VICKIE S. MATHIS,

Grievant,

v.

DOCKET NO. 97-55-356

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Vickie Mathis filed this grievance on April 9, 1997, alleging that her seniority had been improperly calculated and that therefore her reduction-in-force was improper, and requesting that her employment be continued. The grievance was denied at the lower levels. She advanced the grievance to Level IV, where a hearing was held on December 16, 1997. The matter became mature for decision on January 23, 1998, the due date for submission of proposed findings of fact and conclusions of law. For reasons explained herein, the grievance must be denied.

ISSUES

1. Was the grievance timely filed?
2. Is Grievant entitled to seniority credit for substitute teaching during school years 1981-82 and 1989-90?
3. Was Grievant on an approved medical leave of absence in 1975-76? If so, is Grievant entitled to seniority credit for the time she spent on medical leave?

FINDINGS OF FACT

1 1.

Grievant has been sporadically employed by Respondent, as either a substitute teacher or a regularly-employed teacher, at least since 1975.

2 2.

Grievant was hired as a regularly-employed teacher for school year 1975-76. However, sometime during that year, Grievant's physician directed her not to return to work, formedical reasons. At the request of then-Superintendent Pizzino, (See footnote 1) Grievant submitted a letter from her physician explaining that she could not work.

3 3.

Grievant received 39 days of seniority credit for days worked in 1975-76. She received no seniority credit related to an approved medical leave of absence. (L II, Bd. Ex. 4. (See footnote 2))

4 4.

No minutes of board of education meetings indicate that Respondent granted a medical leave of absence for Grievant in 1976. However, board minutes show that Respondent formally acted on other employees' requests for medical leave of absence. There is also no record of Grievant formally resigning her employment with Respondent in 1975-76. Such resignation would normally be reflected in Respondent's minutes. (See L II, Bd. Ex. 3; Tr. pp. 41 and 45.)

5 5.

Grievant was formally rehired, as a substitute teacher, in the fall of 1976.

6 6.

Kati Walls, Secretary in Respondent's personnel department, works with teacher certification and personnel files, and keeps records of individuals' employment. Ms. Walls reviewed Grievant's employment record and Respondent's records to determine if adjustments in her seniority were justified. She was unable to locate any record which indicated that Grievant had ever had an approved medical leave of absence, other than a handwritten note on a business record developed by an unknown employee of Respondent for transmission to the Retirement Board (L II, Gr. Ex. 1). Specifically, a search of meeting minutes and other records revealed no request for medical leave, and no granting of such leave by Respondent. Consequently, no change in Grievant's seniority calculation was made due to claimed medical leave.

7 7.

During school year 1981-82, Grievant worked for more than 133 days. Grievant worked as a substitute teacher for approximately one-half of the school year, and then was hired as a regular, full-time teacher in January of 1982. She taught as a regularly employed teacher for 105 days that year, and received 105 days' seniority credit. (L II, Tr. pp. 6.)

8 8.

Grievant remained employed as a regular, full-time teacher until she resigned August 26, 1985. She was later hired again, as a substitute teacher. (L II, Bd. Ex. 4.)

9 9.

In 1989-90, Grievant worked for more than 133 days. Grievant worked as a substitute

teacher for approximately 86 days, and then as a regular, full-time teacher for 95 days. She received 95 days' seniority credit for this work. (L II, Tr. pp. 7 and 27.)

10 10.

Grievant has remained employed as a regular, full-time teacher since the 1989-90 school year. (L II, Bd. Ex. 4.)

11 11.

In the spring of 1996, Grievant was notified that her employment as a regular, full-time teacher might be terminated as a result of a reduction-in-force (RIF). Grievant then inquired about Respondent's calculation of her seniority, specifically whether she should be credited for substitute service during 1981-82 and 1989-90, when she taught for more than 133 days. A written response in June 1996 stated that her seniority had been properly calculated, as she was not due any seniority credit for her substitute service. Grievant did not contest Respondent's calculation of her seniority, regarding substitute service. Her employment was not terminated, as she was not reduced-in-force (RIF'd). (L II, Tr. p. 28, Bd. Ex. 1.)

12 12.

Before Christmas of 1996, Grievant saw a notice stating that teachers do not lose senioritywhen on medical leave of absence. (L II, Tr. p. 12.)

13 13.

In the spring of 1997, Grievant was again notified that her employment might be terminated as a result of a RIF. She then instituted this grievance, challenging Respondent's calculation of her seniority. She remains employed by Respondent as a regular, full-time teacher.

14 14.

After receiving RIF notices, other teachers requested reviews and adjustments of their seniority. One record was found to be in error. For Peggy Baldwin, credit for an entire school year of regular, full-time employment had been omitted through clerical error. Two other teachers, Kathy Stowers and Linda Brown, had been formally granted leaves of absence by Respondent, and had received seniority credit for the leave time. No adjustment was necessary in Ms. Stowers' and Ms. Brown's records.

15 15.

Respondent's long-standing policy has been to deny seniority credit for time spent in substitute teaching. (L II, Tr. pp. 43 and 50.)

DISCUSSION

In this non-disciplinary grievance, Grievant bears the burden of proving all elements of her claim, by a preponderance of the evidence. 156 C.S.R. §4.19 (1996); Black v. Cabell County Bd. of Educ.,

Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code §18-29-6. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more credible and convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

TIMELINESS: Respondent asserts that, as Grievant and her counsel first inquired in 1996 about her seniority, and were informed that she was not credited for substitute service, her grievance on this point is untimely. It argues that, once Grievant raised the issue of seniority for substitute service, she was obligated to pursue it to a conclusion. Respondent also points out that Grievant knew, at least in December of 1996, that she had a question about whether or not she had received seniority for her alleged medical leave of absence, and that therefore the medical leave issue was also untimely. Grievant asserts that she had suffered no harm in 1996 due to Respondent's seniority calculation because her employment was not terminated, that seniority is a continuing issue, and that therefore her grievance is not untimely.

The grievance statute, W. Va. Code §18-29-4(a)(1), requires that grievance proceedings be initiated “within fifteen days following the occurrence of the event upon which the grievance is based, ... the date on which the event became known to the grievant or ... the most recent occurrence of a continuing practice giving rise to a grievance ..." The Grievance Board has consistently denied grievants' claims when respondents properly raise and prove the affirmative defense of untimeliness, and grievants do not establish good cause for their delay. Cox v. Kanawha County Bd. of Educ., Docket No. 93-20-049 (Mar. 31, 1993); Winland v. Wetzel County Bd. of Educ., Docket No. 92-52-490 (Feb. 16, 1993); Seckman v. Brooke County Bd. of Educ., Docket No. 92-05-106 (Jan. 29, 1993).

Here, Grievant originally raised the substitute seniority question in 1996. (The issue of the medical leave of absence was not raised in 1996.) The answers given then by Respondent were the same as its position herein. However, Grievant did not take any action to resolve her differences regarding the calculation at that time, probably because her employment was not actually terminatedthrough the RIF.

Such delay cannot be countenanced. Prior cases have found similar delays to be untimely. Wells v. Hancock County Bd. of Educ., Docket No. 92-15-405 (July 30, 1993) (no justification for ten month

delay in filing grievance, where the grievant had inquired about and been given a negative determination on professional seniority credit for prior service as a Food Service Director); Lilley v. Summers County Bd. of Educ., Docket No. 93-45-399 (June 16, 1994) (grievant knew of questionable transfer from one school to another in June, but waited until after the new school year began and the transfer effectuated to file grievance; ruled untimely); Booth v. Brooke County Bd. of Educ., Docket No. 92-05-386 (Mar. 2, 1993) (grievant knew of and inquired about a wage dispute but delayed too long to file a grievance). The provisions of W. Va. Code §18A-29-1 are clear and unambiguous and will be applied by this Grievance Board in the absence of evidence that delay in requesting a hearing was attributable to the negligent or deliberate act of the employer, unavoidable accident, or excusable neglect. Jeffries v. Boone County Bd. of Educ., Docket No. 03-86-187-1 (Aug. 9, 1986).

An employee must timely pursue her rights through the grievance process or demonstrate a valid reason for the delay. Butta v. Ritchie County Bd. of Educ., Docket No. 43-86-315-3 (Aug. 11, 1987). Here, Grievant clearly did not timely pursue her right to challenge Respondent's denial of seniority for days upon which she worked as a substitute teacher. Further, there is no convincing rationale in favor of allowing the delay here. Grievant merely asserts that it was acceptable for her to drop her challenge in 1996, after her employment was continued and she was not RIF'd. However, that the “harm” was alleviated for other reasons in no way changes the fact that Grievant knew of the facts giving rise to the grievance nearly one year prior to initiating this grievance. Whilethe calculation of one's seniority may be a continuing matter, once one discovers a perceived error in that calculation and institutes review of the calculation, one is obligated to pursue the issue through the grievance process. Wells, supra. The statute does not allow for the filing of such a late grievance, and the interests of efficiency and finality mandate that such delay not be permitted under these circumstances. The grievance, as to the issue of substitute service seniority for school years 1981-82 and 1989-90, is untimely.

However, Respondent bears the burden of proving when Grievant first knew of the facts giving rise to her grievance regarding seniority for the period of any medical leave of absence, as timeliness is an affirmative defense. Louk v. Barbour County Bd. of Educ., Docket No. 95-01-386 (May 23, 1996), and cases cited therein. It failed to prove when Grievant first knew that she had not been credited with seniority during the period in 1975-76 for which she claims she was on a medical leave

of absence. There is no clear evidence on this point; merely a possible inference to be drawn from Grievant's testimony that she became aware in December 1996 that teachers do not lose their seniority when taking medical leave. I decline to extrapolate from that minimal information that Grievant knew, prior to inquiry related to this grievance, that she had not been credited for her alleged 1975-76 medical leave. Consequently, the medical leave issue cannot be found untimely.

SUBSTITUTE SERVICE:

Even if it were timely, Grievant is not entitled to seniority credit for time spent substitute teaching in 1981-82 and 1989-90. Generally, seniority is 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." W. Va. Code §18A-4-7a, paragraph 2 (emphasis added). However, "[u]pon completion of [133] days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee." W. Va. Code §18A-4-7a, paragraph 3 (emphasis added). (See footnote 3)

Grievant properly received seniority credit for the days upon which she worked as a regularly-employed teacher in each of the two school years. Under the statute as currently written, she is not entitled to seniority credit for time worked as a substitute, except for the very limited purpose of calculating seniority for purposes of applying for vacancies. See, e.g., Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997) (noting that granting “regular” seniority for substitute teaching was an irregularity which led to takeover of the county schools by the State Board of Education) and cases cited therein.

However, Grievant argues that a prior state of affairs regarding substitute service seniority should apply to her. Grievant cites Landers v. Kanawha County Bd. of Educ., Cir. Ct. of Kanawha County, No. 92-AA-323 (Apr. 5, 1995), to support her argument that she should have been credited with one year's regular seniority for her substitute teaching in each of the two school years, 1981-82 and 1989-90. Landers states that substitute teachers are to receive seniority for time worked prior to August of 1990, when they substituted for more than 133 days in a school year. This Grievance Board's decision in Townsend v. Mercer County Bd. of Educ., Docket No. 97-27-093 (Nov. 5, 1997), cited Landers in overruling a prior line of cases. The prior line of cases retroactively applied the current statutory restriction to all substitute service, thus limiting use of a substitute teacher's“seniority” to applying for vacancies and denying any permanent, on-going seniority credit

for substitute service performed prior to August 31, 1990. Townsend overruled those cases, noting that the Legislature failed to include statutory language evidencing its intent to apply the provision retroactively, and holding that an employee who had earlier received permanent, on-going seniority credit for substitute service of more than 133 days in a school year would not be deprived of that seniority as a result of the statutory change.

However, while Grievant may have worked in excess of 133 days in each of the two school years, she did not work in excess of 133 days in each year as a substitute. Rather, her time as a substitute was significantly less than 133 days in each year. There is no precedent of which I am aware which requires that seniority to be granted for less than 133 days substitute service, or that regular employment be combined with substitute employment in fulfilling the 133 days requirement. (See footnote 4) Thus, Grievant is not entitled to seniority credit for her substitute service, based upon the specific facts herein.

MEDICAL LEAVE OF ABSENCE:

Grievant argues that she complied with all of Superintendent Pizzino's requests for submission of a physician's letter in 1975-76, and that she thereby applied for and was granted a medical leave of absence. She asserts that, even though Respondent's meeting minutes and other records do not show formal approval of the leave of absence, it was granted. She points to a record of the Consolidated Public Retirement Board which she asserts proves that she had 5.155 years ofseniority on May 10, 1996; and to a business record developed by an unknown employee of Respondent for transmission to the Retirement Board (L II, Gr. Ex. 1) which notes, in handwriting, a leave of absence with the date 6-20-76. She asserts these documents show that she was granted a medical leave of absence.

Respondent argues that Grievant must have resigned her employment during 1975-76, because its minutes show that Grievant was hired as a substitute teacher in the fall of 1976. She would not have been hired as a substitute if she were still considered a regular, full-time employee, it asserts. It argues that there is no “discrepancy” created in its records by Grievant's Exhibit 1; there is only a mistake in a report created for retirement purposes. Respondent argues that the document should not be given any weight. Respondent notes that the report contains other errors (such as “339" days of teaching for that school year), and was not created as a calculation of seniority. Moreover, the notation regarding leave of absence is ambiguous, as no one knows who made the note or why, or

what “6-20-76" might mean. Respondent also asserts that the statutory provision granting seniority credit for medical leaves of absence (W. Va. Code §18A-2-2a) was not enacted until 1984, and is therefore inapplicable here. Thus, even if Grievant had received approval for a medical leave of absence in 1975-76, she must prove that Respondent had a practice of granting seniority at that time. (See footnote 5)

The evidence regarding whether or not Grievant requested or received approval for a medical leave of absence is ambiguous, at best. The Public Retirement Board letter itself states that the 5.155 years referenced is Grievant's “service with Wyoming County,” not her seniority. The PublicRetirement Board does not calculate seniority for teachers, and therefore its record of time credited for retirement purposes does not establish Grievant's seniority. Grievant's Exhibit 1, with the handwritten note regarding “leave of absence,” was created for use by the Public Retirement Board, not as a seniority calculation, and the handwriting is of unknown authorship. Moreover, a search of Respondent's records reveals no written request for the leave, (See footnote 6) nor granting of the request, although other requests were acted upon. As the document has not been submitted, one must question whether Grievant submitted her physician's letter as an explanation for her resignation, or whether an official request for leave was made. In the absence of better evidence, I am unable to find that Grievant has carried her burden of proving that she requested or was granted a medical leave of absence. Her request for seniority credit for 1975-76 must be denied.

CONCLUSIONS OF LAW

1 1.

> In this non-disciplinary grievance, Grievant bears the burden of proving all elements of her claim, by a preponderance of the evidence. 156 C.S.R. §4.19 (1996); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code §18-29-6. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more credible and convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2 2.

> Respondent bears the burden of proving when Grievant first knew of the facts giving rise toher grievance, as timeliness is an affirmative defense. Louk v. Barbour County Bd. of Educ., Docket No. 95-01-386 (May 23, 1996), and cases cited therein.

3 3.

Respondent proved that Grievant's challenge to its calculation of seniority, as related to Grievant's substitute service, was untimely. Respondent failed to prove that Grievant's challenge to its calculation of seniority, as related to a medical leave of absence, was untimely.

4 4.

Grievant failed to prove by a preponderance of the evidence that she applied for or was granted a medical leave of absence in 1975-76.

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

Any party may appeal this decision to the Circuit Court of either Kanawha or Wyoming County. 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.

Dated: January 29, 1998

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JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

Mr. Pizzino died more than 10 years ago.

Footnote: 2

"L II" refers to the Level II record, with exhibits identified as "Bd. Ex." for Respondent's exhibits, and "Gr. Ex." for Grievant's exhibits. The Level II transcript of hearing is referred to as "Tr."

Footnote: 3

The 133 days, and any days in excess of that, are prorated and vest as a fraction of the school year worked by a permanent, full-time teacher. Id.

Footnote: 4

Several cases mirror Landers in holding that a grievant was entitled to seniority for her service for more than 133 days in each of several years, on a prorated basis. However, in such cases, all of the service in each year was performed as a substitute teacher. See e.g., Inclan v. Marshall County Bd. of Educ., Docket No. 89-25-444 (July 31, 1990).

Footnote: 5

Respondent's representative stated that it had no such practice, prior to the statutory requirement's enactment. Grievant submitted no evidence on this point.

Footnote: 6

The letter submitted at Level II as Board Exhibit 2 is clearly not the request for medical leave, to which Grievant and her husband testified, as that Exhibit cites transportation problems, not medical problems, as the reason for ceasing work.