KIM AMMONS,

Grievant,

v. **Docket No. 04-30-006**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Kim Ammons ("Grievant") initiated this proceeding on November 14, 2003, alleging he should have been selected to fill a Truck Driver/Inventory Supervisor position. He seeks instatement to the position, plus back pay with interest, benefits, and seniority. The grievance was denied at level one on December 1, 2003. A level two hearing was conducted on December 12, 2003, and the grievance was denied by decision dated December 18, 2003. Level three consideration was waived, and Grievant appealed to level four on January 6, 2004. The parties elected to submit this matter for consideration based upon the record developed below, supplemented by fact/law proposals submitted by January 22, 2004. Grievant represented himself in this matter, and Respondent was represented at level four by counsel, Kelly J. Kimble.

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

Findings of Fact

___1. Grievant has been employed by Respondent as a substitute since March 22, 2002, working in the classifications of maintenance, carpenter and painter.

2. On September 4, 2003, Respondent posted a vacancy for TruckDriver/Inventory Supervisor. The posting stated that the successful applicant "must possess a commercial driver's license (CDL)."

3. Grievant did not possess a CDL at the time of the posting or when the position was filled. He obtained a CDL learner's permit on an unspecified date, but had not taken the driving portion of the test as of the date of his level two hearing.

4. Larry Mays was also employed as a substitute by Respondent at the time this position was posted, but the record does not reflect his classification title. Grievant has more substitute seniority than Mr. Mays.

5. Grievant and Larry Mays took and passed the state competency test for Inventory Supervisor prior to filling of the position.

6. Mr. Mays was the only applicant who held a CDL at the time he applied for the position at issue, so he was the successful applicant.

7. Grievant substituted in the Truck Driver position prior to its being filled by Mr. Mays. Grievant obtained a Class D driver's license to drive the truck.

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 §4.21 (2000); 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.

Grievant contends that he should have been allowed the opportunity to obtain a CDL in order to qualify for the position. He also believes that, as the most senior applicant, he was entitled to the position, after successfully obtaining his CDL. W. Va. Code §18A-4-8b provides, regarding the filling of school service personnel positions, that:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
>
> 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.

Respondent argues that, as the only applicant with a CDL and having successfully completed the

competency test for Inventory Supervisor at the time the position was filled, Mr. Mays was the only qualified applicant. Pursuant to previous rulings of this Grievance Board, Respondent contends that the CDL was a prerequisite to being qualified to fill the position, and it had no obligation to allow Grievant to obtain that qualification, when it had a fully qualified applicant available.

Respondent's position is, indeed, supported by prior rulings of this Grievance Board. In a case that is perfectly on point, it was held that, because a CDL was a prerequisite to applying for the position of truck driver, the board of education correctly awarded the position to the only applicant who possessed the CDL, and it had no duty to allow other applicants the opportunity to obtain the license. Wilson v. Marion County Bd. of Educ., Docket No. 93-24-084 (July 27, 1993). Similarly, in Cyphers v. Marion County Board of Education, Docket No. 94-24-134 (Oct. 31, 1994), Grievant was the only applicant who had passed the required competency tests mandated under W. Va. Code §18A-4-8e and hada journeyman electrician license issued by the State Fire Marshall. 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 state's first journeyman electrician test. Cyphers concluded that the school board violated 18A-4-8b in these circumstances.

A board of education's authority to establish a job-related qualification for school service personnel position exceeding the minimum requirements for that classification title has been upheld both by this Grievance Board and the State Supreme Court. 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 Bowman v. Marion County Bd. of Educ., Docket Nos. 95-24-003/007 (Oct. 10, 1995), rev'd, Circuit Court of Kanawha County, Nos. 95-AA-257/277 (July 17, 1996). Although W. Va. Code § 18A-4-8 does not include the CDL requirement in its definition of “truck driver,” it has been recognized that a board of education may require it as a qualification for such positions, in order to comply with the federal Commercial Vehicle Safety Act of 1986 and W. Va. Code § 17E-1-1, et seq. See Grose/Adkins v. Cabell County Bd. of Educ., Docket No. 96-06-274 (Feb. 26, 1997). Grievant has failed to provide sufficient evidence to refute that the CDL is required for the position, although he did contend that the truck at issue was under a certain weight limit and has no air brakes. Unfortunately, Greivant has not provided evidence to explain how these factors relate to the CDL requirement.

In accordance with the preceding discussion, the undersigned finds that Respondent correctly

placed the only qualified applicant in the position at issue, and it had no obligation to allow Grievant the opportunity to obtain a CDL in order to qualify for the position.

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

Conclusions of Law

1. In a non-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 §4.21 (2000); 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. Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. Va. Code §18A-4-8b.

3. A commercial driver's license is a valid prerequisite to applying for a truck driver's position, and a board of education is not obligated to allow applicants the opportunity to obtain such a license prior to filling a vacant position. See Wilson v. Marion County Bd. of Educ., Docket No. 93-24-084 (July 27, 1993); Cyphers v. Marion County Board of Education, Docket No. 94-24-134 (Oct. 31, 1994).

4. Grievant did not have a commercial driver's license at the time the position at issue was filled, so he was not qualified to be selected.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of MonongaliaCounty, 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 partyto 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: February 23, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge