WILHELMINA M. GOINS, and

VIOLET A. COLLINS,

Grievants,

v. **Docket No. 97-41-116**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Wilhelmina Goins (Grievant) filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., claiming Respondent Raleigh County Board of Education (RCBE) owed her vacation days for her service as a long-term substitute. Grievant Goins initiated her grievance on January 8, 1997. On January 10, 1997, Violet Collins elected to join in Grievant Goins' grievance. Following denial at Level I, a Level II hearing was conducted on February 10, 1997. RCBE's Superintendent, Dwight D. Dials, denied the grievance at Level II on February 24, 1997. Grievants appealed to Level III where RCBE waived consideration as authorized by W. Va. Code § 18-29-4(c). Grievants appealed to Level IV on March 3, 1997.

At some point after appealing to Level IV, Grievant Collins elected to represent herself in this matter, and waived a Level IV hearing, relying on the record developed through Level III. Grievant Goins, through her designated representative, elected tosupplement the record at Level IV. In May 1997, Grievant Goins requested Administrative Law Judge Jerry Wright recuse himself, which he did. Thereafter, this matter was reassigned to the undersigned administrative law judge on June 18, 1997, and a Level IV evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on July 29, 1997. Grievant Collins did not participate in that hearing. The parties at the hearing elected to file written post-hearing arguments, and this matter became mature

for decision upon receipt of those submissions on August 27, 1997.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Level II.

FINDINGS OF FACT

1. Grievant Goins is currently employed by Respondent Raleigh County Board of Education (RCBE) as an Accountant/Secretary assigned to the Central Office.

2. RCBE has had policy GBRE-R in effect since September 28, 1982. That policy states that full time (261 day) employees receive one and one-half days of vacation for each complete calendar month of employment. J Ex 1.

3. Grievant Goins worked as a substitute prior to obtaining regular employment with RCBE in 1985.

4. During the 1982-83 school year, Grievant Goins was employed as a long-term substitute in RCBE's Maintenance Department, filling in for an employee on maternity leave from sometime in October 1982 to mid-January 1983. 5. While serving as a long-term substitute during the 1982-83 school year, Grievant Goins did not receive vacation benefits.

6. Grievant Collins is presently employed by RCBE as a Secretary III in the Personnel Department.

7. Grievant Collins was previously employed as a long-term substitute filling in for Garnett Moody during the month of August 1982.

8. Grievant Collins likewise did not receive vacation benefits while serving as a long-term substitute.

9. RCBE's records do not indicate what policy regarding accrual of vacation benefits was in effect for school service personnel prior to September 28, 1982.

10. During the 1984-85 school year Sue Swepston was employed by RCBE as a long-term substitute working in the Payroll Department during the absence of Lilly Sorrent. Ms. Swepston received vacation benefits for the 190 days she worked during that school year.

11. In June 1985, Ruth Hurt, previously employed by RCBE as a Switchboard Operator, replaced Lilly Sorrent as Payroll Clerk in RCBE's Central Office. Ms. Hurt received no specific training from

RCBE's Business Manager, David Shrewsberry, in regard to paying benefits to long-term substitutes, other than general guidance to follow the payroll practices established by Ms. Swepston.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1§ 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

The events giving rise to this grievance transpired in 1982 and 1983, prior to the time this Grievance Board was established to adjudicate grievances. However, unlike the grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., the grievance procedure for education employees does not contain a specific provision stating that the procedure "applies to grievances arising on or after the effective date" of the statute. W. Va. Code § 29-6A-11. That specific language is the basis for prior decisions by this Grievance Board refusing to consider claims by state employees regarding events that took place before July 1, 1988. Skeen v. W. Va. Dept. of Commerce, Labor & Envtl. Resources, Docket No. 91-CLER-371 (Feb. 20, 1992); Crookshanks v. W. Va. Div. of Rehabilitation Serv., Docket No. 89-RS-597 (Jan. 11, 1990); aff'd, Cir. Ct. of Kanawha County No. 90-AA- 22 (Aug. 10, 1992).

Because the education grievance procedure does not contain comparable restrictive language, this Grievance Board has previously adjudicated grievances which were filed within the time limits specified in the statute for initiating a grievance. See, e.g., Mullins v. Kanawha County Bd. of Educ., Docket No. 20-86-352-1 (Dec. 18, 1986); Miller v. Kanawha County Bd. of Educ., Docket No. 20-86-351-1 (Dec. 18, 1986); Dingess v. Kanawha County Bd. of Educ., Docket No. 2-86-013 (Nov. 12, 1986); Jones v. Kanawha County Bd. of Educ., Docket No. 20-86-084 (July 29, 1986); Strickland v. Kanawha County Bd. of Educ., Docket No. 2-86-013 (June 24, 1986). See also W. Va. Code §§ 18-29-3(a); 18-29- 4(a)(1). Although the records are not crystal clear at this point in time, all of the foregoingdecisions may have involved matters which were pending before the State Superintendent of Schools at the time this Grievance Board was established. It is further noted that W. Va. Code § 2-2-10(bb) provides that "a statute is presumed to be prospective in its operation unless expressly made retrospective." Nonetheless, this jurisdictional question need not be decided at this time

because RCBE expressly elected to rely upon the merits of this grievance in its post-hearing brief.

Respondent likewise did not raise the issue of timeliness at or before Level II. (See footnote 1) Therefore, in accordance with W. Va. Code § 18-29-3(a), Respondent was prohibited from raising the defense that this matter was not initiated at Level I within the time limits specified in W. Va. Code § 18-29-4(a)(1). Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996). See Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996).

At the time of the events at issue, only employees holding a 261-day contract were entitled to vacation days. Of course, RCBE was free to bestow more generous benefits on its employees, provided such benefits were uniformly provided to all employees performing like assignments and duties. W. Va. Code § 18A-4-5b. See Ball v. Mason County Bd. of Educ., Docket No. 96-26-135 (Aug. 30, 1996); Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). In Peters v. Kanawha County Board of Education, Docket No. 20-88-168 (Dec. 28, 1988), this Grievance Board determined that although W. Va. Code § 18A-4-3 mandates uniformity in compensation, that statute does not require a board of education to compensate one employee the same as another similarly situated employee, where the higher paid employee was receiving such pay as the result of an error or mistake. See Fisher v. Mercer County Bd. of Educ., Docket No. 27-86-112 (July 25, 1986). Accord, Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989); Crowder v. Kanawha County Bd. of Educ., Docket No. 20-86-307-1 (June 25, 1987). RCBE contends that, consistent with the written policy, Grievants were not awarded vacation time while serving as long-term substitutes. Therefore, the award of vacation time to Ms. Swepston, inconsistent with the established policy, was simply a mistake.

In this grievance, Grievants have established that another employee received vacation pay while they did not. However, Grievants failed to establish that this benefit was extended pursuant to any statute, policy, rule or regulation. See generally Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991). To the contrary, the plain language of RCBE's written policy limits such benefits to employees holding 261- day contracts. Grievants and Ms. Swepston did not hold 261-day contracts during the time periods at issue. Although there was credible testimony at Level II that Ms. Swepston's supervisor was aware she was receiving vacation benefits, it was not established that his interpretation of RCBE Policy GBRE-R was other than a mistake. (See footnote 2) See Parker, supra.

Further, Ruth Hurt, called as a witness by Grievant Goins at Level IV, testified that she made payroll determinations following examples of work performed by Ms. Swepston, who had been substituting for the regular payroll clerk, Ms. Sorrent. Significantly, Ms. Hurt did not indicate that she received any authoritative guidance on this particular matter, and never requested clarification from her supervisor or RCBE regarding application of Policy GBRE-R. (See footnote 3) Thus, a preponderance of the evidence indicates that Ms. Swepston's receipt of vacation benefits was an aberration, while Grievants' non-receipt of such benefits was consistent with RCBE's policy GBRE-R. Under this Board's prior holding in Peters, Grievants may not benefit from this irregularity.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. LoganCounty Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18A-4-5b permits county boards of education to extend benefits to service personnel beyond those benefits which are required, provided that such benefits are provided in a uniform manner.

3. Neither W. Va. Code § 18A-4-5b nor any other statute, policy, rule, or regulation requires a board of education to compensate one employee the same as another similarly situated employee where the higher paid employee was receiving such pay as the result of an error or mistake. See Peters v. Kanawha County Bd. of Educ., Docket No. 20-88-168 (Dec. 28, 1988). Accord, Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-128 (June 5, 1995); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989); Crowder v. Kanawha County Bd. of Educ., Docket No. 20-86-307-1 (June 25, 1987); Fisher v. Mercer County Bd. of Educ., Docket No. 27-86-112 (July 25, 1986).

4. Grievants failed to establish by a preponderance of the evidence that Sue Swepston's receipt of vacation benefits while serving as a long-term substitute for Payroll Clerk Lilly Sorrent during the

1984-85 school year was not contrary to RCBE Policy GBRE- R dated September 28, 1982.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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 andState 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: October 17, 1997

Footnote: 1

RCBE's failure to assert timeliness as a defense was based on the fact that Grievant Goins did not discover that another similarly situated employee had received vacation benefits until she had a conversation with her co-worker, Ms. Swepston, in January 1997, regarding entitlement to vacation benefits for a third employee. Grievant Collins became aware of the same set of facts when Grievant Goins filed her grievance at the Personnel Department. Arguably, Grievants did not become aware of the events giving rise to the grievance until that point in time, meeting the "discovery" exception to the fifteen-day time limit for initiating a grievance contained in W. Va. Code § 18-29-4(a)(1). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Footnote: 2

Although this Grievance Board has previously required school boards to rescind sucherrors, even to the point of recovering money paid to employees by oversight, given the amount of time that has passed since Ms. Swepston received her holiday benefits, the undersigned finds that such a result would be unconscionable.

Footnote: 3

It is apparent that the passage of time has so dimmed the memories of witnesses regarding events that transpired over ten years earlier that Grievants were unable to meet their burden of proof by a preponderance of the evidence. Although this circumstance represents a key element in the doctrine of laches, Respondent's argument on that issue need not be addressed. It is Grievants who have been prejudiced most by the delay in claiming this entitlement.