**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**REBECCA SHANKLIN,**
**Grievant,**

**v.** **Docket No. 2009-1450-KanED**

**KANAWHA COUNTY BOARD OF EDUCATION,**
**Respondent.**

## DECISION

Rebecca Shanklin ("Grievant") filed this grievance on April 14, 2009, against Respondent Kanawha County Board of Education ("BOE") as a result of the BOE reducing the number of General Maintenance service personnel and retaining a less senior General Maintenance employee. Her "Statement of Grievance" provides as follows:

> Grievant contends that she has been rid[1]'d [sic] as [a] General Maintenance employee, while a less senior employee with that classification title within his multiclassification contract has been retained[.] Grievant also contends that the Respondent is retaining substitutes in the maintenance department and that these substitutes will perform the work of the General Maintenance employees, i.e. assisting skilled employees in the various crafts. Grievant alleges a violation of West Virginia Code § 18A-4-8b & 18A-4-8g.

As relief, Grievant seeks "reinstatement as a General Maintenance employee with a 261-day contract and all benefits. She also seeks compensation for all lost wages and benefits (pecuniary and nonpecuniary) with interest on all sums to which she is entitled." By written agreement, the parties agreed to waive this matter directly to Level Three of the grievance process, and the Grievant filed a Level Three appeal on May 9, 2009. W. VA. CODE § 6C-

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[1] As used herein, "RIF" refers to "reduction in force" as the term is used in WEST VIRGINIA CODE § 18A-4-8b.

2-4(a)(4). Three days after Grievant's appeal to Level Three, on May 12, 2009, Karen Harper filed an "Intervention Form" moving to intervene in this grievance. W. VA. CODE § 6C-2-3(f).

A Level Three hearing was conducted before the undersigned Administrative Law Judge ("ALJ") on August 17, 2009, at the Grievance Board's Charleston, West Virginia, office. Both the Grievant and the moving Intervenor appeared by and through their joint counsel, John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent BOE appeared by and through its General Counsel, James W. Withrow, Esquire. This matter became mature for decision on September 17, 2009, upon receipt of the last of the parties' proposed findings of fact and conclusions of law.

**Synopsis**

Grievant and the moving Intervenor were reduced in force ("RIF'd") from their positions as General Maintenance workers. The BOE retained a less senior, multiclassified employee in the General Maintenance classification. Ms. Harper, the moving Intervenor, did not timely file a grievance or intervention. Her application for intervention is denied.

Grievant maintains that her RIF was contrary to law because she had more seniority than the individual who retained his position in the General Maintenance classification. Grievant has established that the BOE failed to retain the most senior employee within the classification when reducing its workforce. Nevertheless, even if the BOE would have followed the appropriate procedure, Grievant was not the most senior RIF'd employee and is therefore not entitled to a position.

Accordingly, this grievance must be **DENIED**.

The following findings of fact are based upon a thorough review of the record produced in this matter:

**Findings of Fact**

1. Prior to being RIF'd, Grievant was employed by the BOE as a General Maintenance service personnel. She had been employed in the General Maintenance classification since July of 2007. Prior to that time, she worked as a cook for approximately twenty years. While working as a cook, Grievant also worked during the summers doing general maintenance work. Grievant currently works as a cook for the BOE.

2. Karen Harper was employed as a General Maintenance service personnel from approximately July of 2007 until being RIF'd. Prior to that, she worked as a bus operator and custodian. Ms. Harper was recertified as a school bus operator and began driving a school bus for the Respondent in the Spring of 2009.

3. In the Spring of 2009, the Superintendent of Schools advised Terry Hollandsworth, Administrative Assistant for Maintenance, Custodial Services and Energy Management, that he should recommend the elimination of a number of positions within the maintenance department. After reviewing the departmental personnel, Mr. Hollandsworth recommended the elimination of one clerk position and four general maintenance positions. These positions were being RIF'd for financial reasons in an effort to stay within the State's school aid formula. The individuals who held such positions were notified of the recommendation to eliminate their positions.

4. By letter dated March 18, 2009, Respondent notified Grievant, Ms. Harper and two other women employed as General Maintenance service personnel that they would be reduced in force for the 2009-2010 school year.

5. Grievant and another General Maintenance employee, Brenda Isaacs, requested a hearing before the BOE, which was held on March 26, 2009. After conducting a hearing, the BOE voted to eliminate the positions on March 26, 2009.

6. Ms. Brenda Isaacs had been employed in the General Maintenance classification for four years, or since approximately 2005. Level Three, Joint Exhibit 1, 18. She had more seniority than Ms. Shanklin or Ms. Harper.

7. Respondent retained a multiclassified employee with the classification of Electrician II/General Maintenance for the 2009-2010 school year. Level Three, Joint Stipulations. This individual had less seniority than Grievant in the General Maintenance classification. *Id*. This individual, Robert Keener, worked at Laidley Field.[2]

8. Grievant is not a licensed electrician and the General Maintenance classification[3] does not require an electrician license.

9. On or about April 14, 2009, Grievant filed a grievance at Level One. By written agreement of the parties, this grievance was waived to Level Three. Grievant filed an appeal to Level Three in accordance with that agreement on May 9, 2009.

10. Ms. Karen Harper made a request to intervene on May 12, 2009, after Grievant's appeal to Level Three. Ms. Harper did not file a grievance within fifteen days of being notified that her employment was terminated due to a reduction in force.

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[2] It appears that an electrician position at Laidley Field was initially being filled by Mr. Donald Enis and Mr. Keener replaced him. Level Three, Joint Stipulation. It is not entirely clear when this switch occurred.

[3] "'General maintenance' means a person employed as a helper to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system." W. VA. CODE § 18A-4-8(43).

11. Exactly four months after Grievant filed this Grievance, Mr. Robert Keener, the employee who retained his position with less seniority than Grievant, agreed to the deletion of the General Maintenance classification from his contract. Level Three, Respondent's Exhibit 1. Mr. Keener made this agreement via letter, a mere three days prior to the Level Three hearing. The record does not reflect that the Kanawha County Board of Education approved the deletion of the General Maintenance portion from Mr. Keener's contract.

## Discussion

There are two primary issues in this grievance. First, whether Karen Harper may properly intervene. The second issue is whether the Grievant has established that she has been inappropriately RIF'd.

### I. Intervention and Timeliness

The request of Karen Harper to intervene and become a party in this grievance must be denied because the request was not timely. At Level Three, the BOE objected to Ms. Harper being permitted to intervene because her grievance would not have been timely. WEST VIRGINIA CODE § 6C-2-3(f), entitled "Intervention" provides that "[u]pon *a timely request*, any employee may intervene and become a party to a grievance at any level when the employee demonstrates that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties." (Emphasis added). The question in this scenario is whether Ms. Harper, in light of the particular facts presented, may timely intervene where the time in which she could file her own grievance has elapsed.

In *Hale v. Mingo County Board of Education*, 199 W. Va. 387, 484 S.E.2d 640

(1997), the West Virginia Supreme Court addressed a similar scenario under the "old" grievance procedure. In *Hale*, the Mingo County Board of Education reduced its workforce and laid off two secretaries. One RIF'd secretary filed a grievance. The second RIF'd secretary intervened claiming she was more senior than the grievant. The *Hale* ALJ dismissed the intervenor's claim ruling that she could not assert an affirmative claim for relief as an intervenor. *Hurley v. Mingo Co. Bd. of Educ. & Varney et al.*, Docket No. 95-29-21 (Sept. 28, 1995). The Circuit Court affirmed the ALJ's decision.

On appeal, the West Virginia Supreme Court of Appeals recognized that the grievance procedure should be a simple, flexible process as free as possible from procedural traps. It held that an intervenor to a grievance proceeding may raise affirmative claims as well as defensive claims when intervening. However, the Court refused to consider the issue of whether the *Hale* intervenor timely intervened because the factual record was insufficient, and the Mingo County Board of Education did not raise the issue at the lower levels. Though it refused to reach the timeliness issue, the *Hale* Court did recognize and agree with the abstract proposition that "intervention should not be permitted to unfairly circumvent the time period applicable to the grievance process." *Id.*, 199 W. Va. 387, 393, 484 S.E.2d 640, 646.

When considering whether an intervention is timely, the timeliness requirement contained within the grievance procedure must be considered. In this scenario, the timely intervention requirement of WEST VIRGINIA CODE § 6C-2-3(f) must be read *in para materia*[4]

[4] This is to say that "[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain

with the general timeliness requirement of WEST VIRGINIA CODE § 6C-2-4(a)(1) and the jurisprudence therewith. The burden of proof is on the Respondent to prove, by a preponderance of the evidence, that a grievance filing or a request for intervention was not timely. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). If the Respondent meets this burden, the Grievant may then attempt to demonstrate that she should be excused from filing within the statutory time frames. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

As to when a grievance must be filed, WEST VIRGINIA CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) provides, in pertinent part, that:

> Within fifteen days[5] following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board.

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ.*,

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legislative intent properly." Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

[5] Pursuant to WEST VIRGINIA CODE § 6C-2-2(c) "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

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). This same body of law is applicable when determining whether an intervenor timely applied to be a party.[6] Indeed, as the *Hale* Court stated, "intervention should not be permitted to unfairly circumvent the time period applicable to the grievance process." *Hale*, 199 W. Va. 387, 393, 484 S.E.2d 640, 646.

When considering the case *sub judice*, Karen Harper was notified that her position would be RIF'd by letter dated March 18, 2009. Unlike Grievant, she did not ask for a hearing before the BOE. On March 31, 2009, the BOE voted to eliminate Ms. Harper's General Maintenance position. She was given confirmation of this action on April 2, 2009. Over twenty-five days passed. Karen Harper filed an intervention form in this grievance on May 12, 2009. The evidence suggest that Ms. Harper, unlike Grievant, slept on her rights. The BOE has established, by a preponderance of the evidence, that Ms. Harper did not timely file her intervention.

This ALJ is not persuaded by Ms. Harper's argument that the BOE failed to timely object to her application for intervention. Ms. Harper points to WEST VIRGINIA CODE § 6C-2-3(c)(1) which provides that "[a]ny assertion that the filing of the grievance at level one was untimely shall be made at or before level two," and argues that the BOE may not object to her application for intervention at Level Three. Ms. Harper did not request to intervene until after this grievance had proceeded to Level Three. The BOE lodged its objection as soon as practicable. The BOE may object based upon timeliness in this specific factual scenario. *See Nicholson v. W.Va. Dep't of Health & Human Res. et al.*, Docket No. 07-

[6] Of course, this timeliness requirement is also subject to the reasonable discovery and continuing practice doctrines, neither of which are applicable in this grievance.

HHR-210 (Nov. 20, 2008). A contrary finding would render the timeliness language of WEST VIRGINIA CODE § 6C-2-3(f) and WEST VIRGINIA CODE § 6C-2-4(a)(1) meaningless. "It is always presumed that the legislature will not enact a meaningless or useless statute." Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma- Chief Logan No. 4523, VFW of the United States, Inc.*, 147 W. Va. 645, 129 S.E.2d 921 (1963).

Ms. Harper has not provided a reason to explain why she should be excused from untimely intervention. Accordingly, Ms. Harper's application to intervene is hereby denied.

The merits of the Grievant's claims are now considered.

**II. Merits**

Because this is a non-disciplinary grievance, Grievant has the burden of proving her grievance by a preponderance of the evidence. 156 C.S.R. § 1.3 (2008). *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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. *Id*.

This grievance concerns reduction in force where an employee is multi-classified. Grievant argues that the BOE terminated her employment in violation of WEST VIRGINIA CODE § 18A-4-8b because she had more seniority than the employee who retained a position in the classification of General Maintenance. The following statutory provisions of WEST VIRGINIA CODE § 18A-4-8b are applicable:

> (h) All decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as provided in this section.
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> (I) The seniority of a service person is determined on the basis of the length of time the employee has been employed by the county board within a particular job classification. For the purpose of establishing seniority for a preferred recall list as provided in this section, a service person who has been employed in one or more classifications retains the seniority accrued in each previous classification.
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> (j) If a county board is required to reduce the number of service personnel within a particular job classification, the following conditions apply:
> (1) The employee with the least amount of seniority within that classification or grades of classification is properly released and employed in a different grade of that classification if there is a job vacancy;
> (2) If there is no job vacancy for employment within that classification or grades of classification, the service person is employed in any other job classification which he or she previously held with the county board if there is a vacancy and retains any seniority accrued in the job classification or grade of classification.
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> (k) . . . the board shall not rescind the reduction in force of an employee until all employees with more seniority in the classification category on the preferred recall list have been offered the opportunity for recall to regular employment as provided in this section.

Hence, when a board of education reduces the workforce of service personnel it must make decisions based upon seniority within a particular job classification and, if a position is available, retain the employee with the most seniority. When considering the effects of an employee's multiclassification,[7] WEST VIRGINIA CODE § 18A-4-8g provides, in part, that:

> (d) For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section

[7] "'Multiclassification' means a person employed to perform tasks that involve the combination of two or more class titles in this section. In these instances the minimum salary scale shall be the higher pay grade of the class titles involved." W. VA. CODE § 18A-4-8 (62).

> eight-e [§ 18A-4-8e] of this article.
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> (e) When implementing a reduction in force, the service person with the least seniority within a particular classification category shall be properly released and placed on the preferred recall list. The particular classification title held by a service person within the classification category may not be considered when implementing a reduction in force.
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> (l) A school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title. A multiclassified service person is subject to reduction in force in any category of employment contained within his or her multiclassification title, based upon the seniority accumulated within that category of employment. If a multiclassified service person is subject to a reduction in force in one classification category, the service person retains employment in any of the other classification categories that he or she holds within his or her multiclassification title. In that case, the county board shall delete the appropriate classification title or classification category from the contract of the multiclassified employee.

Where an employee is multiclassified, he or she accrues separate seniority in each category of employment and may be RIF'd in one classification, but not another. Indeed, when considering multiclassification and reduction in force, the West Virginia Supreme Court of Appeals has recognized that:

> Pursuant to W. VA. CODE § 18A-4-8g(l) (2000), multiclassified school service personnel do not belong to a separate or unique classification category, but rather are employees of each classification category contained within their respective multi-classification titles. Under the statute, a multiclassified employee accrues seniority in each of the several classification categories composing his or her multiclassification title, and, correspondingly, is subject to a reduction in force in these individual job categories on the basis of the respective seniority accumulated in each. In all instances where an employee has seniority in a particular job category--whether that employee is multiclassified or holds only a single job classification--such employee will be entitled to preference during a reduction in force in that category. In the event a multiclassified employee is subject to a reduction in force in one or more, but less than all, of the categories composing his or her

> multiclassification title, such employee remains in the employ of the county board of education with those categories that are subject to the reduction in force being deleted from the employee's multiclassification title.

Syl. Pt. 5, *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 (2001). *See Williams v. Raleigh County Bd. of Educ.*, Docket No. 96-41-169 (Dec. 31, 1996); *Baker v. Cabell Co. Bd. of Educ.*, Docket No. 96-06-317 (June 9, 1997), *rev'd on other grounds by* Cabell County Civil Action No. 97-AA-89; *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003). The language of WEST VIRGINIA CODE § 18A-4-8g(l) is clear and unambiguous and should be applied and not construed. *Taylor-Hurley*, 209 W. Va. 780, 787, 551 S.E.2d 702, 709.[8]

A county board of education has the discretion to determine the number of jobs for, and the employment terms of, a board's service personnel, provided that the requirements of W. VA. CODE § 18A-4-8b are met. *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 466 S.E.2d 487 (1994); *Byrd v. Cabell County Bd. of Educ.*, Docket No. 96-06-316 (May 23, 1997); *Drown v. Cabell County Bd. of Educ.*, Docket No. 96-06-323 (Feb. 28,

[8] When recognizing this unambiguity the *Taylor-Hurley* Court acknowledged ". . . the BOE logically approaches the question of the purported absurdity of § 18A-4-8g(l) from its own vantage point. But in truth, the statute could just as easily be interpreted as embodying an eminently reasonable policy decision to favor the equitable treatment of school service personnel over mere administrative convenience. Indeed, the practical consequence of adopting BOE's point of view would be the creation of a two-tier system of seniority, with multiclassified employees on one level and those holding single job classifications on another. We simply are not inclined to ignore otherwise clear statutory language which appears to result from reasoned policy determinations by the Legislature. As we have stressed on numerous occasions, 'it is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]' *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted)." *Taylor-Hurley*, 209 W. Va. 780, 788, 551 S.E.2d 702, 710. Even if the Court did find that the statute was vague and ambiguous (which it did not), the statute should still be strictly construed in favor of the employee. Syl. Pt. 1, *Morgan v. Pizzino*,163 W.Va. 454, 256 S.E.2d 592 (1979).

1997). In this grievance, the undisputed facts evince that Grievant had more seniority in the General Maintenance classification than the employee who the BOE retained in this classification. Hence, the BOE's decision not to retain the more senior employee within the classification during its RIF was contrary to law. As is clear from the plain language of WEST VIRGINIA CODE § 18A-4-8g and WEST VIRGINIA CODE § 18A-4-8g(l), and as *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 clearly indicates, where there is a RIF the more senior service personnel in the particular classification must be retained. This was not done and BOE's decision was in error.

Respondent BOE advances two arguments it claims justifies its failure to retain the more senior General Maintenance worker. First, it argues that what it really needed was an electrician and the Grievant is not an electrician and therefore she cannot perform the duties needed at Laidley Field. The Respondent BOE's argument must fail. Like the board of education in *Taylor-Hurley*, the BOE is advancing the "absurd results" argument which posits that if the plain language of the statute is followed an absurd result will follow. In this grievance, the alleged absurd result would be that the Grievant would be called on to perform electrician work when she does not have a license. Like the *Taylor-Hurley* Court, this ALJ expressly rejects the BOE's argument. *See* Footnote 8 *supra*. The analysis hinges upon the plain language of the statute which requires that the more senior employee within a particular classification be retained during a reduction in force. The statute was not followed. Respondent BOE's first argument must fail.

Secondly, Respondent maintains that the individual it retained agreed to give up the General Maintenance classification; therefore, its decision to not retain the more senior employee within the particular classification was not erroneous. Months after the BOE

terminated the Grievant's employment as a General Maintenance, and a mere three days before the Level Three hearing, the retained employee, presumably with some coaxing from the BOE administration, voluntarily agreed to relinquish the General Maintenance classification. *See* Respondent's Exhibit 1. From the record, there is no evidence that the Kanawha County Board of Education actually voted to approve this personnel action.[9] Moreover, the grievance procedure allows for an analysis of the legal sufficiency of a RIF at the time it occurred. *See generally Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989). A board of education may not ignore the statute and then perform a subsequent remedial measure to thwart the will and intent of the Legislature. Respondent's second argument must fail.

Even though the Grievant has established that the BOE failed to properly conduct a RIF, she is still not entitled to a General Maintenance position because she has not established she was the most senior employee RIF'd. In order to retain the position identified, Grievant must establish, by a preponderance of the evidence, that she was the most senior General Maintenance employee RIF'd. *See generally Farr v. Wood Co. Bd. of Educ.*, Docket No. 2008-1439-WooED (June 18, 2009); *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 446 S.E.2d at 490 (1994); *Berry v. Kanawha County Bd. of Educ.*, 191 W. Va. 422, 446 S.E.2d 510 (1994). Ms. Isaacs had more seniority than Grievant.[10] Hence, although the BOE failed to properly RIF the employees, assuming a

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[9] *See* W. VA. CODE § 18A-2-7.

[10] Even if Ms. Karen Harper had been permitted to intervene in this grievance, she still would not have been entitled to the position because, like Grievant, Ms. Isaacs had more seniority than Ms. Harper.

proper RIF had been performed, Grievant would still not have been entitled to the position in question because she was not the most senior RIF'd employee.

In addition to the seniority issue discussed above, Grievant also challenges the Respondent's initial determination that there was a "lack of need" to RIF the General Maintenance positions in the first place. W. VA. CODE § 18A-4-8b. To support her argument, Grievant provides evidence that some of the tasks of her "old position" were being performed by substitutes on occasion; ergo, she claims there is no lack of need.

The Grievant has not met her evidentiary burden of proving the BOE's determination of "lack of need" was somehow erroneous. The BOE needed to cut personnel costs to remain within the State aid formula. Level Three, Testimony of Terry Hollandsworth.[11] There is no indication the BOE's conduct was contrary to law or otherwise erroneous.

In summation, Ms. Harper's request to intervene is denied as she did not file a timely application for intervention. Nor has Ms. Harper established a reason in law or equity that would excuse her untimeliness. The BOE did not properly perform a RIF because it did not retain the most senior employee within the General Maintenance classification. Nevertheless, Grievant is not entitled to a position because she was not the most senior General Maintenance employee that was RIF'd.

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[11] Grievant also intertwines the argument that the BOE improperly utilized WEST VIRGINIA CODE § 18A-4-15 when calling out substitutes. As is clear from the record, when Respondent's substitute call out system calls for a substitute maintenance worker, it first attempts to call out a substitute in the particular classification, i.e., electrician, plumber, HVAC, etc. If no substitute in the classification accepts the assignment, the system then attempts to call out a general maintenance substitute. Level Three, Testimony of Terry Hollandsworth. There is no indication that the BOE improperly utilized substitutes after the RIF.

The following conclusions of law are appropriate:

**Conclusions of Law**

1. WEST VIRGINIA CODE § 6C-2-3(f), entitled "Intervention" provides that "[u]pon a timely request, any employee may intervene and become a party to a grievance at any level when the employee demonstrates that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties."

2. The burden of proof is on the Respondent to prove a grievance or intervention was not timely by a preponderance of the evidence. *See Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25,1996). If the Respondent meets this burden, moving party may then attempt to demonstrate that she should be excused from filing within the statutory time frames. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

3. The Respondent BOE has established, by a preponderance of the evidence, that Ms. Karen Harper failed to timely intervene because Ms. Harper knew of the grievable event and permitted over twenty-five days to pass before she filed an application for intervention. Ms. Harper has provided no reason in law or equity to excuse her untimely filing.

4. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *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).

5. Decisions concerning a reduction in force must be based upon seniority. WEST VIRGINIA CODE § 18A-4-8b.

6. "Pursuant to W. VA. CODE § 18A-4-8g(l) (2000), multiclassified school service personnel do not belong to a separate or unique classification category, but rather are employees of each classification category contained within their respective multi-classification titles. Under the statute, a multiclassified employee accrues seniority in each of the several classification categories composing his or her multiclassification title, and, correspondingly, is subject to a reduction in force in these individual job categories on the basis of the respective seniority accumulated in each. In all instances where an employee has seniority in a particular job category--whether that employee is multiclassified or holds only a single job classification--such employee will be entitled to preference during a reduction in force in that category. In the event a multiclassified employee is subject to a reduction in force in one or more, but less than all, of the categories composing his or her multiclassification title, such employee remains in the employ of the county board of education with those categories that are subject to the reduction in force being deleted from the employee's multiclassification title." Syl. Pt. 5, *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 (2001).

_____7. WEST VIRGINIA CODE § 18A-4-8g(l) is plain and unambiguous and must be applied and not construed. *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001).

8. Grievant has established that the BOE did not properly perform a RIF because it retained a multiclassified employee with less seniority in the General Maintenance

classification, when compared to at least three other individuals who were RIF'd.

9. In order to retain the position identified, Grievant must establish, by a preponderance of the evidence, that she was the most senior General Maintenance employee RIF'd. *See generally Farr v. Wood Co. Bd. of Educ.*, Docket No. 2008-1439-WooED (June 18, 2009); *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 446 S.E.2d at 490 (1994); *Berry v. Kanawha County Bd. of Educ.*, 191 W. Va. 422, 446 S.E.2d 510 (1994).

10. Grievant has not established she is entitled to the position because she has not established, by a preponderance of the evidence, that she was the most senior employee RIF'd.

11. Grievant has not established that the BOE's determination of "lack of need" leading up to her RIF, or the BOE's utilization of substitutes under WEST VIRGINIA CODE § 18A-4-15, was somehow contrary to law or erroneous.

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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 28, 2009

**Mark Barney**
**Administrative Law Judge**