THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

VALERIE TIBBS,

Grievant,

v. **Docket No. 06-15-447**

Sue Keller

Senior Administrative Law Judge

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent,

and

ROBERT STEWART, DEBORAH WAITE, &

LAWRENCE SHANE,

Intervenors.

D E C I S I O N

Valerie Tibbs ("Grievant"), employed by the Hancock County Board of Education ("HCBE") as a Bus Operator, filed a level one grievance on April 24, 2006, in which she alleged a mistake in the calculation of her seniority, a violation of *W. Va. Code* § 18A-4-15. For relief, Grievant requests the seniority of 10.9950 years granted by then-Superintendent Daniel Curry in June 1992 be reinstated, and back pay. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied following an evidentiary hearing at level two, and Grievant elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(c). Appeal to level four was made on December 10, 2006. Grievant, represented by Owens Brown of the West Virginia Education Association, HCBE counsel William Fahey, and Intervenors' counsel, John E. Roush of the West Virginia School Service Personnel Association, agreed to submit the grievance for decision based on the lower-level record. The matter became mature fordecision upon receipt of proposed findings of fact and conclusions of law filed by Grievant and Intervenors on or before March 14, 2007.

HCBE elected not to file proposals at level four. (See footnote 1)

Synopsis

___Grievant argues that her seniority has been miscalculated since 1994, and seeks reinstatement of seniority calculated in 1992. HCBE asserts that the grievance was not timely filed, and that Grievant's seniority is correct at present. Grievant testified that she first believed her seniority had been miscalculated during the 1994-95 school year, making the grievance untimely filed.

The following facts are derived from a preponderance of the credible evidence made part of the level two record.

Findings of Fact

1. Grievant was employed by HCBE as a substitute bus operator on October 20, 1979.

2. Grievant was employed as a substitute employee until October 15, 1986, when she received a regular assignment. While a substitute, Grievant was granted two leaves of absence (maternity).

3. While employed as a substitute bus operator, Grievant held assignments replacing bus operators who were on leaves of absence during the 1980-1981 (15 days) and 1985-1986 (69 days) school years for which she was granted regular seniority. 4. When Grievant questioned her seniority in 1992, then-Superintendent Daniel Curry determined her seniority at the end of the 1990-1991 school year was 10.9950 years. There is no explanation in the record as to how the Superintendent arrived at this conclusion.

5. HCBE's records establish that Grievant's seniority has been calculated throughout the years as follows:

1994-1995 - Grievant was credited with 9.7250 years of service, which included .72 years during the 1980-1981 school year. Grievant was later credited for 77 days of regular employment she completed during the 1985-1986 school year to increase her total by .38 years.

1995-1996 school year Grievant was credited with 11.1100 years of service.

2000-2001 school year Grievant was credited with 16.1100 years of service.

2002-2003 school year Grievant was credited with 17.55 years of service after credit for the 1986-87 year was reduced from 1.0 full year to .82.

2003-2004 school year Grievant was credited with 19.665 school years.

6. Grievant has been regularly employed, without interruption, by HCBE since 1986.

7. Grievant has been aware of the changes in her seniority calculation since at least the 1994-

95 school year.

8. At the level two hearing HCBE raised the issue of whether the grievance was timely filed.

Discussion

As a preliminary issue, HCBE contends that this grievance is untimely. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If WCBE meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 29, 1997). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997).

The statutory time lines for filing a grievance are provided in *W. Va. Code* § 18-29-4(a), which provides in part:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

* * * * * *

Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor . . . .

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra. See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). *Spahr v. Preston County Board of Education*, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery ruleof *W. Va. Code* § 18-29-4, stating "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 asserts that HCBE has engaged in a continuing practice, and that she timely filed this grievance after a discussion with administrators regarding her seniority in 2006. However, by her own admission, Grievant had been aware that HCBE's seniority calculation differed from her own since the 1994-95 school year when she was credited with only 9.78 years of seniority. She further testified that "[m]y seniority has changed from year to year. When I get my seniority I always put on there that I don't agree with my seniority, then I'll have a meeting with the assistant superintendent and sometimes I'll be given time back and sometimes not." (Level II trans. p. 7). This testimony establishes that Grievant has been aware of the situation for more than a decade prior to filing this grievance.

Grievant's argument that she is challenging a continuing practice is not persuasive. Although her seniority has fluctuated based on varying calculations over the years, she was aware sometime during the 1994-1995 school year that the 10.9 years granted to her by Superintendent Curry had been eliminated, and the records establish that it has never been reinstated. Further, the last alteration to her seniority appears to have occurred in the 2002-2003 school year, yet Grievant waited approximately four years from that time before filing a grievance. Under any of these scenarios, the grievance was untimely filed. (See footnote 2) In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

2. If the respondent meets this burden, the grievant may then attempt to demonstrate that she should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

3. If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997).

4. The grievance process must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance. *W. Va. Code* § 18-29-4(a).

5. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *Kessler, supra. See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

6. HCBE properly raised the issue of timeliness at the level two hearing, in compliance with *W. Va. Code* § 18-29-3. 7. HCBE established that Grievant has been aware of disparities in the calculation of her seniority since 1994 and delayed pursuing a grievance more than a decade, rendering the grievance untimely filed.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Hancock 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: APRIL 10, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Should the grievance be granted, Grievant would surpass Intervenors in seniority.

Footnote: 2

[2]The outcome of this decision does not prohibit the parties from seeking guidance from the State Department of Education regarding the proper calculation of Grievant's seniority.