

**MARSHALL KENT SARGENT,**

**Grievant,**

**v.**

**DOCKET NO. 96-06-090**

**CABELL COUNTY BOARD OF EDUCATION,**

**Respondent,**

**and**

**GARY LUSHER,**

**Intervenor.**

## **D E C I S I O N**

Grievant, Marshall Kent Sargent, filed this grievance on October 17, 1995, alleging:

Violation of WV Code 18A-4-8b. Grievant was not selected for the supervisor of transportation position that was posted (#2114). Grievant passed the classification test and was the most senior applicant for the position.

This grievance may be resolved by awarding Grievant the supervisor position in question and any backpay, benefits, etc. that were denied him.

Gary Lusher, the successful applicant, intervened at level two. Following adverse decisions at the lower levels, Grievant appealed to level four on March 1, 1996, and requested that a decision be based on the lower level record. Following receipt of the parties' proposed findings of fact and conclusions of law, this case became mature for decision on March 20, 1996. [\(See footnote 1\)](#)

The material facts are not in dispute and are set forth in the following findings.

### Findings of Fact

1. Grievant has been employed by Respondent as a bus operator for twenty-five (25) years.

2. Intervenor had been employed by Respondent as a bus operator for approximately nine (9) years, three as a substitute and six as a regular employee.
3. On or about August 7, 1995, Respondent posted a job vacancy for Supervisor of Transportation, with an attached job description. G. Ex. 1.
4. Included in the job description list of qualifications was a preference for a college degree in safety.
5. Grievant, Intervenor, and others duly applied for the position. None of the applicants had previously held the job classification title of supervisor of transportation.
6. Five of the applicants, including Grievant and Intervenor, were given the competency test for the position as developed by the West Virginia State Department of Education.
7. Grievant and Intervenor passed the competency exam. 8. Grievant and Intervenor both had a history of satisfactory performance evaluations.
9. Grievant does not have a college degree.
10. Intervenor has a Regent's Bachelor of Arts Degree with an emphasis in safety from Marshall University.
11. Intervenor was recommended for and received the position of Supervisor of Transportation in September 1995.

### Discussion

Grievant does not allege that the selection process was in any way flawed, but rather, that Respondent violated W. Va. Code §§ 18A-4-8b, 18A-4-8(e) and 18A-4-8(g), because Grievant has more seniority than the Intervenor, and that it was violative of the statute for Respondent to place more emphasis on qualifications than seniority.

W. Va. Code § 18A-4-8b states, in pertinent part:

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 [18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service. (Emphasis added).

In this instance, it is undisputed that Grievant had more seniority than Intervenor, and that both

individuals possessed satisfactory evaluations. Thus, the only issue to be decided is whether Grievant was "qualified" for the position of Supervisor of Transportation. Grievant avers that since he passed the competency examination, he is deemed qualified to fill the position of Supervisor of Transportation, and thus, the only factor which should have been considered, all other things being equal, was seniority.

Respondent avers that it did not abuse its discretion or act in an arbitrary or capricious manner in establishing a preference for a college degree, or in selecting Intervenor for the position based upon his superior qualifications.

When Intervenor began working as a bus operator for Respondent, he asked his supervisor, Patty Pauley, then-Supervisor of Transportation, how he could move up with the board of education. Ms. Pauley told him she got a degree in safety technology, which had been a preference listed on the job description for Supervisor of Transportation since at least 1989 when Pauley got the position. Intervenor thought Ms. Pauley would eventually move to the Director of Transportation position, and so he began preparing for the Supervisor position. He went to college starting in August 1989, and finally received a Board of Regent's Degree from Marshall University in Safety Technology in May, 1995. Intervenor also was the owner/operator of a tractor/trailer business and did all of his own billing, maintenance and mechanical work.

Grievant had been employed by Respondent as a bus operator for twenty-five (25) years. He has no computer training and no knowledge of a safety data sheet, which is a sheet that all manufacturers are to provide with any chemicals they sell. It lists all the properties and hazards involved with the specific chemicals. Ms. Pauley asked all of the applicants if they knew what a safety data sheet was in order to determine their depth of safety knowledge or experience. The only applicant who knew what a safety sheet was was Intervenor. Ms. Pauley believes the emphasis on safety is the most important aspect of transportation, because it's "what we're all about, . . . we have to keep everyone, our children and our employees, safe." LII Tr, p. 109.

Unfortunately for Respondent and Intervenor, this issue has been recently decided by this Grievance Board in a case directly on point, Bowman/Stacy v. Marion County Bd. of Educ., Docket Nos. 95-24-003/007 (Oct. 10, 1995). In Bowman/Stacy, the Administrative Law Judge held "[a]chieving a passing score on a competency test shall conclusively demonstrate the qualification of an applicant for a classification title." The Administrative Law Judge further held that "[w]ith the

implementation of statutory definitions and guidelines for establishing qualifications, county boards of education may no longer develop or expand qualifications for service personnel positions where a competency test has been developed by the State Board of Education." See also, Hawken v. Hancock County Bd. of Educ., Docket No. 95-15-577 (Apr. 29, 1996). Bowman was distinguished from the West Virginia Supreme Court of Appeals' holding in Hopkins v. Ohio County Bd. of Educ., 457 S.E.2d 537 (W. Va. 1995), on the grounds that the Court did not have W. Va. Code § 18A- 4-8e before it and therefore did not address its applicability to a county board of education's selection of an administrative/supervisory service position.

In the instant case, because a competency test had been developed by the State Board of Education for the service classification of Supervisor of Transportation, it was improper for Respondent to expand the qualifications for the position beyond those contained in the statutory definition. Thus, including a preference for a college degree insafety, clearly not contained in the statutory definition, was beyond the scope of the board's discretion.

Respondent also alleged that Grievant's seniority as a bus operator could not be considered as seniority for a Supervisor of Transportation position. However, this Grievance Board has held that "when no applicant has in-classification seniority . . . total county seniority [is] determinative among applicants who 'qualify' for a service position." Gandee v. Mason County Bd. of Educ., Docket No. 93-296-476 (Sept. 30, 1994); Brewer v. Mercer County Bd. of Educ., Docket No. 91-27-002 (Mar. 30, 1992).

Because Grievant successfully passed the competency test, had received satisfactory evaluations, and was the most senior applicant, he is entitled to the position of Supervisor of Transportation.

In addition to the foregoing facts and discussion, it is appropriate to make the following conclusions of law.

### Conclusions of Law

1. Boards of education in West Virginia must fill school service personnel positions on the basis of seniority, qualifications, and evaluations of past service. Qualification is defined as holding the classification title of the vacancy or being able to meet that definition as contained in W. Va. Code § 18A-4-8.

2. Achieving a passing score on a competency test shall conclusively demonstrate the qualification of an applicant for a classification title. W. Va. Code § 18A-4-8e.

3. With the implementation of statutory definitions and guidelines for establishing qualifications, county boards of education may no longer develop or expand qualifications for service personnel positions where a competency test has been developed by the State Board of Education.

Bowman/Stacy v. Marion County Bd. of Educ., Docket Nos. 95-24-003/007 (Oct. 10, 1995); see also, Hawken v. Hancock County Bd. of Educ., Docket No. 95-15-577 (Apr. 29, 1996).

4. The position of Supervisor of Transportation must be awarded to the most senior applicant who passed the competency test.

Accordingly, this grievance is **GRANTED**. The Cabell County Board of Education is **ORDERED** to instate Grievant Sargent to the position of Supervisor of Transportation with all backpay and benefits to which he is entitled.

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

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: May 2, 1996**

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[Footnote: 1](#)

*Mr. Delmo Ross and Mr. Douglas Goodson also protested the selection of Mr. Lusher, and their grievances were consolidated with Grievant's at level two. Mr. Ross withdrew his grievance at level two, leaving Mr. Goodson and Grievant. Only Grievant appealed the level two decision issued on February 23, 1996.*