SANDRA LAVOIE, .

Grievant, .

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v. . Docket Number: 94-20-186

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KANAWHA COUNTY BOARD OF EDUCATION, .

Respondent. .

DECISION

Sandra Lavoie (hereinafter Grievant) filed this grievance pursuant to the provisions of West Virginia Code §18-29-1 et seq. on or about April 4, 1994, challenging the Kanawha County Board of Education's decision to eliminate her position via a reduction in force. Grievant contends that the Board of Education (hereinafter Board) relied upon an incorrect hire date, thereby, eliminating her position as opposed to the positions of others with less seniority than she. Grievant's claim has been denied at the lower levels of the grievance procedure and appeal was made to level four on May 11, 1994. After numerous continuances for cause, a level four hearing was held on August 18, 1994, and the case became mature for decision on or after October 18, 1994.

At level four, the parties agreed to supplement the evidence presented at level two, which included a set of stipulations of fact. The first nine findings of fact below are stipulated facts.

Findings of Fact

1. Grievant is employed as a classroom teacher assigned to Sissonville High School.

2. Grievant was subject to a reduction in force in the total number of vocational business teachers employed by the Board.

3. Grievant was initially notified by letter dated March 15, 1994 that her contract would be recommended for termination.

4. Subsequent to the receipt of her initial notification, Grievant demonstrated to the [Board's] Personnel Office that the Principal of Sissonville High School had requested that she be employed effective October 5, 1987, and further asserted that the effective date of employment that was used to calculate her seniority was incorrect.

5. Based upon the information provided by the Grievant, a determination was made to use October 5, 1987 to calculate her seniority. The use of October 5, 1987 as the effective date of employment resulted in the rescission of the notice that her contract would be recommended for termination.

6. On March 21, 1994, the superintendent received an interpretation of school law from the State Superintendent of Schools that was relied upon to conclude that the effective date of employment, as approved by a [the] county board of education, was the appropriate date to use in the calculation of seniority.

7. At a regular meeting conducted by the Board on November 19, 1987, the Board approved the employment of Grievant effective October 8, 1987. Grievant was provided with an employment letter dated November 23, 1987, reflecting an effective date of October 8, 1987. Grievant did not then initiate a grievance or otherwise contest the October 8, 1987 effective date of employment.

8. Based upon the State Superintendent's interpretation, Grievant was notified by letter dated March 3, 1994, that she was to disregard the notice that rescinded the recommendation that her contract be terminated.

9. Pursuant to the initial recommendation that Grievant's contract be terminated, a hearing was conducted before the Board on March 30, 1994. Following the hearing, the Board voted to terminate Grievant's contract effective at the end of the current [1993-1994] school year.

10. Prior to Grievant being hired as a regular, full-time business teacher, she was assigned on August 26, 1987, to substitute in the same position which she later was awarded as a regular, full-time teacher.

11. On October 8, 1987, Grievant submitted a claim to the Board for additional wages for

having substituted in the same regular position for more than thirty days. (See footnote 1) The principal at Sissonville High School approved this request.

12. On this request form, Grievant stated that she had taught the business class from August 26, 1987 to October 3, 1987. She signed the form on October 8, 1987.

13. The Board's Personnel Office uses various forms to track the employment history of its professional staff, one of these forms is a Requisition for Personnel Employment. This form is submitted by the principal of the school where the employee is to be assigned. The principal at Sissonville High School, at the time Grievant was hired, was Calvin McKinney. Mr. McKinney submitted a requisition form to the Board on October 5, 1987, indicating that the effective date of Grievant's assignment was October 5, 1987. On October 12, 1987, someone drew a line through the October 5, 1987 date on this form.

14. The Board's Personnel office also maintains an Employee Data Sheet on each employee. The Employee Data Sheet for Grievant stated that she was hired on October 5, 1987, and the form was approved on October 7, 1987. However, this form was later altered on October 12, 1987, to reflect that Grievant's hire date was October 8, 1987. It is not known who altered this form.

15. Grievant entered into a probationary contract of employment with the Board for the school year commencing on July 1, 1987, and ending one year, two-hundred days later.

16. The Board approved Grievant's employment as a regular teacher on November 19, 1987, effective October 8, 1987.

17. At least one other professional employee hired by the Board in 1987, and who teaches in the adult vocation field, has a starting date of employment after October 5, 1987.

Discussion

In the public schools of West Virginia, boards of education, only upon nomination and recommendation of their superintendent, are empowered to hire professional personnel. W. Va. Code §18A-2-1. Also, layoffs or reductions in force as they are so called for professional employees, are to occur on the basis of seniority. In regard to the determination of one's regular employment seniority, W. Va. Code §18A-4-7a states as follows:

> The seniority of classroom teachers as defined in section one article one [18A-1-1] of this chapter with the exception of guidance counselors shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education and

> shall be granted in all areas that the employee is certified or licensed.

Further, W. Va Code §18A-4-7b(a) states, in pertinent part,

> Notwithstanding any other provisions of this code to the contrary, seniority for professional personnel. . . shall be calculated pursuant to the provisions of section seven-a [§18A-4-7a] of this article as well as the following: . . .
>
> (a) A professional employee shall begin to accrue seniority upon commencement of the employee's duties.

Grievant contends that her effective date of employment or hire date should be October 5, 1987. The Board contends that her hire date should be October 8, 1987. (See footnote 2)

Neither party disputes that Grievant was a substitute teacher beginning on August 26, 1987. Therefore, without evidence to the contrary, it is determined that Grievant was hired as a substitute prior to that date. She then entered into her duties as a business teacher at Sissonville High School as a substitute until receiving the position on a permanent basis as a result of the regular teacher's resignation.

In order to ascertain Grievant's legally correct date of hire as a regular, professional employee, W. Va. Code §§18A-4-7a and 7b(a) must be read in pari materia because they relate to the same subject matter and are not inconsistent. See, Finance Corp. v. Bluefield Bank of Grafton 438 S.E.2d 817 (W. Va. 1993). After construing the language of both of these sections so as to accord each of them meaning, it is determined that a professional employee's seniority is to be based upon the "length of time the employee has been employed as a regular full-time certified and/or licensed professional educator," beginning on the date he/she entered into those regular duties. In other words, a professional employee does not begin to accrue regular employment seniority until he/she begins to teach, even though he/she may have been officially hired prior to that date.

Grievant's reliance on Mr. McKinney's requisition for her services as support for a finding that she became a regular,professional employee on October 5, 1987, is misplaced. A principal cannot hire a teacher, only a board of education, by law, may contract with an employee for services. Therefore, Grievant could not have legally entered into her assigned duties as a regular, professional employee until the Board voted to hire her on November 19, 1987. It is questionable as to whether the Board is

empowered to make effective hiring dates retroactive; however, due to the holding in this case, the issue need not be decided herein. Assuming arguendo, the Board does not have such authority, the date Grievant entered into her assigned duties would be November 19, 1987. Otherwise, Grievant's seniority would begin from October 8, 1987. (See footnote 3) In any event, Grievant's claim must be rejected.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. Grievant bears the burden of proving her claim by a preponderance of the evidence. Black v. Cabell County Board of Education, Docket No. 06-88-238 (Jan. 31, 1989).

2. A professional employee's seniority is to be based upon the "length of time the employee has been employed as a regular full-time certified an/or licensed professional educator," beginning on the date he/she entered into those regular duties. W. Va. Code §§18A-4-7a, 18A-4-7b(a).

3. Grievant has failed to establish a violation of W. Va. Code §18A-4-7a with regard to the reduction of her position at the beginning of the 1994-1995 school year. Grievant has failed to establish that she has more seniority than another employee whose position was not reduced in force.

Therefore, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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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ALBERT C. DUNN, JR.

Administrative Law Judge

January 31, 1995

Footnote: 1Pursuant to W. Va. Code §18A-4-7.

Footnote: 2The Board cited to a State Superintendent of School's opinion dated February 16, 1994. Said opinion is not determined to be controlling in this case as the issue presented to the StateSuperintendent was whether a Board could hire a service employee, by contract, but require the employee to begin his/her duties prior to the effective contractual date. This is not the issue herein.

Footnote: 3The parties' testimony and argument presented with regard to the issue of whether Grievant was entitled to the excess substitute pay she received in 1987, and to what extent this determination has upon her seniority determination is a "red herring."