RICHARD BAKER,

Grievant,

v. **Docket No. 96-06-317**

CABELL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Richard Baker, alleges that the reduction in force of his position for the 1996-1997 school year was in violation of statutory provisions governing seniority rights of school service personnel. As relief, he seeks reinstatement to his prior position. This grievance was instituted at level two on May 1, 1996. After an evidentiary hearing was conducted, the grievance was denied by Richard Jefferson, Superintendent, in a decision dated July 15, 1996. The grievance was waived to level four, where the parties agreed to submit this matter on the record developed below, along with proposed findings of fact and conclusions of law submitted on October 22, 1996. This matter was reassigned to the undersigned for administrative reasons on January 23, 1997.

The following findings of fact are made from the record developed at level two.

Findings of Fact

1. Grievant has been a full-time service employee of Cabell County Board of Education ("CCBOE") since 1984, in various service personnel classifications.

2. The classifications in which Grievant has been employed are as follows:

3-7-84 to 10-9-89 -- Custodian

10-9-89 to 8-27-91 -- General Maintenance/Handyman

8-27-91 to 12-2-92 -- Custodian

12-2-92 to 3-9-95 -- Painter/General Maintenance/Handyman 3-9-95 to 6-30-96 --

Carpenter/Painter/General Maintenance/Handyman

3. Grievant's seniority dates in each of the classifications he has held are:

Carpenter -- 3-9-95

General Maintenance -- 3-13-91

Handyman -- 3-13-91

Painter -- 12-2-92

4. Respondent omitted Grievant's name from the custodian seniority roster (R. Ex. 2); however, CCBOE admits that his seniority in that classification was approximately six years and eleven months as of the date of the level two hearing. HT at 29. (See footnote 1)

5. On March 28, 1996, CCBOE voted to terminate Grievant's contract and place his name on a preferred recall list as part of a reduction in force for the 1996-1997 school year. Grievant was notified of this action by letter dated March 29, 1996, which stated, in part, “[y]ou will be placed on a Preferred Recall List with recall based on seniority within your class title, carpenter/painter/general maintenance/handyman/glazier.” (See footnote 2)

6. The 1996 reduction in force referred to in Finding 5, above, was intended to reduce two carpenter positions. Since one carpenter passed away in early 1996, Grievant was the only person classified as a carpenter who was reduced. HT at 33-34. Grievant was not only reduced as a carpenter, but in all of his classification titles.

7. There is no evidence of record that any other classification titles were subject to the 1996 reduction in force, including the other titles held by Grievant. 8. CCBOE's seniority lists reflect that Grievant had greater seniority in the General Maintenance classification than one other employee, Russell Irby. R. Ex. 2.

9. The seniority rosters also reflect that Grievant had greater seniority in the Handyman classification than three other employees: Russell Irby, Bill Brown and Wedzel Whitt. R. Ex. 2.

10. Pursuant to his placement on the preferred recall list, Grievant was notified of postings of available custodian positions for the 1996-1997 school year. A. Ex. 2.

Discussion

Timeliness

Pursuant to the provisions of W. Va. Code § 18-29-3, CCBOE has asserted that this grievance was untimely filed at level one. The basis for this allegation is Grievant's testimony at level two that he was informed the evening of the Board's March 28, 1996, meeting that he was going to be reduced in force. He testified he did not know when he received the March 29, 1996, certified letter notifying him of the Board's decision, and he filed his grievance at level one on May 1, 1996.

W. Va. Code § 18-29-4 specifies that a grievance 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." An employer raising the affirmative defense of timeliness bears the burden of proving the grievance was untimely filed by a preponderance of the evidence. Jeffers v. Mason County Bd. of Educ., Docket No. 95-26-553 (Aug. 22, 1996). Respondent asserts that May 1, 1996, is unquestionably more than fifteen days following the Board meeting and letter, so the grievance was not timely filed.

Respondent has not met its burden of proof regarding the timeliness issue. This GrievanceBoard has previously held that the "event" upon which the grievance is based is the grievant's receipt of written notice of a board of education's action. Porterfield v. Lewis County Bd. of Educ., Docket No. 96-21-270 (Oct. 31, 1996). Accordingly, it is irrelevant if the grievant had oral notice of the board action following the meeting. Furthermore, there is no evidence of record which would show exactly when Grievant received CCBOE's certified letter dated March 29, 1996. In order to prove untimely filing, Respondent would have to introduce the certified mail receipt or some other evidence showing that Grievant received the letter more than fifteen days prior to May 1, 1996. See Eastham v. Cabell County Bd. of Educ., Docket No. 95-06-317/318 (Apr. 9, 1996). It did not do so in this case, so it has not proven the grievance was not timely filed.

Merits of the Grievance

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

> 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. For the purpose of establishing seniority for a preferred recall list as hereinafter provided, when an employee has been employed in one or more classifications, the seniority accrued in each previous classification shall

be retained by the employee.

Also of significant importance to the instant 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.

A very similar factual situation was recently addressed by this Grievance Board in Williams v. Raleigh County Bd. of Educ., Docket No. 96-41-169 (Dec. 31, 1996). The grievant was terminated from his position as Plumber/General Maintenance pursuant to a reduction in force of Plumbers. Although the grievant was the least senior Plumber, another employee had less seniority in the General Maintenance classification. Accordingly, the Administrative Law Judge ruled that the board had improperly reduced the grievant in both categories. Pursuant to § 18A-4-8g, the grievant was to "retain" his employment in the classification title he held in which there had been no reduction in force.

Respondent contends that Grievant did not prove that, once he was reduced in force as a carpenter, that it was possible for CCBOE to retain him in the remaining categories of his multi-classification title. However, the evidence Respondent has provided, the seniority rosters, shows that there are less senior employees than Grievant in two of the classifications he holds. In another recent Grievance Board decision, it was held that, where the grievants did not show that there were employees in their classifications that they should have been permitted to displace, the board did not improperly reduce the grievants. Grose v. Cabell County Bd. of Educ., Docket No. 96-06-274 (Feb. 26, 1997). Such is not the case here. Grievant has introduced unrebutted evidence which proves that he should have been allowed to displace other employees and retain his employment in those categories, pursuant to the requirements of § 18A-4-8g.

In addition to the foregoing findings and discussion, the following Conclusions of Law

areappropriate.

Conclusions of Law

1. A grievant is required to prove the allegations of his complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. The affirmative defense of timeliness must be proven by a preponderance of the evidence. Jeffers v. Mason County Bd. of Educ., Docket No. 95-26-553 (Aug. 22, 1996).

3. To prove a grievance was not timely filed, Respondent must provide evidence showing that the grievant received written notice of the board's action more than fifteen days prior to filing of the grievance. Porterfield v. Lewis County Bd. of Educ., Docket No. 96-21-270 (Oct. 31, 1996); Eastham v. Cabell County Bd. of Educ., Docket No. 95-06-317/318 (Apr. 9, 1996).

4. Multi-classified service employees who are reduced in force in one classification category are to retain employment in the other classification categories of their multi-classification title. Williams v. Raleigh County Bd. of Educ., Docket No. 96-41-169 (Dec. 31, 1996).

5. Respondent's reduction in force of Grievant as the least senior carpenter was not improper.

6. Grievant was entitled to retain employment in the General Maintenance and Handyman classifications, and Respondent improperly reduced his employment in those categories.

Accordingly, this grievance is **GRANTED**. Respondent is Ordered to reinstate Grievant as a General Maintenance/Handyman with all back pay, seniority rights, and benefits, for the 1996-1997 school year. Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of Cabell 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.

DATE: June 9, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

References to the level two hearing will be cited as "HT at ___," and exhibits admitted at level two will be referred to as "G. Ex. ___," "R. Ex. ___," or "A. Ex. ___," meaning Grievant's exhibits, Respondent's exhibits, and Agreed exhibits, respectively.

Footnote: 2

Testimony at the level two hearing revealed that Grievant was never classified as a glazier, and it was erroneously included in his title in the March 29, 1996, notification.