NADINE SNELL,

Grievant,

v. **Docket No. 97-29-154**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

MARY MAYNARD,

Intervenor.

D E C I S I O N

Nadine Snell (Grievant) filed this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., contesting the failure of Respondent Mingo County Board of Education (MCBE) to recall her from the preferred recall list for a Custodian II position vacancy at Gilbert High School (GHS). Following a Level II hearing on March 6, 1997, the grievance was denied by the Superintendent's designee, Johnny Fullen, on March 14, 1997. Grievant waived Level III as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on March 27, 1997. A Level IV evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on May 1, 1997. The parties made oral closing arguments,supplemented by written, post-hearing submissions. This matter became mature for decision upon receipt of the parties' written arguments on June 2, 1997.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence

admitted at Levels II and IV.

FINDINGS OF FACT

1. Grievant was previously employed by the Mingo County Board of Education (MCBE) in the school service personnel classifications of Cook and Custodian.

2. Grievant's position as a Custodian I at Matewan High School was eliminated at the end of the 1995-96 school year in the course of a reduction in force, and Grievant was placed on the preferred recall list.

3. On September 9, 1996, MCBE notified all currently employed Custodians that a Class 1D public water supply operator's certification course would be conducted for Custodians, and that future postings might require Class 1D certification. R Ex 2 at L IV. This notice was not sent to Grievant or other Custodians on preferred recall status.

4. On October 4, 1996, MCBE posted a vacant service personnel position for a Custodian II at Gilbert High School (GHS). The posting specified that applicants "[m]ust hold Class I Water Certificate." G Ex 1 at L II.

5. GHS obtains its water from its own well, rather than from a public water utility. Therefore, GHS is considered to be operating a public water system under W. Va. Code § 16-1-7. See 64 C.S.R. 4 (1989). 6. The West Virginia Department of Health and Human Resources categorizes the water system at GHS as a Class 1D public water supply.

7. Grievant and Intervenor Mary Maynard timely applied for the GHS Custodian II vacancy. At the time the posting closed on October 10, 1996, Intervenor held a current Class 1D certificate as a Public Water Supply Operator.

8. At the time Intervenor applied for the GHS Custodian II vacancy, she was employed by MCBE as a substitute Custodian. Grievant has greater regular seniority than Intervenor.

9. Grievant did not hold a license as a Public Water Supply Operator on October 10, 1996.

10. MCBE selected Intervenor to fill the GHS Custodian II vacancy.

11. Subsequent to MCBE's decision to award the contested position to Intervenor, Grievant completed the requirements for a Class I-D Public Water Supply Operator's Certificate on or before December 19, 1996.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each

element of her 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.

Ordinarily, a grievant who does not meet the minimum requirements for a posted vacancy is not permitted to contest the selection of another employee for the positionbecause such a grievant cannot show any harm from the employment decision in question. Weaver v. Mason County Bd. of Educ., Docket No. 94-26-128 (Oct. 25, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). See W. Va. Code § 18-29-2(a); Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991). However, this grievance is distinguishable from the circumstances presented in either Weaver or Pomphrey, because the essence of Grievant's claim is that MCBE improperly added a license requirement which precluded her from receiving a position that would otherwise have been awarded to her by operation of the factors specified in W. Va. Code § 18A-4-8b.

Grievant alleges that MCBE violated W. Va. Code §§ 18A-4-8 and 18A-4-8b by including a requirement in the posting for this Custodian II position which adds to the requirements contained in the classification title. W. Va. Code § 18A-4-8 provides that a "Custodian II" is a person "employed as a watchman or groundsman." Grievant notes that W. Va. Code § 18A-4-8b provides that "[a] county board of education shall make decisions affecting promotion and filling of any service personnel positions . . . on the basis of seniority, qualifications, and evaluations of past service." Moreover, the statute further provides:

> 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:
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> (1) Regularly employed service personnel;
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> (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 of June, one thousand nine hundred eight- two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

Both Grievant and Intervenor have been employed by MCBE in the classification of Custodian. Thus, having held this classification, both parties are deemed qualified to hold this classification title in accordance with W. Va. Code § 18A-4-8e. Grose v. Cabell County Bd. of Educ.,Docket No. 96-06-274 (Feb. 26, 1997); Maynard v. Mingo County Bd. of Educ., Docket No. 96-29-012 (June 28, 1996). Accordingly, unless MCBE was authorized to expand the requirements for Custodian II at GHS by requiring the successful applicant to possess a Class 1D public water supply operator's certificate, Grievant is entitled to the position at issue because an employee on preferred recall receives a preference over a substitute according to the provisions of W. Va. Code § 18A-4-8b quoted above. See Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). See also Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987).

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). This discretion includes determining the minimum qualifications for positions. See Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Accordingly, this Grievance Board has determined that a board of education may expand the qualifications found in the statute, so long as such expansion is consistent with the definition contained in the statute. Hayhurst v. Harrison County Bd. of Educ., Docket No. 94-17-1113 (June 8, 1995); Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993), aff'd, Circuit Court of Marion County No. 93-P-422 (July 8, 1994); Hyre v. Upshur County Bd. of Educ., Docket No. 49-88-127 (Nov. 7, 1988), aff'd, 186 W. Va. 267, 412

S.E.2d 265 (1991); Brewer v. Mercer County Bd. of Educ., Docket No. 91-27-002 (Mar. 30, 1992). See also Grose, supra. Taking water samples to verify the safety of drinking water is consistent with the "watchman" definition for Custodian II in W. Va. Code § 18A-4-8. There was no persuasive evidence that another service employee position at GHS was more appropriately suited for these duties. Thus, in the circumstances presented in this grievance, MCBE had a reasonable basis for requiring the Custodian II at GHS to hold a Class 1D public water supply operator's certificate.

In Maynard v. Mingo County Board of Education, Docket No. 96-29-012 (June 28, 1996), a matter involving the same parties, but a different school service personnel position, Grievant was permitted to take the competency test for Custodian as required by W. Va. Code § 18-4-8e after the posting closed. See G Ex C. Based upon Maynard, Grievant argues that, even if MCBE did not violate any statute by expanding the requirements for the Custodian II position at GHS to include possession of a Class 1D public water supply operator's license, she should nonetheless have been selected for the position on the basis of her superior standing as an employee in preferred recall status,and her superior seniority in the Custodian classification, and been provided a reasonable opportunity to obtain the required license.

In Cyphers v. Marion County Board of Education, Docket No. 94-24-134 (Oct. 31, 1994), this Grievance Board adopted a position which supports MCBE's decision to select Intervenor for the vacancy at issue. The grievant in Cyphers was a Bus Operator who applied 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 who had a journeyman electrician license issued by the State Fire Marshall, an additional qualification listed in the posting. 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 footnote 1) See Vincent, supra; 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 Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993). The posting at issue contained a requirement that the successful applicant have an appropriate public water supply

operator's certificate at the time he or she entered into the duties of the position. Although MCBE could have posted the position to require the successful applicant to obtain certification within a specified period of time after entering into the position, Grievant did not demonstrate that MCBE abused its substantial discretion in such matters by requiring the certification as of the date the posting closed. 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 Cox v. Hampshire County Bd. of Educ., 177 W. Va. 576, 355 S.E.2d 365 (1987). Likewise, MCBE was not required to provide Grievant, or other employees on preferred recall status, notice of the opportunity to take training to obtain certification, or advance notice that the minimum qualifications for certain Custodian positions would be changed to require certification. See Rose v. Braxton County Bd. of Educ., Docket No. 95-04-521 (Sept. 30, 1996).

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her 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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. MCBE did not abuse its substantial discretion relating to the hiring of school service personnel by requiring the successful applicant for a Custodian II position to have a valid Class 1D certificate as a Public Water Supply Operator. See Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995).

4. As Grievant did not meet the minimum qualifications for the Custodian II position as of the time the posting closed, MCBE did not abuse its discretion by awarding the position to Intervenor, a less

senior substitute Custodian who had obtained the required certificate. See Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994); Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993), aff'd, Circuit Court of Marion County No. 93-P-422 (July 8, 1994).

5. Grievant failed to establish by a preponderance of the evidence that MCBE violated W. Va. Code § 18A-4-8b, or any other law, rule or regulation, in selecting Intervenor for the Custodian II position at Gilbert High School.

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 andState 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: August 13, 1997

Footnote: 1

Grievant's reliance upon Bowman v. Marion County Board of Education, Docket Nos. 95-24-003/007 (Oct. 10, 1995), rev'd Circuit Court of Kanawha County, No. 95-AA-257 (July 17, 1996), and Hopkins v. Ohio County Board of Education, Docket No. 92-35-359 (Aug. 12, 1993), rev'd sub nom Ohio County Board of Education v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995), is misplaced. Unlike the situation presented here, neither of those cases involved an applicant's failure to meet a specific objective license requirement as set forth in the posting for the position.