RONALD GARLOW,

Grievant,

v. **Docket No. 99-17-493**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Ronald Garlow ("Grievant") initiated this grievance on August 12, 1999, alleging he was denied the opportunity to work on the summer "paint crew" by his employer, the Harrison County Board of Education ("HCBOE"). He seeks back wages and benefits for the period during which summer painting was allegedly performed. The grievance was denied by Grievant's immediate supervisor at level one on August 17, 1999. Grievant appealed to level two, where a hearing was conducted on October 11, 1999. The grievance was denied at that level in a written decision dated November 19, 1999. Level three consideration was bypassed, and Grievant appealed to level four on November 24, 1999. A hearing was held in the Grievance Board's office in Morgantown, West Virginia, on February 25, 2000. Grievant was represented by counsel, John E. Roush, and HCBOE was represented by counsel, Basil R. Legg, Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 3, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by HCBOE as a full-time bus operator. 2. During the summers of 1996 and 1997 Grievant worked as a painter for HCBOE, pursuant to postings for summer painter positions.

3. On May 24, 1999, HCBOE posted eight Custodian III positions. The posting stated that these custodians would work on a day-to-day, as-needed basis between June 14, 1999, and August

23, 1999.

4. Grievant did not bid on any of the summer Custodian III positions, because he did not want to do custodial work.

5. The summer custodian positions were awarded to Chad Daugherty, Joseph Webber, Jason Payne, Timothy Ross, Sandra Walker, and Eugene Messer--regularly employed custodians--along with two substitute custodians, Dewey Booth and James Starkey.

6. The eight employees listed above worked in various locations throughout the county during the summer of 1999, performing cleaning and repair work. Once the summer was underway, they were reclassified as Custodian III/General Maintenance to accurately reflect the duties they were performing. (See footnote 1)

7. Beginning on July 14, 1999, HCBOE assigned several employees to perform cleaning, repairs, and painting at Washington Irving Middle School ("WI") after air conditioning renovation work had been completed by a private contractor. This crew included summer and year-round employees, including custodians. Four of the summerCustodian III/General Maintenance employees (See footnote 2) were assigned to do clean-up work at WI.

8. Mr. Weber's time sheets from August 2 through August 23 indicate that the work he performed at WI was "painting and cleaning."

9. Mr. Ross' time sheets from August 15 through August 23 indicate that he was also "painting and cleaning" at WI.

10. Charles Reider, the custodial supervisor, testified that "there was a huge amount of painting done" at WI, but he could not assign a percentage to it in relation to the total work that was performed there. LII Tr. at 39.

11. The employees who did painting at WI during the summer of 1999 were not called to testify in this grievance.

12. Within a few days of learning that the summer custodians were painting at WI, Grievant requested a conference with Mr. Reider, Victor Gabriel, administrative assistant, and Mr. Ammons, maintenance supervisor, to discuss why a summer "painting crew" had not been utilized.

13. At the conference, HCBOE officials told Grievant they could do nothing to remedy the situation, and he would have to file a grievance.

14. Later in the evening of the day the conference was held, Mr. Gabriel contacted Grievant

and asked him to delay filing his grievance until the matter could be investigated further. Approximately a week later, Mr. Gabriel again contacted Grievant, telling him a grievance would have to be filed.

15. Grievant filed this grievance at level one on August 12, 1999.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6. HCBOE contends that this grievance was not initiated within the time limits specified in W. Va. Code § 18-29-4(a)(1), which states:

> 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.

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997). In the instant case, HCBOE has placed great reliance upon Grievant's level two testimony, at which time he stated that he learned that painting was being done at WI by custodians “possibly a little over halfway through the summer.” When questioned as to whether it was “after July 4th,” Grievant stated that it was. Because this grievance was not filed until August 12, Respondent contends that it is notpossible that Grievant filed within fifteen days of first learning about the painting.

Unfortunately for Respondent, the record contains no specific dates regarding when Grievant first found out about the painting, when he requested a conference with his supervisors, or even when

that conference was held. Moreover, Grievant's unrefuted testimony was that Mr. Gabriel told him after the conference to “hold off” in filing the grievance until he could investigate the matter further. The timelines for filing a grievance are tolled when an employer engages in “actions that an employer should unmistakably have understood would cause the employee to delay filing his charge.” Naylor v. W. Va. Human Rights Commission, 378 S.E.2d 843 (1989); See Craig v. Dep't of Health and Human Resources, Docket No. 98-HHR-334 (June 24, 1999); Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994), aff'd No. 95-AA-7 (Kanawha County Cir. Ct., May 1, 1996). Likewise, it is unknown exactly how long it took for Mr. Gabriel to again contact Grievant, or exactly how long after that the grievance was actually filed. Under these circumstances, with specific dates being unknown, HCBOE has not met its burden of proof regarding the timeliness issue.

Grievant contends that it was improper for HCBOE to assign such allegedly extensive painting duties to individuals who had been hired for the summer as Custodian IIIs (and were later reclassified as Custodian III/General Maintenance). He believes that, as in summers past, a “paint crew” should have been utilized, consisting of individuals employed exclusively for the purpose of painting school property. Grievant does not contend that the summer custodian positions should have been posted as painters, but rather that, when it came time to do the painting at WI, HCBOE should have offered this work to employees who had painted during previous summers, including himself. HCBOE has posed several arguments in support of its assignment of painting duties to the employees at issue. Mainly, Respondent relies upon this Grievance Board's decision in Stewart v. Brooke County Board of Education, Docket No. 96-05-394 (Apr. 10, 1997), to justify its position. In that case, a very similar situation occurred. The grievant had previously worked as a summer painter for the board of education, and objected when, during the summer of 1996, the board assigned painting duties to regularly employed custodians, rather than “calling out” the summer paint crew from the prior year. Although the evidence established that the painting duties comprised approximately 50% of the custodians' work for several weeks of that summer, they were an incidental portion of their duties over the course of an entire school year. Therefore, since some painting was appropriately within the Custodian III job description, the board was not obligated to assign these duties to painters for the summer.

As Grievant correctly points out, the instant grievance differs from the situation presented in Stewart, supra, in that Grievant is only objecting to the assignment of painting duties to the

Custodian III/General Maintenance employees who were employed for the summer. As Mr. Reider testified at level two, several full-time custodians and general maintenance employees also painted at WI during the summer of 1999. Grievant agrees that it was not improper for HCBOE to assign painting to those year-round employees for a limited period of time during the summer, and this would not constitute duties beyond their proper classifications. However, Grievant argues that, because the amount of painting was so extensive at WI, it should have been assigned exclusively to painters.

W. Va. Code § 18A-4-8 defines the job classifications pertinent to this grievance as follows:

> "Custodian III" means personnel employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs.
>
> "General maintenance" means personnel employed as helpers to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system.
>
> "Painter" means personnel employed to perform duties of painting, finishing and decorating of wood, metal and concrete surfaces of buildings, other structures, equipment, machinery and furnishings of a county school system.

The same statute places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and pay grade to which it is assigned. Taylor-Hurley v. Mingo County Bd. of Educ., Docket No. 96-29-265 (Apr. 28, 1997); Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (Mar. 25, 1994). Simply stated, the statute requires the board to call the position what it is. Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995).

As was discussed in Stewart, supra, the analysis in cases involving the allegations presented here must focus upon whether the duties performed are so extensive that the employee is clearly working out of their assigned classification, so that the responsibilities should have been offered to employees holding the appropriate classification. There appears to be no dispute in this case that painting duties can be assigned to custodians and general maintenance employees. In previous Grievance Board decisions, it has been held that employees who spent all their time painting clearly should have been classified as painters. Wiseman v. Kanawha County Bd. of Educ., Docket No. 20-

86-275-1 (Mar. 11, 1987); Farrow v. Putnam County Bd. of Educ., Docket No. 97-40-029 (June 4, 1997). However, the instant case is not one in which the employees in question spent all of theirtime painting, as in Wiseman and Farrow, supra. Instead, it must be determined whether the painting duties assigned to the summer employees comprised a primary portion of their responsibilities. Unfortunately, the evidence of record in this case is insufficient to enable the undersigned to make that determination.

None of the four summer employees who allegedly painted at WI testified at any level of this grievance. The only documentary evidence reflecting their activities indicates that two of them engaged in “cleaning and painting” for several weeks. The time records of the other two employees makes no indication as to what type of work they performed at WI. Even as to Mr. Ross and Mr. Weber, it is unknown how much of their time was spent cleaning and how much was spent painting. Although Mr. Reider testified that approximately ten employees were assigned to WI after the air conditioning work was completed and that an extensive amount of painting was done, he did not specify how much painting and/or cleaning each employee did. Additionally, the record does not reflect what type of work these employees performed during the rest of the summer, so it is impossible to assess whether painting duties comprised a large portion of their overall summer employment.

It may very well be that employees classified as Custodian III/General Maintenance performed extensive painting duties which should have been properly assigned to painters during the summer of 1999. However, absent specific evidence regarding the work performed by these employees during that time period, the undersigned cannot find that HCBOE improperly assigned out-of-classification duties to those employees, or that itshould have offered the painting work to employees classified as painters. (See footnote 3)

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W.

Va. Code § 18-29-6.

2. A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A grievance must be filed "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." W. Va. Code § 18-29-4(a)(1).

4. Respondent failed to prove by a preponderance of the evidence that this grievance was not filed in a timely manner.

5. It is permissible for a board of education to assign summer painting dutiesto employees who are not classified as painters, so long as those duties are incidental to the employees' overall job responsibilities. Stewart v. Brooke County Bd. of Educ., Docket No. 96-05-394 (Apr. 10, 1997).

6. Grievant failed to prove by a preponderance of the evidence that Respondent violated any law, rule, policy, regulation, or written agreement in assigning painting duties at Washington Irving Middle School to individuals employed as Custodian III/General Maintenance for the summer of 1999.

Accordingly, this grievance is **DENIED**.

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

Date: April 12, 2000 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although the issue of the reclassification of these employees was discussed in the record, it is unclear whether Grievant alleges this was improper. Therefore, that issue will not be addressed.

Footnote: 2

The four employees were Mr. Weber, Mr. Ross, Ms. Walker, and Mr. Starkey.

Footnote: 3

Because of the determinations made in this Decision, it is not necessary to address Respondent's arguments regarding Grievant's standing or his right to be recalled to his prior summer position.