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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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JOHN H. SWAIN

v.

DOCKET NO. 02-86-167-2

BERKELEY COUNTY BOARD OF EDUCATION

DECISION

Grievant, John H. Swain, is employed by the Berkeley County Board of Education as a bus operator, a position which he has held for eight years. On September 16, 1985, Mr. Swain filed a grievance alleging that the position of Transportation Director was improperly filled. The grievance was denied at levels one and two and the board of education waived consideration of the matter to the Education Employees Grievance Board. The level four hearing was held on October 16, 1985.

In June, 1985, the Berkeley County Board of Education posted the position of Transportation Director. Mr. Swain submitted an application but was advised that he was not eligible for the position which was ultimately filled by a certified teacher and administrator who had not previously been employed by the county.

Mr. Swain argues that Transportation Director is a service employee position and that he was not given first consideration for the vacancy as is required by W. Va. Code, 18A-4-8b.

The respondent argues that the position is classified as professional or service personnel, dependent on the qualifications of the individual who holds the position. The respondent offers as an example the previous Transportation Director, Rodney Jamison. When Mr. Jamison was initially hired as Assistant Transportation Director in 1980, he held a valid teaching certificate and was classified as a professional employee. When he was promoted to Transportation Director in 1982, Mr. Jamison chose not to renew his certification and was classified as a service employee until his resignation in 1985.

Rodney Woods, Director of Personnel in 1985, testified that the primary goal in filling the position of Transportation Director was to secure the most highly trained individual possible. The qualifications for the position stated on the posting were "[a]dministrative certification with a background in safety and teaching experience (preferred)." Of the ten individuals who submitted applications only two possessed administrative certification.

Positions which do not require certification to teach in this state are classified as service personnel positions. A transportation director is not required to possess teaching certification and is to be considered a service personnel position except in individual cases where such an employee is professionally licensed. Cox and Davis v. The Board of Education of the County of Hampshire, State Superintendent of Schools Decision, Feb. 28, 1983; motion to reconsider denied June 1, 1983; and State Superintendent of Schools Opinion dated April 13, 1982. Therefore, the posting and filling of this vacancy must be in accordance with the provisions of W. Va. Code, 18A-4-8b.

In addition to the foregoing the following findings of fact are appropriate.

#### Findings of Fact

1. Grievant has been employed by the Berkeley County Board of Education as a bus operator for the past eight years.

2. In June, 1985, the board of education posted the vacancy of Transportation Director. The qualifications stated for the position were "[a]dministrative certification with a background in safety and teaching experience (preferred)".

3. Of the ten individuals who submitted applications for the position, only two possessed administrative certification.

4. The grievant was informed that he was not eligible for the position and was not interviewed.

5. The individual ultimately hired for the position possesses both teaching and administrative certification.

6. Although not defined in W. Va. Code, 18A-4-8, the State Superintendent of Schools has determined that Transportation Director is a service personnel position except in individual cases where such employee is professionally licensed.

#### Conclusions of Law

1. W. Va. Code, 18A-1-1 (e) defines service personnel as those employees who serve the school(s) as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial and transportation, among others.

2. Interpretations of statutes and school laws made by the State Superintendent of Schools are persuasive authority unless clearly erroneous. Smith v. Board of Education of the County of Logan 342 S.E. 2d 685 (W. Va. 1985).

3. Decisions affecting the promotion or filling of service

personnel positions shall be made on the basis of seniority, qualifications, and evaluation of past service. W. Va. Code, 18A-4-8b (b).

4. Applicants for service employee positions shall be considered in the following order: regularly employed service personnel; service personnel whose employment has been discontinued in accordance with W. Va. Code, 18A-4-8b; professional personnel who held temporary service personnel jobs or positions prior to June 9, 1982 and who apply only for such temporary jobs or positions; substitute service personnel and new service personnel. W. Va. Code, 18A-4-8b (b).

5. School personnel laws are to be strictly construed in favor of employee. Morgan v. Pizzino, 163 W. Va. 454, 256 S.E. 2d 592 (1979).

As the board of education indicated that administrative certification was a preferred qualification and notified the grievant that he was ineligible for the position prior to an interview, the board has not acted within statutory requirements. Therefore, the grievance is GRANTED and it is ORDERED that the position of Transportation Director be posted and filled in compliance with W. Va. Code, 18A-4-8b.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Berkeley County and such appeal must be filed within thirty (30) days of receipt of this decision. (W. Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

DATE December 23, 1986

Sue Keller

SUE KELLER  
Hearing Examiner