JOANNE HARMON,

Grievant,

v. **Docket No. 00-38-201**

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Joanne Harmon, a probationary employee, filed this grievance against her employer, the Pocahontas County Board of Education ("PBOE"), when her probationary contract was not renewed, and she was placed on the preferred recall list. She was subsequently placed in a teaching position for the 2000-2001 school year. She alleged violations of W. Va. Code §§ 18A-2-2, 18A-2-7, 18A-2-8a, and 18A-4-8b, stating as follows:

18A-2-2 section III:

Pocahontas County Board of Education terminated me four (4) days prior to the date of my hearing, therefore, I was denied an opportunity to be heard prior to termination.

18A-2-7:

I was not given an opportunity to be heard prior to having my name placed on the preferred recall list.

18A-2-8a:

Although the Board of Education did grant me a hearing date within the time frame specified, I believe I was discriminated against. A special meeting of the board had been called to hear others affected by reduction of force prior to termination of positions. My position had already been terminated, before I was given the opportunity to be heard.

18A-4-8b:

> The Board of Education has refused to recognize all of my teaching experience within the county in regards to seniority, and in doing so has made me the least senior employee, even though I have more certifications and qualifications for the position from which I was terminated.

She requested as relief:

> Minimum five (5) years full-time teaching position, guaranteed in writing, or three (3) years salary with benefits, plus rehire for first available position within my areas of certification. (See footnote 1)

The following Findings of Fact are based upon stipulations of fact entered into by the parties, the testimony of Superintendent Phares taken during the telephonic conference at Level IV, and the exhibits admitted into evidence at Level IV.

FINDINGS OF FACT

1. During the 1999-2000 school year, Grievant was employed by PBOE as a teacher, under a probationary contract of employment.

2. Grievant was notified by letter dated March 15, 2000, that the superintendent would not be recommending her rehiring, due to reorganization. The letter stated Grievant had ten days from receipt to request a statement of reasons for non-rehiring and a hearing before PBOE. 3. PBOE held termination hearings for employees with continuing contracts and probationary contracts on March 28 and 29, 2000. Grievant's hearing was not held on these dates, because she did not request a hearing until March 24, 2000.

4. PBOE voted not to renew Grievant's employment contract on March 30, 2000. She was notified by letter dated March 31, 2000, that she had been released from her contract due to a reorganization, and her name would be placed on the preferred recall list. The letter states, “[t]his action does not reflect your job performance in any way but is the sole result of reorganization.”

5. Grievant's hearing was held by PBOE on April 3, 2000. PBOE did not change its decision not to renew Grievant's contract after the hearing.

6. Grievant was hired as a substitute teacher for the 1997-98 school year, and worked 97 days.

She was also hired in an alternative education position at Marlinton Middle School, teaching three evenings a week, for the 1997-98 school year, and worked 126 hours in this position.

7. Grievant was hired as a half-time Title I teacher at Hillsboro Elementary Middle School, for the 1998-99 school year. Her probationary contract of employment is dated June 23, 1998.

8. On July 6, 1998, Grievant was also hired as a half-time substitute teacher at Hillsboro Elementary Middle School. Her substitute contract is dated July 7, 1998.

9. PBOE's records reflect Grievant's seniority date as August 24, 1998.

10. Grievant has been placed in a full-time teaching position for the 2000-2001 school year.

DISCUSSION

Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). Grievant's first argument is that she was improperly terminated. Shebelieves that PBOE acted wrongfully in voting to terminate her probationary contract prior to her hearing, and that PBOE did not listen to her at her hearing. She further argued that the procedures set forth in W. Va. Code §§ 18A-2-2 and 18A-4-8b were violated by this action.

As PBOE points out, Grievant's arguments are misplaced. First, W. Va. Code § 18A-4-8b outlines seniority rights for school service personnel. Grievant was a teacher, and this statute does not apply to her. Further, as a probationary employee, Grievant had limited statutory rights. She was not entitled to the advance notice she received that her contract would not be recommended for renewal. By statute, she only has to be notified that the board of education has not renewed her contract, and it is then that she may request a hearing. The fact that PBOE gave her notice of the superintendent's recommendation does not change the statutory procedure. Miller v. Bd. of Educ. of Boone County, 190 W. Va. 153, 437 S.E.2d 591 (1993). Her contract was not terminated. A probationary contract expires by its own terms. PBOE simply declined to renew her contract in the spring of 2000. However, later, it was able to place her in a position for the next school year. PBOE was only required to follow the procedures set forth in W. Va. Code § 18A-2-8a, which it did. Baker v. Hancock County Bd. of Educ., Docket No. 97-15- 447 (May 5, 1998). W. Va. Code § 18A-2-2 cited by Grievant applies, by its terms, to teachers with continuing contracts. As Grievant was not employed under a continuing contract, that statutory provision did not apply to her.

W. Va. Code § 18A-2-8a provides:

> The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last-knownaddresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
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> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

The Supreme Court of Appeals of West Virginia addressed this statutory provision, and the rights of probationary employees in Miller, supra.

> However, the statute plainly states, in pertinent part, that "the superintendent at a meeting of the board on or before the first Monday in May . . . shall provide in writing to the board a list of all probationary teachers that he recommends to be **rehired** for the next ensuing school year." **W. Va. Code**, 18A-2-8a [1977] (emphasis added). There is no mention of a hearing being held before the first Monday in May nor is there any mention of the superintendent having to provide a list of those probationary employees who are not being rehired. There is also no mention of the board of education having to take some action to not rehire probationary employees. The only mention of probationary employees who are not being rehired is that they are to be provided notice of the nonrenewal of their contract, and if requested, a statement of the reasons for the nonrenewal of the contract and a hearing.
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> . . .
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> Not only is **W. Va. Code**, 18A-2-8a [1977] clear that no affirmative action is required when not rehiring a probationary employee, but that is the only interpretation which makes sense because a probationary employee's contract is for one year and the contract automatically expires if it is not renewed without any affirmative action by the board of education.

The Court stated in Syllabus Point 6, " **W. Va. Code,** 18A-2-8a [1977] does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees other than notifying the employees that they will not be rehired, and if requested, providing a reason for the nonrenewal and a hearing." "In Miller the grievants received notice prior to the board meeting that their probationary contracts would not be renewed. Since the grievants were not harmed by this early notice the Court stated this harmless error 'does not requirereversal of the final judgment.' Id. at Syl. Pt. 5." Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995).

Specifically, as to Grievant's argument that she should have been afforded a hearing before the decision was made, the Supreme Court of Appeals of West Virginia has held that the concept of "due process" does not apply to nontenured personnel, because they do not have a "property interest" in their jobs. Miller, supra, (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)). This Grievance Board has held that W. Va. Code § 18A-2-8a does not require a pre-termination hearing when a board of education is not renewing a probationary contract of employment.

> When a probationary contract is not renewed per the procedure set forth in Code § 18A-2-8a, the board is "not required to convene a pre-termination hearing because Grievant, in effect, was not terminated; rather, [her] contract, which is probationary and thus affords [her] no property interest in [her] employment, was not renewed." Cordray [v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991)], [citing Belota v. Boone Co. Bd. of Educ., Docket No. 90-03-252 (Nov. 30, 1990); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) and Roth, supra]. Even if the reasons for non-renewal are disciplinary in nature, a probationary employee is not entitled to any protections beyond those provided for in Code § 18A-2-8a. See Burrows v. Wood County Bd. of Educ., Docket No. 96-54-281 (Oct. 24, 1996). Accordingly, Grievant was not entitled to any advance notice of the Board's decision, nor was [the Board of Education] required to follow the provisions of Code § 18A-4-8.
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> Therefore, it must only be determined whether the provisions of the applicable statute, Code § 18A-2-8a, were followed. In order to comply with that provision, a board of education need only notify the employee of its decision by certified mail within ten days, which was undisputedly done by the Board in this case. Then, if the employee so requests, the Board must provide the reasons for the decision in writing and a hearing. Miller, supra.

Baker, supra.

Applying this case law to the facts here, PBOE notified Grievant her contract would not be renewed, and provided her with a hearing after that decision was made, just as the statute provides. She was not entitled to a hearing prior to PBOE deciding whether to accept this recommendation. As

in Miller, the fact that the superintendent did providenotice to Grievant that he would not recommend that her contract be renewed does not provide her with any additional statutory rights.

As to Grievant's claim that she was discriminated against because other employees received hearings apparently in conjunction with the decision not to renew their contracts, she has not made a prima facie case of discrimination. W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

In order to establish a prima facie case of discrimination, a grievant must prove:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment been treated by his employer in a manner that the other employee(s) has/have not in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext." Id.

Grievant did not demonstrate that she suffered any detriment by not receiving a hearing before the decision by PBOE not to renew her contract as other employees did. She asserted that PBOE did not listen to her because her hearing was held after a decision had been made, but she offered no evidence in support of this claim. Just because she was unable to convince the board of education of her position does not mean they did not listen to her and consider whether her position was reasonable and correct. It should be noted that there was no evidence that any probationary

employee who received a hearing prior to the decision on contract renewal was able to persuade PBOE to renew his or her contract. Further, PBOE has provided a legitimate reason for treating Grievant differently. Grievant did not request her hearing until March 24. Had she requested the hearing earlier, she also would have had her hearing on March 28 and 29. Grievant was not discriminated against.

Grievant further argued she had sufficient seniority that she should not have been subject to being "terminated" as the least senior teacher. Again, as a probationary employee, Grievant's status was different from that of a regular employee. PBOE was not required to demonstrate cause for not renewing her contract. The undersigned can find no authority for the proposition that PBOE was required to look to Grievant's seniority. "The nonrenewal of a probationary teacher's contract of employment is governed by Code §18A-2-8a regardless of whether the nonrenewal is the result of a county board's need to reduce its professional staff. Alltop v. Gilmer County Bd. of Educ., Docket No. 11-87-167-3 (Dec. 11, 1987)." McCarthy v. Mason County Bd. of Educ., Docket No. 93-26-292 (May 31, 1994. "[A]t Level IV, the [probationary] employee bears the burden of showing that he did not receive a full and complete hearing on the reasons for the non-renewal of his contract; that the evidence did not support that the reasons were substantive; and/or he was denied his rights under Policy 5300." Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4, 1995). Neither party asked that the transcript from Grievant's hearing before the board of education be made a part of the record. Accordingly, although PBOE supplied that transcript to the undersigned, it will not be considered by the undersigned. The only reason in the record for the non-renewal of Grievant's contract was that there was a reorganization. Although Grievant asserted in her written argument that two non-tenured teachers were teaching in the same certification area as she, and they had lesser qualifications, no evidence was placed in the record regarding this assertion. Grievant has not demonstrated that the evidence presented at the hearing before the board of education did not support that the reasons given for non-renewal of her contract were substantive, and she has not met her burden of proof in this regard.

PBOE pointed out, however, that, regardless of Grievant's seniority, seniority earned as a substitute is meaningless in a reduction in force, citing Code § 18A-4-7a, which provides, in pertinent part:

> Upon completion of one hundred thirty-three 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. One hundred thirty-three days or more of said employment shall be prorated and shall vest as a fraction of the school year worked by the permanent, full-time teacher.

PBOE is quite correct in this regard. “[I]t is well established that substitute service cannot be considered when seniority is determined for [reduction in force] purposes. See Ankrum v. Brooke County Bd. of Educ., Docket No. 93-05-130 (June 23, 1993); Landers v. Kanawha County Bd. of Educ., Docket No. 92-20-170 (Nov. 4, 1992); Hoffman v. Kanawha County Bd. of Educ., Docket No. 91-20-278 (Jan. 31, 1992).” Jackson v. Monroe County Bd. of Educ., Docket No. 96-31-208 (Aug. 29, 1996). It is further noted that “[i]t is well established that employment as a substitute does not count toward accumulation of regular seniority. Jackson v. Monroe County Bd. of Educ., Docket No. 96-31-208 (Aug. 29, 1996); Bish v. Marion County Bd. of Educ., Docket No. 93-24-191 (Dec. 28, 1993); Fulk v. Preston County Bd. of Educ., Docket No. 92-39-266 (Jan. 4, 1993).” Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

> "Seniority for professional employees of a county board of education is based on 'regular, full-time' professional employment and the only seniority that a substitute teacher can earn is 'exclusively for the purpose of applying for employment' and this limited employment preference accrues 'upon completion of one hundred thirty-three days of employment in any one school year.' W. Va. Code, 18A-4-7a [1990]." Syl. Pt. 4, Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992).

Syl. Pt. 1, Bd. of Educ. of County of Mercer v. Townsend, Appeal No. 26600 (Apr. 25, 2000). Nonetheless, as Grievant has discovered what she believes is an error in her seniority date, which could affect her in the future, her arguments regarding what her seniority date is should be decided at this time.

Grievant argued she should have been credited with two years of seniority for the 1998-99 school year. She substituted in two positions nearly the entire year, each being a half-day position. She concluded that if a substitute who teaches a half-day for the year is entitled to a full year of seniority, she should get twice that amount. She cited no authority for this proposition. Clearly, someone who teaches a full day all year, whether it be in one full day position or two half day positions, is entitled to only one year of seniority, and no more. PBOE pointed out that W. Va. Code § 18A-4-7a makes clear this is the case where it states in ¶ five,

> Employment for a full employment term shall equal one (1) year of seniority, but no

employee may accrue more than one (1) year during any given fiscal year.

Grievant argued she is entitled to a full year of seniority for the 1997-98 school year. She argued that if you add the 97 days she substituted to the 41 days she taught in the alternative education program, this is more than 133 days. It must be pointed out that the record does not reflect the number of days Grievant taught in the alternative education program. The parties stipulated that she taught 126 hours in that program. Respondent argued that 126 hours, at the accrual rate of 7 hours a day, amounts to 18 days, which when added to 97 days is a total of 117 days. However, Respondent pointed out that this calculation is unnecessary because the contract for the alternative education position provides that it is an extracurricular assignment, and employees do not accrue seniority in such assignments. The record does not include this contract, nor does it otherwise reflect that the contract for the alternative education position states it was an extracurricular assignment. W. Va. Code § 18A-4-16 defines extracurricular assignment, and provides, in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. . ..

Grievant's contract to teach evening classes in the alternative education program was an extracurricular assignment, as it occurred at a time other than regularly scheduled working hours, and involved instructing students, on a regular basis.

W. Va. Code § 18A-4-7b provides as follows:

> Notwithstanding any other provision of this code to the contrary, seniority for professional personnel as defined in section one [§ 18A-1-1], article one, chapter eighteen-a of this code shall be calculated pursuant to the provisions of section seven-a [§ 18A-7a] of this article as well as the following: Provided, That any recalculation of seniority of a professional personnel employee that may be required in order to remain consistent with the provisions contained herein shall be calculated retroactively, but shall not be utilized for the purposes of reversing any decision that has been made or grievance that has been filed prior to the effective date of this section:
>
> (a) A professional employee shall begin to accrue seniority upon commencement of the employee's duties.

> (b) An employee shall receive seniority credit for each day the employee is professionally employed regardless of whether the employee receives pay for that day: Provided, That no employee shall receive seniority credit for any day the employee is suspended without pay pursuant to section eight [§ 18A-28], article two of this chapter: Provided, however, That an employee who is on an approved leave of absence shall accrue seniority during the period of time that the employee is on the approved leave of absence.

W. Va. Code § 18A-4-7a provides that:

> The seniority of classroom teachers as defined in section one, article one 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 and/or licensed.

It then goes on to address the seniority provision for substitutes working 133 days cited above. There is no provision for the accrual of seniority while serving in an extracurricular position. Grievant did not accumulate 133 days of employment during the 1997-98 school year, and is not entitled to seniority under W. Va. Code § 18A-4-7a for that year. She has not demonstrated that PBOE's record of her seniority date is wrong.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996).

2. "W. Va. Code §18A-2-8a [1977] does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees." Syl. Pt. 6, Miller v. Bd. of Educ. of Boone County, 190 W. Va. 153, 437 S.E.2d 591 (1993).

3. W. Va. Code § 18A-2-8a requires a county board of education to provide “after-the-fact” notice to a probationary employee that it has decided not to renew her contract. If the employee so requests, the board must provide the employee a list of reasons for the decision and a hearing on those reasons. Miller, supra.

4. A probationary employee whose contract is not renewed has no property interest in her employment, is not entitled to due process of law, and does not have a right to a pre-termination hearing or notice. Miller, supra; Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998); Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991).

5. As a probationary employee, Grievant had limited statutory rights. She was not entitled to the advance notice she received that her contract would not be recommended for renewal. The fact that PBOE gave her notice of the superintendent'srecommendation does not change the statutory procedure. Miller, supra. PBOE was only required to follow the procedures set forth in W. Va. Code § 18A-2-8a, which it did. Baker, supra. W. Va. Code § 18A-2-2 cited by Grievant applies, by its terms, to teachers with continuing contracts. As Grievant was not employed under a continuing contract, that statutory provision did not apply to her.

6. In order to establish a prima facie case of discrimination, a grievant must prove:

(a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment been treated by his employer in a manner that the other employee(s) has/have not in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Once a prima facie case of discrimination has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext." Id.

8. Grievant did not demonstrate that she suffered any detriment by not receiving a hearing before the decision by PBOE not to renew her contract as other employees did. Further, PBOE has provided a legitimate reason for not holding Grievant's hearing at the same time other employees

were afforded a hearing. Grievant was not discriminated against.

9. Grievant was entitled to only one year of seniority, and no more, for the year she taught in two half day positions. W. Va. Code § 18A-4-7a. 10. The position held by Grievant in the alternative education program was an extracurricular assignment. Grievant did not accrue any seniority under W. Va. Code § 18A-4-7a while serving in this assignment.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Pocahontas County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: October 18, 2000

Footnote: 1

This grievance was filed on or about May 2, 2000. Grievant's supervisor responded at Level I on May 22, 2000, that he was without authority to resolve the grievance. Grievant appealed to Level II, where a hearing was held on May 31, 2000. A Level II decision denying the grievance was issued on June 6, 2000. Grievant waived Level III, appealing to Level IV on June 12, 2000. A Level IV hearing was scheduled, and then canceled at Grievant's request. Respondent then asked that the grievance be submitted for decision based upon the record developed at the lower levels. A telephonic conference was held on August 16, 2000, to discuss this request, at which time PBOE Superintendent James Phares stated that the Level II hearing was not recorded. Nonetheless, the parties agreed to stipulations of fact during the conference call, and Superintendent Phares was duly sworn and gave limited testimony on one issue. Grievant's Exhibits 1 through 7 were also identified and marked during the conference call, and are admitted into evidence, there being no objection to their admission. After the conference call the parties met and agreed to one additional stipulation of fact, and submitted the grievance for decision, supplemented by written argument. Grievant was represented by her husband, Joe Harmon, and Respondent was represented by Walter Weiford, Esquire. This grievance became mature for decision upon receipt of the

parties' written arguments on September 8, 2000.