CAROLYN DEMPSEY,

Grievant,

v. DOCKET NO. 96-29-020

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

ROSETTA SPAULDING,

Intervenor.

D E C I S I O N

Grievant, Carolyn Dempsey, filed this grievance in or about December, 1995, as follows:

> Grievant applied for a teacher's aide vacancy at Williamson Middle School. This vacancy was awarded to Rosetta Spaulding. Grievant alleges that the Respondent has violated West Virginia Code §18A-4-8b and §18A-4-8g by awarding this position to Ms. Spaulding instead of to the Grievant. Grievant requests instatement into the aide's position at Williamson Middle School, wages, benefits, and regular employment seniority retroactive to December 11, 1995.

Following adverse decisions at the lower levels, Grievant appealed to Level IV on January 18, 1996. A hearing was conducted on April 3, 1996, and this case became mature for decision on May 15, 1996, upon receipt of Grievant's Proposed Findings of Fact and Conclusions of Law.

Background

The underlying facts are not in dispute. Grievant was regularly employed by Respondent from Fall 1973 to Spring 1976. Grievant's Experience Record (G Ex. 1) notes that Grievant was "Not rehired for following year - withdrew retirement 9-21-76". Thereafter, an approximately 10-year hiatus ensued before Grievant worked again for Respondent. Grievant returned in 1985 as a substitute and

was subsequently regularly employed by Respondent on January 23, 1989. She remained regularly employed until June 30, 1990, when she was laid off and placed on the preferred recall list. Grievant was recalled as a regular employee on or about January 6, 1991, and worked through June 30, 1991, when she was again placed on preferred recall. Finally, Grievant was regularly employed on or about December 10, 1994, through June 30, 1995, when she was again laid off and placed on preferred recall.

Intervenor, Rosetta Spaulding, was regularly employed by Respondent on December 12, 1988, and worked for Respondent as a regular employee until June 30, 1991, at which time she was laid off and placed on preferred recall. She was again regularly employed by Respondent on December 1, 1991 through June 30, 1992, when she was again placed on preferred recall. The parties' regular service records, as presented by Grievant, without objection, are reproduced more succinctly as follows:

Grievant

12/10/73-6/30/76	2 years and 203 days
1/23/89-6/30/90	1 year and 158 days
1/6/91-6/30/91	175 days
12/10/94-6/30/95	202 days
TOTAL:	5 years and 8 days

Intervenor

12/12/88-6/30/91	2 years and 201 days
12/1/91-6/30/92	212 days
TOTAL:	3 years and 48 days

Respondent posted a vacant Aide position at Williamson Middle School in Fall 1995. Grievant and Intervenor were the top two senior applicants, both were qualified to fill an Aide position, and both had acceptable evaluations. Respondent chose Intervenor for the position based on her regular seniority date of December 12, 1988, versus Grievant's regular seniority date of January 23, 1989. Respondent did not credit Grievant with her regular employment time from 1973-1976.

Discussion

West Virginia Code § 18A-4-8b states:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel . . . on the basis of seniority, qualifications and evaluation of past service.
>
> . . .
>
> For purposes of determining seniority under this section an employee's seniority begins on the date that he enters into his assigned duties.

There is no dispute that both Grievant and Intervenor were qualified for the vacant Aide position, and that the more senior of the two applicants should have received the position. The dispute revolves around which of the two is the more senior applicant. A review of Grievant's regular service record indicates that, excluding the years of service from 1973-1976, Grievant's total time as a regular employee, 2 years and 170 days, is less than Intervenor's total time of 3 years and 48 days.

Thus, Respondent and Intervenor contend Intervenor was the most senior, albeit for different reasons. Respondent contends Intervenor is most senior solely based upon her starting date as a regular employee of December 12, 1988, versus Grievant's starting date as a regular employee of January 23, 1989. Intervenor contends she is the most senior based upon the total time in regular service employment.

Grievant contends that she is the most senior, and that Respondent erred when it did not credit her with regular employmentseniority for the years 1973-1976. Grievant argues that her break in service at the end of the 1976 school year was involuntary and, as such, the time period between 1976 and her reemployment in 1989 should be "bridged" so that she can recapture that approximately 3- year period of seniority.

Respondent is incorrect in its attempt to calculate Grievant's and Intervenor's regular employment seniority solely upon the basis of their respective starting dates. This Board has held that, when filling service personnel positions, the actual amount of regular seniority time the applicants possess must

be utilized to award the position, if such seniority is present. Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993). Because neither Grievant nor Intervenor had an unbroken record of regular employment with Respondent, merely relying upon their starting dates of employment results in an erroneous calculation of their actual time in regular employment. Both parties were laid off and placed on preferred recall several times during their employment, and their actual time in regular employment must be calculated to reflect those periods of layoff. Thus, the Grievant's calculations, presented above, are the more accurate reflection of the parties' actual time in regular service.

The issue becomes, then, whether Grievant is to be credited with regular service between 1973-1976, which would give her more actual time in service than Intervenor. Otherwise, Intervenor has more actual regular seniority with Respondent. This Board has previously held, in Chapman v. Webster County Bd. of Educ., Docket No. 92-52-349 (Feb. 25, 1993), citing Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992), that employees cannot recapture seniority based upon their years of experience before a voluntary break in service. That holding, as well as Triggs, implicitly reasons that an employee whose break in service was involuntary, such as a layoff, would be entitled to recapture seniority acquired before the break.

The decision in Chapman, supra, was not retroactive. Therefore, employees who had been credited with experience prior to a voluntary break in service before the date of the Chapman decision would be allowed to keep it. Those employees who voluntarily left a board's employment after the date of Chapman, February 25, 1993, could not do so.

In a non-disciplinary matter, a grievant has the burden of proving his or her allegations by a preponderance of the evidence. Thus, Grievant must prove by a preponderance of the evidence either that her break in service was involuntary, or that the board had a policy or practice of crediting employees with years of service prior to a voluntary break.

Grievant alleges she was laid off at the end of the 1975-76 school year. Respondent has no independent recollection other than Grievant's Experience Record (G. Ex. 1), which merely states, "Not rehired for following year - withdrew retirement 9-21-76." Respondent infers that since Grievant withdrew her retirement at that time, she did not intend to come back to work, and thus, herseverance must have been voluntary. As Grievant would not have been employed at that time for three years, she would not have had a continuing contract of employment, and so her contract simply

would not have been renewed. (See footnote 1)

Grievant has failed to meet her burden in both respects. The undersigned cannot find, based only on Grievant's testimony and her Experience Record, that her approximately ten-year hiatus in service was more likely than not involuntary. Importantly, Grievant did not even substitute for Respondent during that ten- year period. Further, Grievant failed to demonstrate the board had a policy or practice of crediting employees with years of service prior to a voluntary break in service. Indeed, in Hatfield v. Mingo County Bd. of Educ., Docket No. 29-87-019-4 (May 28, 1987), overruled in Chapman, supra, it is apparent that Respondent did not routinely credit employees with experience acquired prior to a voluntary break in service.

Based upon the record and the above narrative, it is appropriate to make the following finding of fact and conclusions of law.

Finding of Fact

1. Grievant's break in service from the end of the 1975-76 school year until 1985 was voluntary.

2. Respondent did not routinely credit employees with experience acquired prior to a voluntary break in service.

3. Grievant's regular employment seniority, excluding the years from 1973-1976, totals 2 years and 172 days.

4. Intervenor's regular employment seniority totals 3 years and 48 days.

Conclusions of Law

1. Service personnel cannot recapture seniority based upon their years of experience before a voluntary break in service. Chapman v. Webster County Bd. of Educ., Docket No. 92-51-349 (Feb. 25, 1993).

2. County boards of education must fill school service personnel positions on the basis of seniority, evaluations, and qualifications. W. Va. Code § 18A-4-8b.

3. When filling service personnel positions, the amount of regular seniority the applicants possess must be utilized to award the position, if such seniority is present. Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993).

4. Grievant has failed to prove by a preponderance of the evidence that her break in service from 1976 to 1985 was involuntary. 5. Grievant has failed to prove by a preponderance of the evidence that Respondent routinely credited employees with experience acquired prior to a voluntary break in service.

6. Grievant has failed to prove by a preponderance of the evidence that she has more regular employment seniority than Intervenor.

Accordingly, this grievance is **DENIED**.

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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

MARY JO SWARTZ

Administrative Law Judge

Date: June 28, 1996

Footnote: 1

A review of the pertinent Code Sections in effect in 1976 revealed that service employees were issued continuing contracts of employment after three years of acceptable service, and upon entering a new contract of employment for the following year. Otherwise, service employees' contracts were simply not renewed at the end of a school year. Service employees had no preferred recall rights in 1976. See W. Va. Code § 18A-2-6 (1973).