance, decided by this Board in 1991. (See footnote 2) In that prior grievance Mr. Girard was placed in a full-time teaching position for the 1990/1991 school year, and Ms. Suan, the intervenor here, grieved that selection. This Board found the Lewis County Board of Education (hereinafter LCBE) used the wrong set of factors in filling the position and remanded the case to LCBE to re-evaluate the twocandidates using the correct set of factors stated in the first portion of W. Va. Code §18-4-7a. This Decision was subsequently affirmed by the Kanawha County Circuit Court. LCBE formed an independent selection committee, and that committee recommended Ms. Suan for the position. The LCBE then placed Ms. Suan in the position in January, 1993.

The Grievant's argument is if he had been properly placed on the preferred recall list at the end of the 1988/1989 school year he would have received the 1990/1991 position before any new employees, such as Ms. Suan, were considered.

FINDINGS OF FACT

The facts in this case are largely undisputed.

1. Mr. Girard has been employed as a substitute teacher with Lewis County for many years. During that time he frequently held full-time substitute positions to complete a school year for an absent teacher.

2. The Grievant began the 1988/1989 school year as a day-to-day substitute. In February of 1989 he became a full-time substitute. His contract at that time stated he was to be employed for 78 days. A letter attached to the contract stated the LCBE had employed him "as a Full-time Teacher in the Lewis County Schools with Lewis County High School as your home school for the remainder of the 1988-89 school year. . . ." The teacher regularly employed in this position was on medical leave.

3. The Grievant returned to day-to-day substituting during the 1989/1990 school year.

4. There was no reduction in force during the 1988/1989 school year. (Resp.'s Exh. 1, Affidavit of Mr. Gabe DeVano, Supervisor of Lewis County Schools).

5. Neither the Grievant's position of substitute teacher nor the position that he had substituted in was eliminated.

6. In August of 1990 the LCBE posted a vacancy for a vocational business teacher, utilized the second set of factors identified in W. Va. Code §18A-4-7a, and selected Mr. Girard for the position.

7. Shortly thereafter another applicant for the position filed a grievance over her non-selection.

8. This Board ruled on August 28, 1991 that since both applicants were substitute teachers at the time of the decision, the LCBE had used the wrong set of factors under W. Va. Code §18A-4-7a in evaluating the applicants. The case was remanded to LCBE to reevaluate the candidates using the correct set of factors.

9. Ms. Suan appealed to the circuit court and it upheld this Board's decision.

10. The LCBE appointed an independent review committee to reconsider the two applicants using the correct set of factors. They found Ms. Suan to be the most qualified, and LCBE awarded the position to her.

11. LCBE then placed Mr. Girard in a full-time substitute position. He filed this grievance stating he should have been placed on the preferred recall list at the end of the 1988/1989 school year, when he was not placed in the same full-timesubstitute position for the 1989/1990 year or was not allowed to "bump" another person.

12. Mr. Girard's testimony below is that he did not know there was a preferred recall list nor was he aware of his alleged right to be placed on this list.

PARTIES CONTENTIONS

Grievant argues his full-time substitute contract for the remainder of the 1988/1989 school year entitled him to be placed on the preferred recall list if there were no positions available for him to bump into. This argument is based on the Teacher's Probationary Contract of Employment he signed for that year. He states this contract bound both parties to all provisions of the contract, and since the contract had a clause which stated, "This contract shall be subject to any and all existing state laws, West Virginia Board of Education policies, County Board of Education policies and such laws, policies, rules and regulations as may be hereinafter enacted or adopted. . ." the LCBE was obligated to afford the Grievant all due process rights and also obligated to place him on the preferred recall list.

LCBE and the intervenor have three basic arguments. First, they argue the grievance is not timely because the grievable event occurred in 1989 and was not grieved until March of 1993. They aver the Grievant's reason for not filing, lack of knowledge of the list and lack of knowledge of the law, is insufficient to toll the time frame for filing a grievance. Secondly, they argue the Grievant as a substitute was never eligible to be placed on thepreferred recall list. Only permanent employees are eligible for placement on the list and only when there is a reduction in force. Their third argument is that this issue is precluded from review based upon the doctrine of res judicata, because the Grievant could have intervened in the prior grievance either upon request, or later by statutorily created right. W. Va. Code §§18-29-3(u).

DISCUSSION

A. Timeliness

W. Va. Code §18-29-4(a)(1) requires a grievance to be filed " within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant. . . ." Grievant testified he was aware his 1988/1989 position was just for the remainder of the school year, and that he returned to a day-to-day substitute position for the 1989/1990 school year. What he says he was not aware of was that there was a preferred recall list and that his contract allowed him the right to be placed on it. He also states he did not tell his representative what type of contract he had as a full-time substitute, thus, his representative could not advise him on this matter.

Grievant states the case Spahr v. Preston County Board of Education is controlling. Spahr noted

that W. Va. Code §18-29-4(a) contained a discovery rule exception to the time limits for filing grievances. Spahr held the time to invoke the grievance procedure did not begin to run until the grievant knew of the facts giving rise to the grievance. Id. at Syl. Pt. 1. Mr. Girard does notcontend he was unaware of the facts surrounding his employment, he states he was unaware of the law. The law is not an operative fact. Kent v. Jackson County Bd. of Educ., Docket No. 90-18-418 (Jan. 25, 1991). "Ignorance of the law is no excuse and does not invoke the Spahr discovery rule exception to the requirements of W. Va. Code §18-24-4(u)(1)." Watts v. Hancock County Bd. of Educ., DOcket No. 90-15-392 (Dec. 28, 1990); See Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991). The facts of the grievance were known by the Grievant in 1989. The Grievant did not file this grievance until 1993, thus this grievance is untimely.

B. Placement on the Preferred Recall List

W. Va. Code §18A-4-7a states in pertinent part:

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least seniority shall be properly notified and released from employment . . . . All professional personnel whose seniority is insufficient to allow their retention by the county board during a reduction in force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position.

A plain reading of the statute demonstrates a reduction in force is necessary before a preferred recall list can be created. Sworn testimony indicates there was no reduction on force for theyear 1988/1989. The position the Grievant was substituting in was not reduced, and the number of substitute teachers was not reduced. Thus, since there was no reduction in force there was no preferred recall list.

CONCLUSIONS OF LAW

1. Ignorance of the law will not toll the running of the time limitations cited in W. Va. Code §18A-29-4(a)(1). Watts; supra; Kent; supra.

2. There can be no preferred recall list developed for a school year unless there is a reduction

in force. W. Va. Code §18A-4-7a.

This grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 29, 1994

Footnote: 1The grievance form does not indicate the date of filing. A Level III hearing was held on March 8, 1993.

Footnote: 2Suan v. Lewis County Bd. of Educ., Docket No. 91-21-074 (Aug. 8, 1991).