

CARLA MARTIN,

Grievant,

v.

Docket No. 02-20-058

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant, Carla Martin, against her employer, Respondent, Kanawha County Board of Education ("KBOE"), in December 2001. The statement of grievance reads:

Grievant is employed as a substitute teacher's aide. Grievant contends that Respondent has failed to calculate her substitute teacher's aide seniority properly by failing to give her credit for approximately three years of substitute teacher's aide seniority she earned prior to her stint as a regular teacher's aide. Grievant alleges a violation of West Virginia Code §§18A-4- 8b and 18A-4-8g.

As relief, Grievant seeks "recalculation of her substitute seniority to include the three years of seniority mentioned above." [\(See footnote 1\)](#)

The following Findings of Fact necessary to the decision reached, are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant began working as a substitute aide for KBOE in October 1986, and was hired as a regular employee in the aide classification in October 1989.
2. In order to devote more time to a business opportunity, Grievant resigned from her regular position with KBOE, on March 20, 2001. At the same time, Grievant applied for work with KBOE as a substitute aide.
3. Grievant's resignation from her regular position was accepted by KBOE at a meeting on April 12, 2001. At that same meeting, KBOE approved Grievant's employment as a substitute aide, effective that day.

Discussion

The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant is seeking to have KBOE add the substitute seniority she earned from 1986 to 1989, to the substitute seniority she began earning in the Fall of 2001. Grievant argued she should not lose her substitute seniority, because there was no break in her service with KBOE; rather, she simply changed her employment status, similar to when an employee changes from one class title to another. In that regard, she pointed to W. Va. Code § 18A-4-8g(d), which provides that when an employee transfers from one class title to another, she retains the seniority in the old class title. Grievant also pointed to W. Va. Code § 18A-4-8g(e), which provides that the regular seniority a substitute earns while working in a long-term posted substitute position, for an employee on a leave of absence, is retained when the substitute is no longer in that position. Grievant acknowledges that neither of these statutes answers the question at hand, but points to them as support for the proposition that her old substitute seniority should not have just disappeared.

KBOE pointed to W. Va. Code § 18A-4-8g(a) which provides as follows:

a) Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five, article two of this chapter and continues until the employee's employment as a regular employee is severed with the county board. Seniority shall not cease to accumulate when an employee is absent without pay as authorized by the county board or the absence is due to illness or other reasons over which the employee has no control as authorized by the county board. Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen of this article, after executing with the board a contract of employment as provided in section five, article two of this chapter. **The seniority of a substitute employee, once established, shall continue until the employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter or employment as a substitute with the county board is severed.** Seniority of a regular or substitute employee shall continue to accumulate except during the time when an employee is willfully absent from employment duties because of a concerted work stoppage or strike or is suspended without pay.

(Emphasis added.)

While there was no break in Grievant's employment with KBOE, the statutory provisions on accumulation of seniority for substitutes and regular employees are quite detailed in addressing the varying situations during which substitute or regular seniority is earned, and in what circumstances it

is retained. "Seniority arises either from a statute or from a contract between an employer and an employee." Hall v. Bd. of Educ., 208 W. Va. 534, 541 S.E.2d 624 (2000). West Virginia Code § 18A-4-8g(a) states that substitute seniority "continues" only until the substitute either attains a regular position, or severs her employment. While it may not be entirely clear what is meant by the word "continue" as it is used in this statutory provision, it is clear that what happens to the substitute seniority is the same, regardless of whether the substitute severs her employment or attains a regular position. The undersigned concludes that this necessarily means that once a substitute attains a regular position, she loses her substitute seniority. Grievant lost her substitute seniority when she was hired by KBOE in 1989 into a regular position, and she cannot recapture it.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. "Seniority arises either from a statute or from a contract between an employer and an employee." Hall v. Bd. of Educ., 208 W. Va. 534, 541 S.E.2d 624 (2000).

3. The statutory provisions on accumulation of seniority for substitutes and regular employees are quite detailed in addressing the varying situations during which substitute or regular seniority is earned, and in what circumstances it is retained. W. Va. Code § 18A-4-8g(a) states that a substitute retains her substitute seniority only until she attains a regular position or severs her employment. This necessarily means that once a substitute attains a regular position, she loses her substitute seniority.

4. Grievant lost her substitute seniority when she was hired by KBOE in 1989 into a regular position, and she cannot recapture it.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: July 19, 2002

[Footnote: 1](#)

Grievant requested an informal conference on or about November 26, 2001, and filed her grievance after receiving her supervisor's response in December. The grievance was denied at Level I on January 9, 2002. Grievant appealed to Level II on January 14, 2002, and a Level II hearing was held on February 20, 2002. A Level II decision denying the grievance was issued on March 6, 2002. Grievant bypassed Level III, appealing to Level IV on March 13, 2002. A Level IV hearing was held on June 11, 2002. Grievant was represented by John Everett Roush, Esq., and Respondent was represented by James W. Withrow, Esquire. This grievance became mature for decision on July 3, 2002, upon receipt of the last of the parties' written arguments.