BARRY SCRAGG,

Grievant,

v. Docket No. 05-50-256

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Barry Scragg ("Grievant"), employed by the Wayne County Board of Education ("WCBE") as a principal, filed a level one grievance on March 23, 2005, in which he alleged violations of W. Va. Code §§ 18-29-2(o) and 18A-4-3, when he was not paid for ten years experience credit. (See footnote 1) For relief, Grievant requests compensation for his experience credit, with interest and benefits. Consideration was waived by the parties at level one. Sometime prior to the level two hearing, WCBE corrected Grievant's salary calculation and compensated him for the 2004-2005 school year. Following an evidentiary hearing at level two, the grievance was granted in part, and Grievant was awarded the credit, plus interest for a calendar year prior to the filing of the grievance. Relying upon the doctrine of laches, and the statutory exception to laches, the grievance was denied regarding additional back pay. Appeal was made to level four on July 26, 2005, at which time the parties agreed the grievance could be reviewed based upon the level two record. (See footnote 2) Proposed findings of fact and conclusions of law were submitted on or before September 1, 2005, and the grievance was subsequently transferred to the undersigned for disposition. The following facts have been derived from a preponderance of the evidence made part of the record at level two.

Findings of Fact

1. Grievant began his teaching career at WCBE in 1970. He later moved to Florida where he taught for three years, and then to Mingo County, where he taught for another seven years. Grievant returned to WCBE in 1997, and is presently principal of Ceredo-Kenova Middle School.

2. Since his return to WCBE Grievant has inquired a number of times as to whether his salary was calculated correctly. He was always advised that his salary was correct.

3. Grievant's experience had been forwarded to the Personnel office, and was correctly listed in the county directory, but verification of the experience had not been given to the Treasurer.

4. In December 2004, Grievant learned that his ten years experience earned outside WCBE had not been included for purposes of salary calculation.

5. WCBE corrected the calculation and compensated Grievant for one year prior to the filing of this grievance.

6. Grievant seeks back pay, plus interest, for the years 2001-2002 and 2002- 2003. Prior to 2001, Grievant had received the maximum amount of experience credit due him at that time.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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 (2004); 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.

WCBE argues that Grievant's failure to exercise due diligence and confirm his salary over an extended period of time constitutes laches, and his relief is limited to one year prior to the filing of the grievance, as provided by W. Va. Code § 18-29-3(v). WCBE relies upon Ryan, et al. v. Berkeley County Board of Education, Docket No. 02-88-060 (Sept. 29, 1988), in which employees did not pursue a salary discrepancy after accepting an administrator's incorrect explanation for the difference. That grievance was denied based on a finding that the grievants had not exercised diligence in protecting their interest. Grievant asserts that he had confirmed that his salary was correct with the Treasurer's office on several occasions, and filed a grievance promptly upon learning the facts of the matter.

A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Bd. of Educ. of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987). "Laches" is a delay which operates prejudicially to another person's rights. Carter v. Carter, 148 S.E. 378 (W. Va. 1929); Bank of Marlinton v. McLaughlin, 1 S.E.2d 251 (W. Va. 1939). It is well-established that for laches to attach, two elements must be established: lack

of due diligence on the part of the party asserting its claim and prejudice to the opposing party resulting from the delay. Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994); Dollison v. W. Va. Dept. of Emp. Sec., Docket No. 89-ES-101 (Nov. 3, 1989); Maynard, supra. Unlike the grievants in Ryan, Grievant did not make a single inquiry, but was advised several times that his salary was correctly calculated. Seeking multiple confirmations from the Treasurer's office, plus verifying that his correct amount of experience was listed in the employee directory, was a reasonable effort by Grievant to ascertain the facts. WCBE concedes that the personnel office failed to inform the Treasurer's office of Grievant's experience credit. It could also be argued that the Treasurer's office was remiss in not cross checking the information.

Grievant timely initiated grievance proceedings upon learning that he was not being fully compensated, as the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94-41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

Although Grievant had previously suspected he was not properly compensated, he did not have the documented evidence to support his claim until December 2004. Thus, the "discovery rule," provided in W. Va. Code § 29-6A-4(a), applies in this instance. That rule provides 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." Syl. Pt. 1, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Accordingly, under these circumstances, laches will not bar Grievant from the full recovery to which he is entitled.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules ofthe W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §.4.21 (2004); 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. For laches to attach, two elements must be established: lack of due diligence on the

part of the party asserting its claim and prejudice to the opposing party resulting from the delay. Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994); Dollison v. W. Va. Dept. of Emp. Sec., Docket No. 89-ES-101 (Nov. 3, 1989); Maynard v. Bd. of Educ. of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987).

3. Grievant exercised due diligence under the "discovery rule," which provides 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." Syl. Pt. 1, Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

4. Grievant has proven that he is entitled to additional back pay for the experience credit omitted from the calculation of his salary during the 2001-2002 and 2002- 2003 school years, plus interest.

Accordingly, the grievance is GRANTED, and WCBE Ordered to compensate Grievant consistent with the holding of this decision.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Wayne 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 GrievanceBoard. 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: SEPTEMBER 27, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant did not pursue the claim of favoritism at level four. Code § 18A-4-3 addresses salary increments for principals, but is not on point in this case.

Footnote: 2 ***Grievant was represented by Susan Hubbard of the West Virginia Education Association, and WCBE was represented by David Lycan, Esq.***