RITA EDWARDS,

Grievant,

v. **Docket No. 95-29-472**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rita Edwards, states:
Starting with the 1990-91 school year the Mingo County Board of ED. [sic] paid Ms. Edwards for 1 less year of experience than she was entitled. Several attempts at resolving this matter have failed. Ms. Edwards asks for the $1,196 she is owed for back pay plus interest.

Grievant seeks back pay since the 1990-91 school year. Mingo County Board of Education ("MCBOE") partially granted this grievance at Level II. The Hearing Examiner adjusted Grievant's years of seniority and ordered MCBOE to pay Grievant her back pay for the 1994-95 school year, as well as the amount currently owing for the 1995-96 school year. The award totalled approximately $300.00 "plus statutory interest on the date of payment." MCBOE limited the award because of its longstanding policy to adjust improper payments for only one year due to fiscal year budget constraints. Grievant appealed this decision to Level IV and a hearing was held on December 11, 1995. This grievance became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law. The facts are not in dispute and will be summarized below only to clarify the legal issues raised by the parties.

Findings of Fact

1. Grievant has worked for MCBOE since the 1985-86 school year. She is currently, and has been for sometime, a Chapter I Aide in a position funded by Federal monies.

2. At the beginning of the 1990-91 school year, MCBOE, because of a clerical error, failed to increase Grievant's rate of pay to reflect an additional year of seniority.

3. In February 1995, MCBOE, planning for a potential RIF action, sent seniority lists to all the schools so employees could check their seniority dates. At that time, Grievant discovered her seniority had been miscalculated.

4. That day Grievant called the Board's office and talked to Nautilus (See footnote 1) in payroll. Grievant was instructed to call Mr. Charles Cline, the Director of Chapter I programs. Grievant called the Chapter I office, but received no answer. The next work day Grievant called the Chapter I office and spoke to Ms. Betty Sammons, Mr. Cline's secretary. Ms. Sammons stated she and Nautilus would “check into it.”

5. A few days later Grievant called her representative, Ms. Rosemary Jenkins, and told her of the problem.

6. Ms. Jenkins met with Mr. Tommy Sammons, Treasurer, and he indicated a mistake may have been made and that he was not sure how far back it would go. He sent Ms. Jenkins to see Mr. Cline. 7. The meeting with Mr. Cline did not produce any results, and Ms. Jenkins returned to see Mr. Sammons.

8. Mr. Sammons then indicated a mistake had been made and he would check into the situation. Ms. Jenkins' understanding, at this time, was the problem would be “worked out.”

9. Because of MCBOE's multiple financial problems, Ms. Jenkins stated she gave Mr. Sammons the “benefit of the doubt” and did not suggest Grievant file a grievance.

10. Later, Mr. Sammons informed Ms. Jenkins about MCBOE's one year formula, and its policy to adjust any improper payments only one year back. (See footnote 2)

11. Ms. Jenkins informed Mr. Sammons, Grievant should receive back pay since 1990-91 and took Mr. Sammons a copy of a Putnam County Circuit Court case which supported her position. This last conversation between Ms. Jenkins and Mr. Sammons occurred in late May or early June 1995.

12. Although all parties agreed a mistake had been made, no mutual agreement was ever reached on back pay from the 93-94 year and earlier.

13. Grievant did not file this grievance until September 20, 1995. She waited to check her first pay check of the new school year to see if she had received the additional payment.

Issues

Grievant argues she is owed the money, did not discover the underpayment until February 1995,

and should be paid the entire amount. Grievant also argues the discussionsfrom February until late May/early June should toll the filing requirements of the grievance procedure. Grievant also states this grievance has been recognized as timely by the Level II decision to pay part of the owed funds. (See footnote 3)

MCBOE argues, as it did at Level II, that the grievance is untimely filed, and that settlement negotiations do not toll the filing requirements of the statute. Grievant should have filed when she learned the facts giving rise to the grievance in February 1995. In the alternative, MCBOE argues even if these discussions would toll the statute, Grievant should have filed shortly after late May/early June 1995, when it was clear there was no meeting of the minds, thus filing on September 20, 1995, is untimely. MCBOE further argues that if this grievance is found timely, the payment should be limited to the 1994-95 and 1995-96 school years, especially in light of MCBOE's long-standing policy to correct either over or underpayments for only the past year, due to budgetary restraints. MCBOE also notes Grievant, like any other employee, has a responsibility to verify her employment information occasionally.

Discussion

W. Va. Code §18-29-4(a)(1) states a grievance is 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 or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance . . . .

The W. Va. Supreme Court, in Spahr, et al. v. Preston County Bd. of Educ. (See footnote 4), addresses the issue of the discovery rule exception stated in the above Code section. The Spahr case is particularly instructive because it dealt with, as here, “a single act” that occurred years before that caused “continuing damage.” Id. at 742. The grievants in Spahr learned they should have been receiving a pay supplement for several years. The discovery rule exception outlined in W. Va. Code §18-29-4(a)(1) and clarified in Spahr, tolled grievants' filing time until the teachers discovered the error. However, “[o]nce the [Spahr] teachers learned about the pay discrepancy, they had an obligation to initiate the grievance procedure.” Spahr at 742. In this case, Grievant found out about the facts giving rise to her grievance in February 1995, and did not officially initiate the grievance procedure until seven or eight months later on September 20, 1995. With these facts alone it would

appear the grievance was untimely filed. However, a question remains whether the discussions between Grievant's representative and MCBOE from February 1995 to late May/early June 1995 served to toll the filing requirements until September 20, 1995. (See footnote 5)

The grievance process is "intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." Duruttya v. Bd. of Educ., 382 S.E.2d 40 (W. Va. 1989). Thus, settlement discussions and negotiations are encouraged. Our Supreme Court has also stated: "We do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten." Spahr at 743. The Court also noted that "in many instances the grievant will not have a lawyer; therefore the process should remain relatively simple." Id.

However, even if Grievant were given the benefit of the doubt, and the statute interpreted liberally, the discussions from mid-February to late May/early June cannot be seen as tolling the statute until September 20, 1995. Grievant or her representative knew before the end of the school year that MCBOE was willing to pay Grievant for 1994-95 and to adjust her salary for 1995-96, but would not pay her any further back wages. Although Ms. Jenkins then gave Mr. Sammons a copy of a court case dealing with a similar issue which found in a grievant's favor, this ruling on a Writ of Mandamus and from another county and circuit court could not be relied upon to settle this grievance without further communication and corroboration. Grievant had a duty to investigate the situation and assure the issue was resolved in a timely manner, instead of assuming MCBOE would change its mind and give her all requested back wages. Since Grievant's complaint had not been resolved, and there was no meeting of the minds on the issue of the rest of the back pay, Grievant should have, at the very least, filed her grievance at that time. Accordingly, this grievance is not timely filed.

However, since MCBOE, in its Level II decision recognized an error and was willing to grant Grievant back pay for 1994-95, as well as the beginning of the 1995-96 school year, this award will not be disturbed. (See footnote 6)

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. The discovery rule in W. Va. Code §18-29-4(a)(1) tolled Grievant's filing requirement until fifteen days from the date on which she learned of the event. Spahr, et al. v. Preston County Bd. of

Educ., 391 S.E.2d 737, 743 (W. Va. 1990).

2. Grievant learned of the event giving rise to her grievance in mid-February 1995 and engaged in settlement negotiations during the rest of the school year which did not resolve all of her concerns. These negotiations "broke down" in late May or early June, as the parties could not agree on the issue of back pay from 1990 to 1994. Thus Grievant knew at that time that her request for further back pay was denied.

3. Because Grievant did not file this grievance until September 20, 1995, it is untimely filed.

Accordingly, this grievance is **DENIED**. The ruling of the Level II Hearing Examiner, however, will not be disturbed. Grievant's seniority is to be adjusted and she is to receive the appropriate back pay for the 1994-95 and 1995-96 school years.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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: March 19, 1996

Footnote: 1

This individual was not further identified.

Footnote: 2

These improper payments included both over and under payments.

Footnote: 3

Given the decision in this case, the undersigned does not have to reach this issue.

Footnote: 4

391 S.E.2d 737, 743 (W. Va. 1990).

Footnote: 5

The safest and most appropriate thing for Grievant to have done in this instance would have been to file a grievance, and then hold it in abeyance by mutual agreement, pending possible settlement.

Footnote: 6

It is noted MCBOE did not appeal the Level II decision. See Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435; 420 S.E.2d 260 (1992).