CONSTANCE BUFFEY,

Grievant,

v. **Docket No. 00-17-398**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Constance Buffey, employed by the Harrison County Board of Education (HCBOE) as a teacher, filed a level one grievance on October 12, 2000, in which she alleged violations of W. Va. Code §§ 18-29-1, 18A-4-5a, and 18A-4-1, occurred when experience earned outside the system was not included in the calculation of her salary. Grievant requested that her salary be adjusted, and back pay from the date of her regular employment in 1995. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, and advanced her appeal to level four on December 20, 2000. An evidentiary hearing was conducted in the Grievance Board's Westover office on March 19, 2001, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on April 24, 2001. (See footnote 1)

The following essential facts are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant was first employed by HCBOE as a substitute teacher effective August 30, 1990. 2. Grievant resigned from HCBOE in October 1990, after she accepted employment at Fairmont Catholic School.

3. Grievant was reemployed by HCBOE as a substitute teacher in August 1992. Grievant did not complete a new application at this time.

4. HCBOE employed Grievant as a regular employee in 1995. Grievant secured this position by bid sheet, and again, did not complete an application for employment. Although the bid sheets include information regarding the applicant's experience, HCBOE does not use these documents for purposes other than filling vacancies.

5. At some point, Grievant inquired of an HCBOE Secretary in the Personnel Department whether her experience at Fairmont Catholic School should be considered for pay purposes, and was

advised that it would not be used.

6. In August 2000, Grievant learned that HCBOE had credited another teacher for experience earned at a parochial school, for salary purposes. Grievant again inquired regarding this matter, and was advised that the experience would be counted.

7. Upon completion of the necessary paperwork, HCBOE paid Grievant for an additional two years of experience, retroactive to July 1, 2000.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. ofEduc. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant acknowledges that she was aware she was not being compensated for the experience, but asserts that she included the information on the bid sheet, informed her principal of her experience, and inquired at the Personnel Department. She did not learn that any other employee was receiving credit for outside experience until August 2000, at which time she promptly completed her application. Grievant relies upon the discovery rule exception set forth in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), in support of her claim for back pay.

HCBOE argues that Grievant was aware that she was not being compensated for the experience since her employment, and that upon application, the credit was awarded. Since the award was made retroactive to July 1, 2000, HCBOE denies that Grievant is entitled to any additional back pay, which is typically limited to fifteen days prior to initiation of the grievance in cases involving continuing violations. Finally, citing Chambers-Cooper v. Roane County Board of Education, Docket No. 90-44-

385 (Jan. 15, 1991), HCBOE notes that it is the employee's obligation to make application for the credit, and that the employer cannot be accountable for investigating the background of every employee. W. Va. Code §18-4-1(1) defines "Years of experience" to mean the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools, and service in the armed forces of the United States if the teacher was under contract to teach at the time of induction.

W. Va. Code § 18A-4-5a requires that county boards of education establish salary schedules for teachers which shall be uniform throughout the county as to the classification of training, experience, responsibility and other requirements.

Since HCBOE does not dispute the fact that Grievant was entitled to credit for the experience she earned at Fairmont Catholic School, the only remaining issue is whether she is entitled to any additional back pay. In Spahr, several vocational teachers who were inadvertently not paid a salary supplement beginning with the 1982-83 school year were awarded back pay. The Spahr grievants did not have actual knowledge that other similarly situated teachers were receiving a salary supplement until they met with their West Virginia Education Association (WVEA) representative in the fall of 1986, and they filed their grievance in October 1986, within fifteen days of this meeting.

The Court concluded in Syllabus Points 1 and 2 of Spahr that W.Va. Code § 18-29-4(a)(1), "contains a discovery rule exception to the time limits for instituting a grievance." Under this exception, the time limits on invoking the grievance procedure do not begin to run "until the grievant knows of the facts giving rise to a grievance." In the absence of such knowledge, the limitation period for filing a grievance is tolled as to prior years. In the text of Spahr, the Court also spoke of the grievants' lack of actual knowledge of their "entitlement to the supplement" until they met with their WVEA representative. In Spahr, the Court found the "fact" giving rise to the grievance was the knowledge that similarly-situated teachers were receiving a salary supplement but the grievants were not. Once the grievants confirmed that similarly-situated teachers were being paid the supplements, they were thus clearly made aware that their rights had been violated. The discovery of the facts in Spahr made the grievants aware of their rights. Hence, the facts and their entitlement were inextricably intertwined. Chambers-Cooper, supra.

The present situation is remarkably similar to that in Spahr. Grievant was not aware of all the operative facts when she was hired, and did not learn that other teachers were being credited for

experience earned outside the system until August 2000. Nevertheless, HCBOE attempts to shift the responsibility to Grievant to ensure that she was properly credited and compensated. In general, an employee is obligated to make her employer aware of facts such as experience and education, which are used to calculate compensation. In this case, Grievant exercised reasonable diligence in notifying HCBOE of her experience by including it on the bid sheets, and inquiring at the Personnel Department about her experience.

Accepting that HCBOE does not use the bid sheets for purposes of salary calculation, it remains the responsibility of an employer to properly classify and compensate new employees. No explanation was given as to why Grievant was not required to complete a new application in 1995. Using information provided five years earlier was clearly erroneous in a profession where experience and advanced education are determinative of compensation. In consideration of the fact that HCBOE did not solicit updated information from Grievant at the time she was hired into a regular, full-time position, that Grievant exercised due diligence in attempting to gain the experience credit,and later filed this grievance after learning that another teacher was given the credit, she is entitled to back pay from the effective date of her employment.

The factual and legal determinations contained in the foregoing discussion and analysis are incorporated in and made a part of the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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.

2. W.Va. Code § 18-29-4(a)(1), "contains a discovery rule exception to the time limits for instituting a grievance." Under this exception, the time limits on invoking the grievance procedure do not begin to run "until the grievant knows of the facts giving rise to a grievance." In the absence of such knowledge, the limitation period for filing a grievance is tolled as to prior years. Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990).

3. Grievant has proven that she did not know of the facts giving rise to the grievance until August 2000, tolling the time lines for filing the grievance as to prior years.

Accordingly, the grievance is **GRANTED**, and HCBOE Ordered to compensate Grievant all back pay from the date she was hired as a regular teacher in 1995 to July 1, 2000. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 3, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Steve Angel of the W. Va. Federation of Teachers, while HCBOE was represented by Basil R. Legg, Jr., Esq.