KENT GROSE and

STEVEN ADKINS,

Grievants,

v. **Docket No. 96-06-274**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Kent Grose and Steven Adkins (Grievants) filed this grievance in accordance with the provisions of W. Va. Code §§ 18-29-1, et seq., complaining that Respondent Cabell County Board of Education (CCBE) improperly displaced them from their multi-classified positions of Truck Driver/General Maintenance/Handyman. Grievants initiated this grievance on May 1, 1996. The grievance was waived to Level II where a hearing was conducted on May 29, 1996. CCBE Superintendent Richard Jefferson issued his Level II decision denying the grievance on June 20, 1996, and Grievants appealed directly to Level IV, waiving consideration at Level III as authorized by W. Va. Code § 18-29-4(c). Following a continuance, which was granted for good cause shown, a Level IV hearing was held in this Board's office in Charleston, West Virginia, on September 25, 1996. This matter became mature for decision upon receipt of Respondent's written post-hearing argument on October 3, 1996. The facts which are dispositive of this grievance are essentially undisputed. Accordingly, the following Findings of Fact are derived from the record developed through Level IV.

FINDINGS OF FACT

1. Grievant Kent Grose was employed by the Cabell County Board of Education (CCBE) during the 1995-96 school year in a regular school service personnel position holding the multi-classification of Truck Driver/General Maintenance/Handyman. HT at 17, 35. (See footnote 1)

2. Grievant Grose was first regularly employed by CCBE in January 1988 as a Custodian. HT at

35. Prior to that time, he had been employed as a substitute Custodian, beginning in September 1985. HT at 17, 35. He began working in the multi-classification of Truck Driver/General Maintenance/Handyman in September 1989. HT at 35.

3. Grievant Steven Adkins was employed by CCBE during the 1995-96 school year in a regular school service personnel position holding the multi-classification of Truck Driver/General Maintenance/Handyman. HT at 10, 35.

4. Grievant Adkins was first employed by CCBE in September 1978 as a Custodian. HT at 11, 35. He began working in the multi-classification of GeneralMaintenance/Handyman in December 1986. HT at 35. He began working in the multi- classification of Truck Driver/General Maintenance/Handyman in July 1990. HT at 35.

5. Fred McCoy was employed by CCBE during the 1995-96 school year in a regular school service personnel position holding the multi-classification of Truck Driver/ Handyman/Warehouseman. HT at 36.

6. Mr. McCoy was first employed by CCBE in July 1977 as a Custodian. HT at 36. He became a Stockroom Clerk in November 1978. HT at 36. In September 1980, he became a Truck Driver. HT at 36. Mr. McCoy returned to the Custodian classification in June 1982. HT at 36. In August 1986, he obtained the multi-classification of General Maintenance/Handyman. HT at 36; Rupert testimony at L IV. He began working in the multi-classification of Truck Driver/Handyman/Warehouseman in November 1986. HT at 36.

7. Carl Roach was employed by CCBE during the 1995-96 school year in a regular school service personnel position holding the multi-classification of Truck Driver/ Audiovisual Technician/Handyman. HT at 36.

8. Mr. Roach was first regularly employed by CCBE in February 1978 in the classification of General Maintenance. HT at 35; Rupert testimony at L IV. Prior to that time, he had been employed as a substitute custodian, beginning in September 1977. HT at 35. Mr. Roach began working in the multi-classification of Truck Driver/Handyman in August 1984 and, beginning in April 1993, in the multi-classification of Truck Driver/Audiovisual Technician/Handyman. HT at 35-36.

9. Sometime during the 1995-96 school year, CCBE decided to close the warehouse and audiovisual departments, effective at the start of the 1996-97 school year. Thus, the board determined that it would be necessary to eliminate the school service personnel positions then held

by Mr. McCoy and Mr. Roach. HT at 38-39.

10. In order of greatest seniority, the seniority dates in the service personnel classification of Truck Driver for those employees previously discussed are as follows:

Carl Roach	10/18/82
Fred McCoy	01/23/84
Kent Grose	11/03/89
Steve Adkins	07/01/90

(J Ex 1 at L IV.)

11. The predominant activity of the four positions held by Grievants, Mr. McCoy and Mr. Roach during the 1995-96 school year involved the Truck Driver classification within their respective multi-classifications. CCBE elected to reduce-in-force (RIF) Grievants as the least senior Truck Drivers currently employed in that classification. HT at 39-40.

12. CCBE placed Mr. McCoy and Mr. Roach on the preferred recall list as the result of the decision to eliminate their positions. Grievants, as the least senior Truck Drivers employed by CCBE, were notified that they were being RIF'd, or terminated, and they were placed on the preferred recall list for the 1996-97 school year. CCBE also notified a number of Custodians with less seniority than Grievants that they were being RIF'd, thereby providing Grievants an opportunity to bid into one of those positions. HT at 39-40.

13. On May 6, 1996, CCBE posted two school service personnel positions in its Maintenance Department soliciting applications for the multi-classification of Truck Driver/ General Maintenance/Handyman. The posting specified that, in addition to meeting therequirements of each classification, the successful applicants would need a West Virginia Commercial Drivers License (CDL), effective July 1, 1996. G Ex 1.

14. Grievants, Mr. Roach, and Mr. McCoy, applied for the posted multi-classified positions.

15. As of the date the posting closed, May 10, 1996, through at least July 1, 1996, Grievants each held current West Virginia CDLs. HT at 11, 15, 17-18; Grose testimony at L IV; Adkins testimony at L IV.

16. CCBE has historically furnished appropriate equipment for its employees to drive when taking the operating portion of a job-related CDL examination. HT at 42.

17. As of May 29, 1996, Mr. Roach and Mr. McCoy had not been able to take the driving portion

of the West Virginia CDL examination because the CCBE truck they were required to drive for the test was under repair at a private garage. HT at 29-30; Roach testimony at L IV; Rupert testimony at L IV.

18. Sometime in 1989 all Truck Drivers employed by CCBE were given the opportunity to test for a CDL. Neither Mr. Roach nor Mr. McCoy availed themselves of that opportunity. Parsons testimony at L IV. Neither Mr. McCoy nor Mr. Roach was required to have a CDL to perform the duties of the positions they held during the 1995-96 school year. Parsons testimony at L IV; Roach testimony at L IV.

19. Mr. McCoy received his CDL on June 14, 1996. McCoy testimony at L IV.

20. Mr. Roach received his CDL on June 24, 1996. Roach testimony at L IV.

21. On June 25, 1996, CCBE approved Mr. McCoy and Mr. Roach as the successful applicants for the posted Truck Driver/General Maintenance/Handyman positions. R Ex A at L IV. They assumed the duties of those positions on July 1, 1996.

DISCUSSION

W. Va. Code § 18A-4-8b provides, in pertinent part:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
>
> Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:
>
> (1) Regularly employed service personnel;
>
> (2) Service personnel whose employment has been discontinued in accordance with this section;
>
> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty- two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

* * *

All decisions by county boards of education concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided.

The seniority of any such service personnel shall be determined on the basis of the length of time the employee has been employed by the county board of education within a particular job classification.

* * *

Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade in that jobclassification if there is a job vacancy: Provided, That if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification.

* * *

Also pertinent to this grievance is the following portion of W. Va. Code § 18A-4-8g:

School service personnel who hold multi-classification titles shall accrue seniority in each classification category of employment which said employee holds and shall be considered an employee of each classification category contained within his multi-classification title. Multi-classified employees shall be subject to reduction in force in any category of employment contained within their multi-classification title based upon the seniority accumulated within said category of employment: Provided, That if a multi-classified employee is reduced in force in one classification category, said employee shall retain employment in any of the other classification categories that he holds within his multi-classification title. In such a case, the county board of education shall delete the appropriate classification title or classification category from the contract of the multi- classified employee.

That this grievance represents multiple competing equities is obviously an understatement. The

various personnel laws contained in W. Va. Code Chapters 18 and 18A, and, in particular, § 18A-4-8b, provide that seniority will be appropriately considered in making decisions concerning reduction in work force of service personnel. In the instant matter, CCBE awarded the service personnel positions at issue to the most senior applicants. However, Grievants note that these positions represent the jobs they have been performing satisfactorily for the past four years or longer. Further, at the time the posting closed, only Grievants were fully qualified for the positions as they held current CDLs, credentials which the successful applicants had not yet obtained. In adjudicating this dispute, the undersigned must necessarily look to this Grievance Board's prior decisions interpreting applicable service personnel laws. In Shahan v. Preston County Board of Education, Docket No. 92-39-213 (Dec. 29, 1992), this Grievance Board determined that grievants classified as Aides could not bump less senior employees who held the multi-classifications of Handyman/Custodian/ Aide or Bus Operator/Aide. Shahan noted that "multi-classification" is listed as a separate class title in W. Va. Code § 18A-4-8, and the State Superintendent of Schools had issued an opinion that multi-classified service personnel are to be considered as a separate classification. The essence of Shahan is that the grievants were not qualified to perform the Handyman/Custodian or Bus Operator aspects of the multi-classification positions held by the less senior employees. Therefore, their employer did not violate W. Va. Code § 18A-4-8b by refusing to allow them to displace those employees.

W. Va. Code § 18A-4-8g, quoted above, was first enacted in 1993. This statute, to a certain degree, supersedes Shahan, and the Superintendent's opinion referenced therein, by clarifying that multi-classified employees "shall be subject to reduction in force in any category of employment contained within their multi-classification title." W. Va. Code § 18A-4-8g ¶ 12 (1995). Otherwise, multi-classified employees identified for RIF would arguably compete for seniority with all other multi-classified employees, without regard to the various classifications held within their multi-classification title.

More recently, in Williams v. Raleigh County Board of Education, Docket No. 96-41- 169 (Dec. 31, 1996), this Grievance Board applied these provisions of W. Va. Code § 18A- 4-8g which more specifically address the seniority rights of multi-classified employees. Williams held that the grievant, a multi-classified Plumber I/General Maintenance employee, should have been allowed to displace a less senior employee holding theGeneral Maintenance classification, after the school board decided to eliminate a Plumber position, and the grievant was the least senior Plumber.

Applying the holdings in Williams and Shahan to the facts and circumstances presented by this grievance, the undersigned administrative law judge finds that CCBE substantially complied with W. Va. Code § 18A-4-8b when it subjected Grievants to RIF as the least senior Truck Drivers then employed by CCBE. Grievants did not present persuasive evidence that there were employees holding either the Handyman or General Maintenance classification whom Grievants should have been permitted to displace in accordance with W. Va. Code § 18A-4-8b. See Williams, supra. Further, CCBE properly posted the positions held previously by Grievants to be filled under the competitive procedures established in W. Va. Code § 18A-4-8b. Thus, it must now be determined if CCBE correctly awarded these positions to the successful applicants, rather than Grievants. (See footnote 2)

In regard to Grievants' nonselection to their previously held positions as Truck Driver/General Maintenance/Handyman, Grievants contend that the successful applicants did not have their CDL, as required by the posting, and were not otherwise qualified to hold the three classifications included in this multi-classified position. This latter argument will be addressed first. Both Mr. McCoy and Mr. Roach held the Truck Driver and Handyman classifications at the time they applied for the posted Truck Driver/General Maint enance/Handyman positions. Further, they had each held the General Maintenanceclassification at an earlier point in their employment. Under W. Va. Code § 18A-4-8e ¶ 9, "once an employee holds or has held a classification title in a particular category of employment, that employee shall be deemed as qualified for said classification title even though that employee no longer holds that classification." See Maynard v. Mingo County Bd. of Educ., Docket No. 96-29-012 (June 28, 1996). (See footnote 3)

Although Mr. Roach and Mr. McCoy are deemed qualified to hold the multi-classified Truck Driver/General Maintenance/Handyman positions under W. Va. Code §§ 18A-4-8b ¶ 2 and 18A-4-8e ¶ 9, Grievants contend that W. Va. Code § 18A-4-8b ¶ 7 required CCBE to fill the posted positions "within twenty working days from the posting date." Grievants contend that because Mr. Roach and Mr. McCoy did not have the required CDL by that point, Grievants should have been awarded the positions.

In Cyphers v. Marion County Board of Education, Docket No. 94-24-134 (Oct. 31, 1994), this Grievance Board substantially adopted the position argued by Grievants in this matter. The grievant in Cyphers was a Bus Operator who applied for a posted vacancy for a multi-classified position of

Electrician II/General Maintenance. As of the date the posting closed, Grievant was the only applicant who had passed the required competency tests mandated under W. Va. Code § 18A-4-8e and had a journeyman elec-trician licenseissued by the State Fire Marshall. The school board did not fill the position within twenty days after the posting, allowing the most senior applicant an opportunity to take and pass the first journeyman electrician test offered by the State Fire Marshall. Cyphers concluded that the school board violated § 18A-4-8b in these circumstances. The holding in Cyphers is consistent with earlier rulings of this Grievance Board. See Wilson v. Marion County Bd. of Educ., Docket No. 93-24-084 (July 27, 1993); Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88-050 (Oct. 3, 1988). See also Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993).

In the instant matter, CCBE's authority to establish a job-related qualification for school service personnel position exceeding the minimum requirements for that classifica tion title is not disputed. See Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995), rev'g Hopkins v. Ohio County Bd. of Educ., Docket No. 92-35-359 (Aug. 12, 1993). See also Bowman v. Marion County Bd. of Educ., Docket Nos. 95-24-003/007 (Oct. 10, 1995), rev'd, Circuit Court of Kanawha County, Nos. 95-AA-257/277 (July 17, 1996). Inasmuch as the parties recognize that the duties of the positions in dispute inherently require employees holding those positions to have CDLs in order to comply with the federal Commercial Vehicle Safety Act of 1986 and W. Va. Code §§ 17E-1-1, et seq., the school board's authority to expand qualifications for a service personnel position is not at issue. See Bowman, supra; Hopkins, supra.

CCBE takes the position that Mr. Roach and Mr. McCoy, as the more senior Truck Drivers competing for these positions that predominantly involve driving trucks, should be awarded these vacancies, unless there is an overriding circumstance. Further, CCBE contends that such a circumstance arose when, through no fault of their own, Mr. Roachand Mr. McCoy were delayed in taking the operating portion of the CDL by CCBE's inability to provide a working vehicle. CCBE previously supplied vehicles to other employees taking the same examination.

In Toney v. Lincoln County Board of Education, Docket No. 22-87-047-1 (Apr. 30, 1987), this Grievance Board recognized that "where one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two innocent parties who should prevail." The undersigned administrative law judge is persuaded that the failure of Mr. McCoy and Mr. Roach to

take the CDL exam in 1987 when that opportunity was presented is an event too remote in time to be held against them now. Moreover, it is clear from the record that CCBE has attempted to comply with the mandates of the law in an unusually complex set of circumstances, with the sole intention of awarding these positions to the employees who are legally entitled to fill them. CCBE posted the positions to indicate that the CDL was not required when the posting closed, but on July 1, 1996, when the successful applicants would enter upon their duties. (See footnote 4) Mr. McCoy and Mr. Roach had passed the written portion of the CDL exam prior to the posting but were delayed in taking the operating portion because CCBE was unable to provide an appropriate vehicle. (See footnote 5) In these circumstances, the undersigned finds that the facts and circumstances of this grievance require the exercise of equitable discretion as authorized by W. Va. Code § 18-29-5(b). See Toney, supra. Therefore, notwithstanding the fact that Grievants possessed the minimal qualifications of the position at the time the posting closed, Mr. McCoy and Mr. Roach, the more senior applicants as defined by W. Va. Code §§ 18A-4-8b and 18A-4-8g, would have been better qualified, but for CCBE's failure to provide them with a proper vehicle to take the operator's portion of the West Virginia CDL examination. Moreover, W. Va. Code § 18A-4-8b required CCBE to be able to "show cause why the employee with the most seniority is not promoted or employed in the position for which he applies." Accordingly, CCBE did not act arbitrarily and capriciously or abuse its discretion when it allowed additional time to the more senior applicants to complete the operating portion of the CDL test. See Toney, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievants are required to prove the allegations in their complaints by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. W. Va. Code § 18A-4-8b generally provides that county boards of education required to reduce the number of employees in a particular job classification, will take suchreduction-in-force (RIF) actions on the basis of seniority. W. Va. Code § 18A-4-8g further provides that multi-classified employees are subject to RIF in any category of employment included within their multi-classification title on the basis of seniority. See Williams v. Raleigh County Bd. of Educ., Docket No. 96-41-169 (Dec 31, 1996).

3. Grievants failed to establish that the Cabell County Board of Education (CCBE) violated W. Va. Code §§ 18A-4-8b or 18A-4-8g when it subjected them to RIF as the least senior Truck Drivers in its employ. See Williams, supra. See also Shahan v. Preston County Bd. of Educ., Docket No. 92-39-213 (Dec. 29, 1992).

4. W. Va. Code § 18A-4-8b requires that posted vacancies be filled within twenty days of the posting date. Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994).

5. "[W]here one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two innocent parties who should prevail." Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987).

6. But for CCBE's failure to provide a properly operating vehicle with which to take the examination, the successful applicants would, in all probability, have obtained their CDL prior to twenty days after the closing date of the posting. Further, the Truck Driver/General Maintenance/Handyman positions at issue here were not actually "vacant" until July 1, 1996, after Grievants' reduction-in-force became effective. In these circum stances, the prior decisions of this Grievance Board in Cyphers and related cases are distinguished, and based upon authority provided in W. Va. Code § 18-29-5(b), the undersigned finds that CCBE properly exercised its discretion by allowing the successful applicants additional time to obtain their CDL. See Toney, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Cabell County or to the Circuit Court of Kanawha County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 26, 1997

Footnote: 1

The transcript of the Level II hearing will be cited as "HT at ." Exhibits admitted at Level II will be cited as "G Ex " for Grievant's exhibits and "A Ex " for Agreed exhibits. Any exhibits admitted at Level IV will be cited as "G Ex at L IV" or "R Ex at L IV" for Respondent's exhibits. At Level IV, the parties stipulated to admission of a document identified as "Respondent's Exhibit 2" in another hearing, Baker v. Cabell County Bd. of Educ. This exhibit contains a comprehensive seniority list and will be referred to as "J [Joint] Ex 1" in this decision.

Footnote: 2

The original grievance was expanded at Level II to include this issue. CCBE acquiesced to this expansion. Accordingly, this issue is properly before the undersigned in accordance with W. Va. Code § 18-29-3(j). See W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Footnote: 3

Grievants note that the seniority lists compiled by CCBE do not include Mr. McCoy or Mr. Roach in the General Maintenance classification. See J Ex 1. Likewise, these employees are not listed on the CCBE seniority list for the Handyman classification. CCBE's omission of Mr. McCoy and Mr. Roach from the Handyman seniority list is a patent error, as a preponderance of the evidence indicates that those two employees were working in that classification during the 1995-96 school year. Omission of Mr. McCoy and Mr. Roach from the General Maintenance classification, ostensibly because they were no longer employed in that classification, is contrary to W. Va. Code § 18A-4-8e, as discussed, above.

Footnote: 4

Although Grievants were officially notified in March 1996 that they were being placed on the preferred recall list, this did not become effective until after Grievants completed the 1995-96 school year, on June 30, 1996. Thus, CCBE did not need two new employees with CDLs until July 1, 1996. Indeed, unlike the situation in Cyphers, supra, the positions at issue were not "vacant" twenty days after the postings closed.

Footnote: 5

Administrative notice is taken that an applicant will not be permitted to take an operator's test if the vehicle they are driving is not in good working order and would obviously fail the required state motor vehicle inspection. It is also noted that W. Va. Code§ 18A-2-4 provides: "If a commercial driver's license is required as a condition of employment for any school employee or qualified applicant who becomes an employee by a county board of education, the cost shall be paid in full by the employer."