RENEE NESTOR,

Grievant,

v. **Docket No. 05-47-221**

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Renee Nestor ("Grievant") initiated this proceeding on April 13, 2005, alleging she should not have been reduced in force ("RIF") in the spring of 2005, due to an alleged miscalculation of the seniority of another employee in her classification. The grievance was denied at level one on April 22, 2005. A level two hearing was conducted on May 6, 2005, and the grievance was denied in a decision dated May 12, 2005. A level three hearing was held on June 21, 2005, and the grievance was denied the same day. Grievant appealed to level four on June 27, 2005. A hearing was conducted in Elkins, West Virginia, on September 9, 2005. Grievant was represented by counsel, John E. Roush, and Respondent was represented by Superintendent Richard H. Hicks. This matter became mature for consideration upon receipt of the parties' fact/law proposals, on September 21, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

___1. Grievant is employed by Respondent as an aide/paraprofessional. After having served as a substitute for approximately six months, Grievant became a regularly employed aide on August 27, 2002.

2. Bobbi Quattro is also currently employed as an aide, and she became regularly employed on September 24, 2002.

3. Ms. Quattro was previously employed by Respondent in the aide classification from February of 1975 through June of 1977. Due to lack of need for her position, Ms. Quattro's contract

was not renewed for the 1977-1978 school year. (See footnote 1)

4. Ms. Quattro has been credited with two years more of seniority than Grievant, due to her previous employment from 1975-1977.

5. In the spring of 2005, Grievant's position as an aide was RIF'd due to lack of need, and she was placed on the preferred recall list.

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 (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.

The basis of Grievant's claim is that Ms. Quattro was not entitled to regular seniority credit for the time she worked during the 1970's; accordingly, if Grievant were more senior than Ms. Quattro, then she would have been RIF'd instead of Grievant. She argues that,because the laws governing reduction in force and preferred recall were not enacted until the early 1980's, Ms. Quattro had no right to retain her 1970's seniority when she was re- employed by Respondent in 2002.

The West Virginia Supreme Court of Appeals recognized in Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994), if a board of education decides to reduce the number of jobs for service personnel, it must follow the reduction in force procedures of W. Va. Code § 18A-4-8b, which requires that the board release the least senior employee in the classification to be reduced. See Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-233 (Apr. 30, 2001). Therefore, the only issue to be determined in this case is whether or not Ms. Quattro was, in fact, entitled to “bridge” the seniority she earned from 1975-1977, thereby making her more senior than Grievant.

As Respondent notes, this Grievance Board has previously addressed situations in which employees have worked for a board of education, left that employment, and then returned at a later date. As to whether or not early seniority can be retained, the determinative factor is whether the employee's break from employment occurred voluntarily or through board action, such as a RIF.

This Board has previously held, in Chapman v. Webster County Bd. of Educ., Docket No. 92-52-349 (Feb. 25, 1993), citing Triggs v. Berkeley County Bd. of Educ.,

> 188 W. Va. 435, 425 S.E.2d 111 (1992), that employees cannot recapture seniority based upon their years of experience before a voluntary break in service. That holding, as well as Triggs, implicitly reasons that **an employee whose break in service was involuntary, such as a layoff, would be entitled to recapture seniority acquired before the break**.

Dempsey v. Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996) (Emphasis added). This concept was reiterated in Griffith v. Boone County Board of Education, Docket No. 99-03-172 (March 16, 2000).

Grievant points to the fact that, during Ms. Quattro's quite lengthy break from employment with Respondent, she entered into her own business (a day-care center) and made no known efforts to obtain a new position with the Tucker County Board of Education. Nevertheless, this fact is irrelevant. Simply stated, Ms. Quattro's termination in 1977 was clearly involuntary; thus, she did not relinquish her seniority rights. Pursuant to W. Va. Code § 18A-4-8b, service personnel seniority is determined "on the basis of the length of time the employee has been employed by the county board within a particular job classification" and it "begins on the date that he or she enters into his assigned duties." Because Ms. Quattro's departure was through no fault of her own, she is entitled to retain the seniority she earned working in the aide classification from 1975-1977.

Grievant has failed to establish any error regarding Ms. Quattro's seniority. Therefore, as the least senior aide, Grievant was properly RIF'd in the spring of 2005. (See footnote 2) The following conclusions of law support this Decision.

Conclusions of Law

1. In a non-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 (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. If a board of education decides to reduce the number of jobs for service personnel, it must follow the reduction in force procedures of W. Va. Code § 18A-4-8b, which requires that the board release the least senior employee in the classification to be reduced. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994); See Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-233 (Apr. 30, 2001).

3. An employee whose break in service was involuntary, such as a layoff, is entitled to

recapture seniority acquired before the break. Dempsey v. Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996); See Griffith v. Boone County Bd. of Educ., Docket No. 99-03-172 (March 16, 2000).

4. Bobbi Quattro's seniority was properly calculated by Respondent; therefore, Grievant is less senior than Ms. Quattro in the aide classification.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Tucker 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: October 7, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently, she was not placed on a preferred recall list, because the statutory scheme governing it was not enacted until 1981.

Footnote: 2

It should also be noted that Grievant was recalled to her previous position for the 2005-2006 school year. Therefore, it appears that the goal of this grievance was to adjust Grievant's position on the seniority list.