BEVERLY BAILEY,

Grievant,

v.

DOCKET NO. 97-29-392

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Beverly Bailey, filed this grievance on June 6, 1997, protesting her reduction-in-force at the end of the 1996-97 school year. More specifically, Grievant alleges:

> Grievants(sic) claims a violation of 18A-4-7a when she was RIF'd after she informed the BOE of the fact she (sic) waiting on her math certification from the WV State Dept. of Education. She claims she should have been transferred instead. She seeks all back pay, health insurance, other benefits and also her seniority and certification to be adjusted.

Following adverse decisions at the lower levels, Grievant appealed to the Grievance Board on August 27, 1997, and hearing was held on October 6, 1997. This case became mature for decision on October 31, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Mingo County Board of Education meeting minutes for May 1, 1997.Ex. 2 - June 14, 1997 letter from West Virginia Department of Education to

Beverly Bailey.

Board's Exhibits

Ex. 1 -

Professional Teaching Certificate for Beverly Bailey

Ex. 2 -

Professional Teaching Certificate for Beverly Bailey

Ex. 3 -

Professional Teaching Certificate for Mildred Ooten

Ex. 4 -

December 20, 1996 letter from Michael Underwood to John Fullen

Ex. 5 -

Application for a Change in Professional Status for Mildred Ooten, dated April 23, 1996

Ex. 6 -

Application for a Change in Professional Status for Beverly Bailey, dated May 12, 1997

Ex. 7 -

October 29, 1996 letter from Everett Conn to Beverly Bailey

Ex. 8 -

December 6, 1996 letter from Everett Conn to Beverly Bailey

Ex. 9 -

December 5, 1996 Board minutes listing professional personnel to be terminated and placed on preferred recall list for the 1997-98 school term.

ISSUE

The issue to be decided is whether Grievant has proven by a preponderance of the evidence that the Board violated W. Va. Code § 18A-4-7a by reducing her in force at the end of the 1996-97 school year, placing her on the preferred recall list; and subsequently transferring a less senior teacher into a mathematics position at Burch Middle School.

AFFIRMATIVE DEFENSE

The Board has raised the affirmative defense of timeliness, asserting the grievance was not timely filed pursuant to W. Va. Code § 18-29-4(a)(1).

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was employed by the Board for the 1996-97 school term as a Title I teacher at Gilbert High School, certified in Multi-Subjects K-8. R. Ex. 1.

2. Grievant's position was advertised as a one-year only position to cease at the end of the 1996-97 school term. 3. On October 29, 1996, Grievant received a letter from Superintendent Everett Conn advising her that she would be “listed as not hired and placed on the preferred recall list effective July 1, 1997.” That letter also advises Grievant that she could request a hearing before the Board if she chose to protest the matter. R. Ex. 7.

4. On December 6, 1996, Grievant received by certified mail a letter from Superintendent Everett Conn notifying her that the Board voted to accept his recommendation to terminate her and place her on the preferred recall list by a majority vote at its December 5, 1996 meeting. R. Exs. 8, 9.

5. On December 20, 1996, Grievant requested that West Virginia Graduate College issue a letter to Assistant Superintendent John Fullen, advising him that she had completed fifteen hours of the Math through Algebra I program and was eligible for a permit in that field at that time. The letter further advised Mr. Fullen that Grievant was enrolled for the Spring semester to complete the remaining six hours required for that certification. R. Ex. 4.

6. Mr. Fullen had advertised a mathematics teaching position the first semester to be filled in January 1997, and had spoken with Grievant regarding her certification status at that time, wondering whether she was certified to fill that position. After Mr. Fullen received the letter from West Virginia Graduate College indicating Grievant was only eligible for a permit at that time, he filled the position

with someone who was fully certified in math.

7. In the Spring of 1997, Grievant possessed a multi-subjects K-8 teaching certificate. She was, however, pursuing a certificate to teach mathematics and to this endwas enrolled in classes, the successful completion of which would make her eligible for such certification.

8. County boards must make decisions regarding reductions-in-force of professional personnel before April 1. In this instance, Grievant did not have her math certification as of April 1, 1997, even though she was working towards that certificate.

9. At an official Board meeting on May 1, 1997, the Board voted to approve the transfer of Mildred Ooten into a math teacher position at Burch Middle School, effective July 1, 1997. The Board minutes of that meeting reflect that Ms. Ooten was "[s]aved by Math Certification". G. Ex. 1.

10. Subsequently, effective July 1, 1997, Grievant received additional certification in Math through Algebra I, 5-12. R. Ex. 2.

11. Ms. Ooten is less senior than Grievant.

12. Grievant received a copy of the May 1, 1997, Board minutes on May 22, 1997, and filed this grievance on June 6, 1997.

PRELIMINARY ISSUE

The Board moved to dismiss this grievance as untimely filed under the provisions of W. Va. Code § 18-29-1, et seq., the grievance procedure for education employees. Specifically:

> 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.

W. Va. Code § 18-29-4(a)(1).

Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 28, 1997); Higginbotham

v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54- 325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

In the instant case, the Board alleges the grievable event occurred on December 6, 1996, when Grievant was notified by the Superintendent that the Board had voted to accept his recommendation to terminate her employment and place her on the preferred recall list at the December 5, 1996 Board meeting. R. Ex. 8. However, a close review of this grievance reveals that Grievant is not grieving her initial reduction-in-force, of which she was unequivocally notified in December 1996. What Grievant is challenging is the transfer of Ms. Ooten, a less senior teacher than she, into a mathematics teaching position, which occurred at the May 1, 1997, Board meeting, to be effective July 1, 1997. At that time, Grievant was on the preferred recall list and asserts she should have been placed into the mathematics position before Ms. Ooten because of her greater seniority. Grievant alleges she did not discover that Ms. Ooten had been transferred into the mathematics position until May 22, 1997, when she obtained a copy of the May 1, 1997, Board minutes. G. Ex. 1. She then filed this grievance on June 6, 1997. The Board presented no evidence to prove that Grievant was aware of Ms. Ooten's transfer until May 22, 1997. Indeed, because Grievant had been notified of her reduction-in-force in December 1996, there would have been no need for her to attend or present her case to the Board in May 1997. Therefore, the Board has failed to prove by a preponderance of the evidence that Grievant knew of the facts giving rise to this grievance prior to May 22, 1997.

DISCUSSION

Grievant alleges the Board violated W. Va. Code § 18A-4-7a when it transferred Mildred Ooten into the mathematics position in May 1997, because Grievant, who was then on the preferred recall list, had more seniority than Ms. Ooten. Grievant admits that she did not possess the required mathematics certification at the time of the Board action, but argues that she was working on her certification, which she eventually received, effective July 1, 1997, and thus, the Board should have

rescinded the transfer of Ms. Ooten and placed Grievant into the position.

The Board contends that Grievant did not possess the required mathematics certification at the time Ms. Ooten was placed into the position, and thus, the Board could not have placed Grievant into that position.

This case addresses two issues: One, whether Grievant possessed the required certification at the time of the Board action to transfer Ms. Ooten into the mathematics position; and two, whether the Board should have rescinded that action once Grievantreceived her mathematics certification, effective July 1, 1997. The answer to both of these questions is no.

It is undisputed that, at the time the Board voted on May 1, 1997, to transfer Mildred Ooten into the mathematics position at Burch Middle School, Grievant did not possess a mathematics certification, nor was she eligible to receive it. Grievant did possess a permit to teach mathematics which she received the prior Fall of 1996. However, the law is clear that if there is a regularly employed fully-certified professional available to teach a specific subject, that person must be hired before an individual who possesses a permit. While W. Va. Code § 18A-3-2 permits school boards to employ teachers in good faith who are anticipated to, but have not yet, received their certification, there is nothing in that statute that mandates a board of education do so, especially when there is a fully-certified educator available to fill the specific teaching position. West Virginia Board of Education Policy 5202 does not allow a board of education to hire an uncertified educator for a specific position unless it “is unable to employ” an educator certified for the position. Davidson v. Wyoming County Bd. of Educ., Docket No. 92-55-402 (Feb. 23, 1993). See also, Grossl v. Mingo County Bd. of Educ., Docket No. 93-29-496 (July 21, 1994).

Grievant also asserts that the Board abused its discretion in not rescinding the termination of her employment once she attained the certification in question. She cites Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (March 18, 1993), in support of her assertion that in the event the reason for an employee's termination in a RIF action ceases to exist prior to the end of the school year in which the action was initiated, a board of education must rescind the termination. Implicit in the assertion is that thereason for the termination was the determination that the grievant did not possess the certification necessary for her to bump the less senior teacher. Hollins, supra.

Hollins rested on the fact that the grievant in that case actually received her additional certification

prior to the end of the school term in which the RIF was initiated. Specifically, Ms. Hollins received her certification effective May 4, 1992. In the instant case, Grievant's certification was not effective until July 1, 1997. R. Ex. 2.

As noted in Hollins,

> [w]hen a teacher's transfer, otherwise valid but not initiated by her, loses its stated justification prior to the end of the school year in which the transfer was processed, absent some extraordinary circumstance, the employee is entitled to instatement into the position he would have held but-for the transfer. A county board of education's failure to offer such is, absent the referenced extraordinary circumstance, an abuse of discretion. When the stated justification is lost after the close of the aforementioned school-year, the county board's decision to not offer automatic reinstatement will not, again absent extremely compelling cause, be deemed an abuse of discretion.

Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990). See also, Kuhn v. Hancock County Bd. of Educ., Docket No. 91-15-360 (Dec. 30, 1991). This Grievance Board has held that the end of the school year for purposes of rescinding transfers or reductions-in-force for loss of justification is June 30. See Brown, supra.

As noted above, the grievant in Hollins received her additional certification in May of the school term, and the Administrative Law Judge found her transfer should have been rescinded. In this case, Grievant's certification in mathematics was not effective until July 1, 1997, which was after the close of the school term. Therefore, it was not an abuse of discretion, or otherwise statutorily improper, for the Board not to rescind her reduction-in- force, and to leave Ms. Ooten in the mathematics teaching position.

CONCLUSIONS OF LAW

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Kessler v. W. Va. Dept. of Trans., Docket No. 96- DOH-445 (July 28, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97- DPS-018 (Mar. 31, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State

College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

2. The Board failed to prove by a preponderance of the evidence that the grievance was untimely filed.

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

4. In order for an applicant to be basically qualified for a classroom teaching position vacancy in West Virginia, that person must hold the appropriate certification. Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991). See Via v. Nicholas County Bd. of Educ., Docket No. 89-34-710 (Apr. 11, 1990); Ashworth v. Putnam County Bd. of Educ., Docket No. 89-40-560 (Oct. 31, 1989). 5. Only if no certified applicant applies for a position may a county board of education petition the West Virginia Department of Education for a person to be granted a special permit to fill the post. Peters v. Putnam County Bd. of Educ., Docket No. 90-40- 247 (Aug. 16, 1991). See West Virginia Board of Education Policy 5202.

6. W. Va. Code § 18A-3-2 permits school boards to employ teachers in good faith who are anticipated to, but have not yet, received their certification. However, there is nothing in that statute that mandates a board of education do so, especially when there is a fully-certified educator available to fill the specific teaching position.

7. Grievant was not entitled to be recalled from the preferred recall list to fill the mathematics teaching position at Burch Middle School because she was not certified in mathematics at the time the hiring decision was made, nor was she certified by the end of the school year. Dunford v. Mercer County Bd. of Educ., Docket No. 94-27-618 (Dec. 21, 1994); see Adams v. Mercer County Bd. of Educ., Docket No. 92-27-455 (Mar. 31, 1993).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: January 6, 1998