CURTIS GUNNOE,

Grievant,

v.

DOCKET NO. 03-41-084

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Curtis Gunnoe, filed this grievance against his employer, the Raleigh County Board of Education ("Board") on July 22, 2002:

> Grievant is a regularly employed Custodian/Electronic Technician. Grievant alleges that the Respondent erred in failing to grant him the proper number of personal leave days since 1990. Also, as direct result of the failure to properly grant him the number of personal leave days, it has not paid him the correct sum under the personal leave incentive program. Grievant alleges a violation of West Virginia Code [§] 18A-4-10 and applicable county policies and practices.
>
> Relief sought: Grievant seeks reinstatement of the personal leave days and compensation for lost sick leave incentive pay retroactive to 1990 with interest. (Grievant was awarded this relief retroactive to July 2001 at level II).

Grievant's Principal, Charles Maynard, was unable to grant the relief requested at level one. A level two hearing was held on March 5, 2003, and Connie Giammerino granted the grievance in part by decision dated March 18, 2003. Level three was bypassed pursuant to W. Va. Code § 18-29-4, and Grievant appealed to level four on March 25, 2003. A level four hearing was held in Beckley, West Virginia, on May 19, 2003,and this matter became mature for decision on June 19, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the

Board was represented by Kathryn Reed Bayless, Esq.

SUMMARY OF EVIDENCE

Level Three Joint Exhibits

Ex. 1 -

Grievance and level one decision.

Ex. 2 -

Scheduling documents.

Ex. 3 -

Personal Leave Policy.

Level Three Board Exhibits

Ex. 1 -

Curtis Gunnoe's Continuing Contract of Employment, dated April 17, 1990.

Ex. 2 -

April 9, 2001 Vacancy List.

Ex. 3 -

April 15, 2002 Vacancy List.

Ex. 4 -

Raleigh County Schools Summer-Personal Leave FY 2000-01.

Ex. 5 -

Raleigh County Schools Summer-Personal Leave FY 2001-02.

Ex. 6 -

March 7, 2003 letter from Emily C. Meadows to Connie Giammerino, with attachments.

Ex. 7 -

Curtis Gunnoe Sick Leave Incentive Bonus 1997-98 to Present.

Ex. 8 -

Curtis Gunnoe Summer Payroll Summary Summer 1991 to Present.

Level Four Board Exhibits

Ex. 1 -

April 22, 1997 Minutes of Committee Meeting.

Ex. 2 -

May 27, 1997 Minutes of Regular Meeting, p. 4.

Ex. 3 -

June 24, 1997 Minutes of Regular Meeting, p. 2.

Ex. 4 -

August 24, 2001 memorandum from Payroll Department.

Ex. 5 -

August 26, 2002 memorandum from Payroll Department.

Testimony

Grievant testified in his own behalf, and presented the testimony of Charles Maynard, and Howard Webb. The Board presented the testimony of Emily Meadows.

After a careful review of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by the Board as an Electronic Technician II/Custodian III at Woodrow Wilson High School. Grievant holds a 210-day employment contract in this position. Grievant also

holds a 30-day extra-duty summer contract as a Custodian III at Woodrow Wilson High School.

2. Howard Webb is employed by the Board as a custodian under a 240-day contract.

3. Raleigh County Board Policy C.1.20 provides that employees receive a bonus payment for days of personal leave which they earn but do not use. The bonus payment is $60.00 for each unused day of earned leave.

4. At some point in the summer of 2002, Grievant and Mr. Webb discussed the amounts of their bonus pay, and Grievant learned he was receiving less bonus pay than Mr. Webb.

5. For a number of fiscal years, Mr. Webb was credited with 18 days of personal leave per year, and Grievant was credited with 16.5 days of personal leave per year.

6. The Board had been awarding Grievant personal leave by granting 15 days of leave for the 210-day contract, and 1.5 days for the 30-day contract, for a total of 16.5 days.

7. W. Va. Code § 18A-4-10 provides that service employees are to be given a day and a half of leave for each month or greater portion thereof. Using this formula, the Board calculated that Grievant worked ten and one-half months under the 210-day contract, and was due 15 days for that period, and then worked one and one-half months under the 30-day contract, and was due 1.5 days for that period. 8. Grievant has received incentive pay for 16.5 days for each year the incentive policy has been in place until fiscal year 2002.

9. The level two grievance evaluator found in favor of Grievant, but limited his back pay award to one year prior to the filing of the grievance.

DISCUSSION

In a non-disciplinary grievance, the grievant has the burden of proving each element of his 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. Grievant contends he has lost “bonus pay” and personal leave days since 1990 as a result of the Board's failure to properly credit him with the appropriate amount of personal leave. The level two grievance evaluator ruled in favor of Grievant. The Board denies it improperly calculated Grievant's personal leave days in the first instance, but also argues that since the level two grievance evaluator awarded Grievant relief limited to one year

prior to the filing of the grievance, that laches should apply, and Grievant should be barred from any further relief.

The Board did not raise a timeliness issue at level two, and the sole issue is whether the doctrine of laches was correctly applied by the level two grievance evaluator to limit Grievant's damages to one year prior to the filing of the grievance.

W. Va. Code § 18-29-3(v) provides:

> The doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice.

"Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches." Maynard v. Bd. of Educ. of Wayne County, 357 S.E.2d 246 (W. Va. 1987); Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994). Laches occurs when an individual sleeps on his rights or neglects to assert a right of which is aware. Black's Law Dictionary 435 (5th abr. ed. 1983). Knowledge, unreasonable delay, and change of position are the essential elements of laches. Id.

Each year, the Board notifies its employees of the amount of leave credited to each employee. This notice is in the form of a sample check and each employee is asked to review that sample check for accuracy. Grievant testified he "took it for granted" that the leave awarded was correct, and "didn't pay no attention" to his communication from the Board which was provided prior to each actual paycheck of each school year. Grievant maintains that it was not until he was talking with Mr. Webb sometime prior to July 2002 that he "discovered" that the Board improperly calculated his personal leave days.

Grievant relies on the "discovery rule" in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), which holds that the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance. Grievant maintains the same rule applies to "laches," and further, that the Board's failure to credit him which the correct number of personal leave days is a continuing practice.

This Grievance Board has held that when a grievant challenges a salary determination which was made in the past, which the grievant alleges should have beengreater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing

damage cannot be converted into a continuing practice giving rise to a timely grievance . . .. See, [Spahr]." Garvin v. Webster County Bd. of Educ., Docket No. 01-51-616 (Apr. 23, 2002); Nutter v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995). Grievant's claim is that an alleged specific wrongful act which occurred in the past continues to inflict damage upon him. Although he chose to ignore the Board's communications, the fact giving rise to this grievance, the amount of personal days he received, was known to Grievant since 1990. Therefore, this does not fall within the continuing practice exception under Spahr, and likewise, does not except Grievant's claim from the doctrine of laches.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving each element of his 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 § 18-29-3(v) provides:

> The doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice.

3. "Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches." Maynard v. Bd. of Educ. of Wayne County, 357 S.E.2d 246 (W. Va.1987); Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994).

4. Laches occurs when an individual sleeps on his rights or neglects to assert a right of which is aware. Black's Law Dictionary 435 (5th abr. ed. 1983). Knowledge, unreasonable delay, and change of position are the essential elements of laches. Id.

5. When a grievant challenges a salary determination which was made in the past, which the grievant alleges should have been greater, this "can only be classified as a continuing damage arising from the alleged wrongful act which occurred in [the past]. Continuing damage cannot be converted

into a continuing practice giving rise to a timely grievance . . .. See, [Spahr]." Garvin v. Webster County Bd. of Educ., Docket No. 01-51- 616 (Apr. 23, 2002); Nutter v. W. Va. Dept. of Health and Human Resources, Docket No. 94-HHR-630 (Mar. 23, 1995).

6. Grievant had knowledge of the event giving rise to his grievance as early as 1991, but did not file the grievance until July 2002; therefore, he is barred by the doctrine of laches from recovering damages beyond the one year period prior to filing of the grievance.

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. 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 tosuch 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 21, 2003